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QUESTION OF PUNISHMENT OF WAR CRIMINALS AND OF PERSONS WHO HAVE COMMITTED CRIMES AGAINST HUMANITY

Question of the non-applicability of statutory limitation to war crimes and crimes against humanity

Study submitted by the Secretary-General

In pursuance of resolution 3 (XXI) of the Commission on Human Rights, the Secretary-General has the honour to submit a study on the question of the non-applicability of statutory limitation to war crimes and crimes against humanity, dealing in particular with legal procedures to ensure that no period of limitation shall apply to such crimes in international law. This study has been prepared by the Office of Legal Affairs.

TABLE OF CONTENTS

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TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

/...

TABLE OF CONTENTS (continued)

/...

TABLE OF CONTENTS (continued)

INTRODUCTION

I. PURPOSE AND LIMITS OF THE STUDY

1. On 9 April 1965, the Commission on Human Rights, acting on the basis of a proposal submitted by the delegation of Poland (E/CN.4/L.733/Rev.1), adopted at its 844th meeting resolution 3 (XXI), "Question of punishment of war criminals and of persons who have committeed crimes against humanity", which reads as follows:

"The Commission on Human Rights,

"Recalling the General Assembly resolution of 13 February 1946 entitled "Extradition and Punishment of War Criminals", and General Assembly resolution 95 (I) of 11 December 1946 entitled "Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal",

"Taking note of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and especially its Article VIII which states that any Contracting Party may call upon the competent United Nations organs to take such action under the United Nations Charter as they consider appropriate for the prevention and suppression of acts of genocide,

"Convinced that the prosecution of and punishment for war crimes and crimes against humanity would prevent others from the commission of similar crimes, protect human rights and fundamental freedoms, promote confidence among peoples, and contribute to international peace and security,

"Deeply concerned that no one guilty of war crimes or of crimes against humanity of the Nazi period shall escape the bar of justice wherever he may be and whenever he may be detected,

"Noting that, while some measures have been undertaken to make possible the prosecution of war crimes and crimes against humanity, the variety of such measures requires that further steps be taken,

"Considering that the United Nations must contribute to the solution of the problems raised by war crimes and crimes against humanity, which are serious violations of the law of nations, and that it must, in particular, study possible ways and means of establishing the principle that there is no period of limitation for such crimes in international law,

"1. Requests the Economic and Social Council:

(a) To urge all States to continue their efforts to ensure that, in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and equitably punished by the competent courts. For this purpose they should co-operate, in particular, by making available any documents in their possession relating to such crimes,

/...

(b) To invite eligible States which have not yet done so to accede as soon as possible to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

"2. Requests the Secretary-General to undertake a study of the problems raised in international law by war crimes and crimes against humanity, and by priority a study of legal procedures to ensure that no period of limitation shall apply to such crimes;

"3. Decides that the report concerning that study should be discussed by the Commission as one of the matters of priority at its next regular session."

2. In accordance with operative paragraph 2 of that resolution, the Secretary-General submits the present study, which was prepared by the Office of Legal Affairs.

3. For the reasons given in the report of the Commission on Human Rights,[1] the present study does not deal with all the problems raised by war crimes and other grave crimes in international law. It is limited to the question of establishing the principle that no period of limitation should apply to such crimes, and deals both with the basis and legal nature of that principle and with the appropriate procedures for effectively ensuring its enforcement. The effectiveness of any procedures that might be adopted in this important field would depend on the legal and the moral value of the principle which it is sought to assert. As to the question which categories of crimes the Commission on Human Rights regards as "serious violations of the law of nations" in connexion with which international action should be taken to ensure that no period of limitation applies, a comment should be made here. Resolution 3 (XXI) speaks only of "war crimes" and "crimes against humanity". No mention is made of "crimes against peace", either in the actual text of the resolution or indeed in the various proposals which led to its adoption. Nor was this category of crimes referred to in the debate. Perhaps the Commission understood the term "war crimes" in its broad sense, i.e. as

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1/ Report on the twenty-first Session, E/4024, E/CN.4/891, para. 563.

including crimes against peace.[2/] For the sake of comprehensiveness, however, it is proposed, in the present study, to deal together with war crimes, crimes against peace and crimes against humanity.

4. With a view to the preparation of the present study, the Secretary-General on 19 May 1965 addressed to States Members of the United Nations and members of the specialized agencies a note verbale requesting them to furnish information on their laws and practices concerning, inter alia, the applicability of any prescription or statute of limitations to war crimes and crimes against humanity. He asked them also for their views on the legal procedures which might appropriately be taken on the international level to ensure that no prescription or statute of limitations shall apply to those crimes. By 10 January 1966 the Secretary-General had received information and comments on this subject from the following States: Belgium, Bolivia, Bulgaria, Cambodia, Cameroon, Central African Republic, Czechoslovakia, China, Colombia, Denmark, Federal Republic of Germany, Hungary, India, Ireland, Israel, Ivory Coast, Japan, Kenya, Luxembourg, Malta, Morocco, Netherlands, Nigeria, Norway, Poland, Singapore, Spain, Sweden, Turkey, Uganda, Ukrainian Soviet Socialist Republic,

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2/ Resolution 3 (XXI) was based on a proposal submitted by Poland entitled "The question of punishment of war criminals". During the debate certain representatives expressed the wish that the Commission should consider not only the question of punishment for war crimes but also that of crimes against humanity. Following a suggestion submitted orally by France, the Commission decided to add to the title of the item before it the words "and of persons who have committed crimes against humanity" (ibid., para. 12) Perhaps the Commission did not mean "war criminals" in the precise legal sense of the term, i.e., as applying only to persons guilty of "war crimes" stricto sensu. It should be noted that the same term is used in the title of the 1945 London Agreement "for the prosecution and punishment of the major war criminals" and in various articles both of the Agreement and of the Charter annexed to it, to embrace without distinction all acts coming within any of the three categories of crimes: crimes against peace, war crimes and crimes against humanity.

Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, Venezuela.[3/]

II. PLAN OF THE STUDY

5. Part I of this study will consist of a survey of activities undertaken and measures adopted since the Second World War for the punishment of war crimes, crimes against peace and crimes against humanity; it will cite the pertinent provisions of international instruments and state what has been achieved internationally in this regard, and will set out the information received from States on the question of the applicability of municipal statutes of limitation to such crimes. Part II will deal with the principle that no period of limitation should apply to such crimes and will examine the basis of that principle and its applicability in municipal law. Part III will indicate what measures would be needed internationally to ensure the incorporation of this principle in national legislations, and will cite the comments received from States on that subject.

3/ The following States simply stated that their laws contained no provisions concerning war crimes and crimes against humanity: Kuwait, Lebanon, Malawi, Maldive Islands, Pakistan, Upper Volta. Argentina sent in Legislative Decree No. 6286 dated 9 April 1956, by which it acceded to the 1948 Convention for the prevention and punishment of the crime of genocide. Laos reported that its current legislation "contains no special provisions for the punishment of war crimes and crimes against humanity. But such punishment is provided for in articles 284 to 294 of the draft criminal code to be submitted shortly to the National Assembly". Greece sent in the text of "Constitutional Act No. 73" concerning the punishment of war crimes. Togo replied that the law applicable "to the punishment of war crimes or offences is that laid down in the Ordinance of 28 August 1944 promulgated by Order No. 571 of 17 November 1944".

PART I

THE QUESTION OF THE PUNISHMENT OF WAR CRIMES, CRIMES AGAINST PEACE AND CRIMES AGAINST HUMANITY SINCE THE SECOND WORLD WAR

6. The Second World War will be taken as starting point for the simple reason that since then, international penal law, although its roots go back into the distant past, has been dominated by new ideas. As V. Pella points out,[1] the idea of punishment for acts committed either by States or by individuals against international peace "was often regarded as the manifestation of a dangerous revolutionary sentiment... It was not until the Second World War, with its tragic lessons, that the rulers of States finally decided to cast off the old armour of prejudice which had led them to declare any international penal justice impossible".

7. With the outbreak of the Second World War and, especially, the serious crimes that were committed before and during hostilities, the question of punishment of war criminals assumed major importance. The Governments and statesmen of the Allied Powers on several occasions solemnly declared their intention to bring to justice those guilty of war crimes and atrocities.[2] The representatives of the occupied and other allied countries at first met informally or semi-officially to study the complex problems involved. The year 1942 and the following years saw the conclusion of a number of important international instruments relating to the punishment of war crimes, crimes against peace and crimes against humanity. The United Nations, from its very inception, adopted certain resolutions aimed at ensuring the prosecution and punishment of war criminals and persons guilty of crimes against humanity, and at resolving certain issues raised by such crimes. In addition, important measures were adopted under the Geneva Conventions of 1949, the Council of Europe and municipal legislations. From the documents produced and the practical steps achieved in this field we shall cite any elements which have a direct or indirect bearing on the subject of this study.

1/ La guerre-crime et les criminals de guerre, Geneva-Paris, 1946, p. 16.

2/ For the text of most of the declarations made on this subject, see History of the United Nations War Crimes Commission, H.M. Stationery Office, London, 1948, pp. 87-108.

I. INTERNATIONAL AGREEMENTS AND DECLARATIONS OF THE GOVERNMENTS AND STATESMEN OF THE ALLIED POWERS

A. Declaration of St. James's of 1942

8. By the Declaration signed at St. James's Palace on 13 January 1942, the Governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway, Poland and Yugoslavia, which were then in London, placed among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for war crimes "whether they have ordered them, perpetrated them or participated in them". They resolved "to see to it in a spirit of international solidarity that those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged" and that "the sentences pronounced are carried out". Punishment was to be meted out not only to all those guilty of war crimes properly so called but also to those guilty of acts of violence inflicted upon the civilian populations and "having nothing in common with the conceptions of an act of war or a political crime as understood by civilized nations". Thus, the Declaration proclaimed the principle of the punishment of crimes against humanity. Here is its full text:3/

> "Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a regime of terror characterized amongst other things by imprisonments, mass expulsions, the execution of hostages and massacres,
>
> "And whereas these acts of violence are being similarly committed by the Allies and Associates of the Reich and, in certain countries, by the accomplices of the occupying Power,
>
> "And whereas international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilized world,
>
> "Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, do not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the laws in force, or to overthrow national institutions,

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3/ See History of the United Nations War Crimes Commission, pp. 89-90.

(1) affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or a political crime as understood by civilized nations,

(2) take note of the declarations made in this respect on 25 October 1941, by the President of the United States of America and by the British Prime Minister,

(3) place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them,

(4) resolve to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out;

"In faith whereof, the undersigned duly authorized to this effect have signed the present Declaration."

9. "The twofold value of this Declaration as an affirmation of law and as a warning" was emphasized in a statement made on signing the document by the Minister for Foreign Affairs of Luxembourg, who said: "It will be useless, when the day of victory comes, for the torturers of our peoples to claim that they only did what they were ordered to do and acted according to their laws. These laws and the application of them are now stigmatized by the Declaration of the Governments of the Occupied Countries as being contrary to law, the moral law as well as national and international law ... The guilty will be liable to the laws of the countries in which their crimes have been committed. If need be, our national legislative systems must be adapted to the aims laid down in our common Declaration and, if necessary, the repression of such crimes must be organized on international basis".[4/]

B. Moscow Declaration of 1943

10. The Allies' intention to prosecute and punish war criminals was again expressed during the Moscow Conference of October 1943. By a Declaration published on 1 November 1943, the Governments of the Union of Soviet Socialist Republics, the

4/ Ibid., p. 91.

United Kingdom and the United States, "speaking in the interests of the thirty-three United Nations", warned the war criminals that "most assuredly" they would "pursue them to the uttermost ends of the earth and deliver them to their accusers in order that justice /might/ be done". Criminals in a specified category would be "sent back to the countries in which their abominable deeds were done in order that they /might/ be judged and punished according to the laws of these liberated countries and of the free governments which /would/ be created therein". Criminals "whose offences /had/ no particular geographical localization" would be "punished by the joint decision of the Governments of the Allies". Here is the full text of the Moscow Declaration:5/

> "The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled.
>
> "The brutalities of Hitlerite domination are no new thing and all the peoples of territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are being redeemed by the advancing armies of the liberating Powers and that in their desperation the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites, and on French and Italian territory.
>
> "Accordingly, the aforesaid three Allied Powers, speaking in the interests of the thirty-two (thirty-three) United Nations, hereby solemnly declare and give full warning of their declaration as follows:
>
> "At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. Lists will be compiled in all possible detail from all these countries, having regard

5/ A/CN.4/5, p. 87.

especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

"Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

"The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."

C. The Potsdam Agreements of 1945

11. During their Conference of 17 July to 2 August 1945, the Heads of Government of the Union of Soviet Socialist Republics, the United Kingdom and the United States declared that:

"War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment."

They took "note of the discussions which have been proceeding in recent weeks in London between British, United States, Soviet and French representatives with a view to reaching agreement on the methods of trial of those major war criminals whose crimes under the Moscow Declaration of October 1943 have no particular geographical localization. The three Governments reaffirm their intention to bring these criminals to swift and sure justice...".[6/]

6/ History of the United Nations War Crimes Commission, p. 270.

D. Declarations of Governments and statesmen of the Allied Powers

12. In reply to a note verbale dated 30 July 1942 addressed to the United States Government by the representatives of the Netherlands, Yugoslavia and Luxembourg, on behalf of the nine countries signatories to the Declaration of St. James's, President Roosevelt on 21 August 1942 issued a Declaration in which he warned war criminals in the following terms:

> "They shall have to stand in courts of law in the very countries they are now oppressing and answer for their acts". 7/

13. Speaking in the House of Lords on 7 October 1942, the Lord Chancellor said:

> "It is fallacious to suppose that people who run to the ends of the earth thereby acquire a right of asylum ... it is rather important not to encourage the idea that everybody who gets away into some other land thereby acquires a sort of right to stay where he is ...". 8/

14. In a speech made on 6 November 1942, Marshal Stalin condemned "the vile system of hostages" and the "massacre of civilian populations", and announced "that the guilty, whose names are known to tens of thousands of tortured persons, shall not escape the terrible punishment which awaits them". 9/

15. In a simultaneous Declaration of 17 December 1942 concerning "retribution for crimes committed against persons of Jewish race", the Governments of London, Moscow and Washington reaffirmed:

> "their solemn resolution to insure that those responsible for these crimes shall not escape retribution". 10/

16. In a statement issued on 24 March 1944, President Roosevelt, referring to some of "the blackest crimes in history", said:

> "It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished." 11/

7/ Ibid., p. 93.

8/ Punishment for War Crimes, United Nations Information Office, New York, p. 30.

9/ V.V. Pella, op. cit., p. 21.

10/ History of the United Nations War Crimes Commission, p. 106.

11/ Department of State Bulletin, United States Government Printing Office, Vol. X, No. 248, p. 277.

II. THE WORK OF INTER-ALLIED BODIES

17. Concurrently with the drafting of the international agreements and other declarations mentioned above, which were necessarily of a very general character, discussions of a technical nature on the legal questions involved in the measures planned by the Allied Governments were taking place in inter-allied organs of study. The organs in question were the following: the London International Assembly, the International Commission for Penal Reconstruction and Development, and the United Nations War Crimes Commission.

A. The London International Assembly

18. This Assembly, which was created in 1941 under the auspices of the League of Nations Union, was not an official body, but its members were designated by the Allied Governments in London, and the Assembly made recommendations through its members to those Governments. It studied various aspects of the war crimes question: the definition of war crimes, crimes committed by order of superiors, the responsibility of statesmen, the competence of municipal courts, the institution of an international criminal court, and extradition.[12/]

B. The International Commission for Penal Reconstruction and Development

19. This semi-official body, which was established in November 1943, was composed of jurists of the United Kingdom and a few other Allied countries. It assembled a considerable amount of useful information on the following subjects: the definition of war crimes, municipal jurisdiction in regard to war criminals, the institution of an international criminal court, and extradition.[13/]

C. The United Nations War Crimes Commission

20. At a diplomatic conference held in London on 20 October 1943 and attended by representatives of the Allied Governments, it was decided to set up a

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12/ History of the United Nations War Crimes Commission, London, 1948, pp. 99-104.

13/ Ibid., pp. 94-98.

United Nations Commission for the investigation of war crimes. The Commission did not limit itself to investigating and recording the facts but tried also to resolve the legal difficulties raised by the punishment of war crimes and other crimes against the law of nations.14/

14/ Ibid., pp. 109-185.

III. THE INTERNATIONAL MILITARY TRIBUNALS OF NÜRNBERG AND THE FAR EAST

A. The Nürnberg International Military Tribunal

21. In pursuance of the Moscow Declaration, the Governments of France, the Union of Soviet Socialist Republics, the United Kingdom and the United States, "acting in the interests of all the United Nations", signed the London Agreement of 8 August 1945.[15/] [16/] The Agreement provided for the establishment, after consultation with the Control Council for Germany, of an International Military Tribunal "for the trial of war criminals whose offences /had/ no particular geographical location". The signatories undertook to take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who were to be tried by the International Military Tribunal. The Agreement applied to "ordinary" criminals - i.e., those who did not come within the jurisdiction of the Tribunal - the principle of territorial jurisdiction, thereby confirming the provisions of the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes. The rules relating to the establishment of the International Military Tribunal, its organization, purpose, jurisdiction and functions were set out in the Charter annexed to and forming an integral part of the Agreement. Under the terms of its Charter, the International Military Tribunal, established for the just and prompt trial and punishment of the major war criminals of the European Axis was to consist of four members, each with an alternate, each Signatory appointing one member and one alternate. It had the right to impose upon a defendant, on conviction, death or such other punishment as was determined by it to be just. The crimes coming within its jurisdiction for which there was to be individual responsibility were set out in article 6, which provided as follows:

15/ Ibid., p. 457.

16/ Acting under article 5, the Governments of the following countries acceded to the Agreement: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, Yugoslavia.

"The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

22. In its judgement, the Tribunal expressed its views on the law of the Charter. The Charter, it held, rested on dual foundations. Firstly, the Signatory Powers, in framing the Charter, had exercised powers vested in them by the rules of international law; and secondly, the Charter did not substantively depart from international law, but was merely the expression of existing international law.

"The making of the Charter", the judgement states, "was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations... it is the expression of international

law existing at the time of its creation; and to that extent is itself a contribution to international law.

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." 17/

23. The trial, which took place at Nürnberg, began on 20 November 1945 and ended on 31 August 1946. Judgement was delivered on 30 September and 1 October 1946. The principles of international law established by the Charter of the Tribunal and by the judgement were confirmed and formulated, as will be seen below, by the United Nations General Assembly.

B. The International Military Tribunal for the Far East

24. In the declaration issued at Potsdam on 26 July 1945 by the United States, China and the United Kingdom, to which the Union of Soviet Socialist Republics later acceded, it was announced that "stern justice will be meted out to all war criminals, including those who have visited cruelties upon our prisoners". 18/ At the Moscow Conference which met in December 1945, the Government of the Union of Soviet Socialist Republics, the United Kingdom and the United States decided, with the participation of China, that "The Supreme Commander shall issue all orders for the implementation of the terms of surrender, the occupation and control of Japan, and directives supplementary thereto." 19/ Thus empowered, General MacArthur, Supreme Commander for the Allied Powers, established, by a Special Proclamation dated 19 January 1946, the International Military Tribunal for the Far East for "the trial of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace". The Proclamation stated that the constitution, jurisdiction and functions of the Tribunal were those set forth in the Charter

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17/ See Nazi Conspiracy and Aggression. Opinion and Judgment, United States Government Printing Office. Washington: 1948, p. 48.

18/ United Nations Documents, 1941-1945. Royal Institute of International Affairs. London 1946, p. 207.

19/ Ibid., p. 262.

of the International Military Tribunal for the Far East approved the same day by the Supreme Commander.[20] Under the terms of the Charter, the Tribunal was to consist of not less than six or more than eleven members appointed by the Supreme Commander from the names submitted by the Signatories to the Instrument of Surrender and by India and the Philippines.[21] The Supreme Commander was also to appoint a member to be President of the Tribunal and to designate a Chief of Counsel responsible for the investigation and prosecution of charges. Any Member of the United Nations with which Japan had been at war might appoint an Associate Counsel to assist the Chief of Counsel. The Tribunal was to have the power to impose upon an accused, on conviction, death or such other punishment as was determined by it to be just. The applicable principles of law were set out in the Charter, the relevant provisions of which were largely identical with those of the Charter of the Nürnberg Tribunal. There were, however, a few differences, particularly in regard to the definition of crimes within the jurisdiction of the Tribunal. These crimes were defined in article 5 of the Charter of the Tokyo Tribunal as follows:[22]

> "(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> "(b) Conventional War Crimes: Namely, violations of the laws or customs of war;
>
> "(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators

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20/ For the text of the Proclamation and Charter, see Department of State Bulletin, U.S.A., Vol. XIV, No. 349, pp. 361 et seq.

21/ The following countries were represented on the Tribunal: Australia, Canada, China, France, India, Netherlands, New Zealand, Philippines, USSR, United Kingdom, United States.

22/ Department of State Bulletin, U.S.A., Vol. XIV, No. 349, p. 362.

and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

25. In general, the decisions of the Tokyo Tribunal accorded with and confirmed those of the Nürnberg Tribunal.

IV. LAW NO. 10 OF THE CONTROL COUNCIL FOR GERMANY

Dated 20 December 1945

26. In order to give effect to the Moscow Declaration of 1943 and the London Agreement of 1945 and the Charter issued pursuant thereto, and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council for Germany promulgated Law No. 10 concerning the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity. These crimes are defined in the first paragraph of article 2 of the Law in the following terms:[23]

"Each of the following acts is recognized as a crime.

"(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or consipracy for the accomplishment of any of the foregoing.

"(b) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to murder, ill-treatment or deportation to slave labour, or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"(c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

"(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."

23/ Official Gazette of the Control Council for Germany, No. 3, p. 22.

V. THE PEACE TREATIES OF 1947

27. The Treaties of Peace which were concluded at the end of the Second World War with Bulgaria (art. 5),[24] Finland (art. 9),[25] Hungary (art. 6),[26] Italy (art. 45)[27] and Romania (art. 6)[28] contain identical provisions imposing on these countries the obligation to take all necessary steps to ensure the apprehension and surrender for trial of persons accused of war crimes, crimes against peace and crimes against humanity. Article 5 of the Peace Treaty with Bulgaria provides as follows:

> "1. Bulgaria shall take all necessary steps to ensure the apprehension and surrender for trial of:
>
> "(a) Persons accused of having committed, ordered or abetted war crimes or crimes against peace or humanity;
>
> "(b) Nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war.
>
> "2. At the request of the United Nations Government concerned, Bulgaria shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of the persons referred to in paragraph 1 of this Article."
>
> ...

24/ United Nations, Treaty Series, Vol. 41, p. 50.

25/ Ibid., Vol. 48, p. 228.

26/ Ibid., Vol. 41, p. 168.

27/ Ibid., Vol. 49, p. 126.

28/ Ibid., Vol. 42, p. 34.

VI. ACTION BY THE UNITED NATIONS

A. Extradition and punishment of war criminals

28. On 13 February 1946, at its first session, the General Assembly adopted resolution 3 (I) whereby it took note of (1) the Declarations of St. James's (1942) and Moscow (1943), (2) the laws and usages of warfare established by the fourth Hague Convention of 1907, and (3) the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal of Nürnberg. By that same resolution the General Assembly

> "believing that certain war criminals continue to evade justice in the territories of certain States;
>
> recommends
>
> "that Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries;
>
> "and calls upon
>
> "the governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries."

29. On 31 October 1947, at its second session, the General Assembly adopted resolution 170 (II) in which, after reaffirming its aforementioned resolution of 13 February 1946, it continued as follows:

> "Recommends Members of the United Nations to continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals;
>
> "Recommends Members of the United Nations, which desire the surrender of alleged war criminals or traitors (that is to say nationals of any State accused of having violated their national law by treason or active collaboration with the enemy during the war) by other Members in whose jurisdiction they are believed to be, to request such surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable prima facie case exists as to identity and guilt, and

"Reasserts that trials of war criminals and traitors, like all other trials, should be governed by the principles of justice, law and evidence."

B. Confirmation and formulation of the principles recognized by the Charter and in the judgment of the Nürnberg International Tribunal

30. Some days after judgment was delivered by the Nürnberg International Tribunal, the General Assembly met for the second part of its first session. The importance of the Charter of the Tribunal was recognized at the opening meeting held on 23 October 1946. In his address to the Assembly at that meeting, the President of the United States recalled that "twenty-three Members of the United Nations have bound themselves by the Charter of the Nürnberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as States shall be tried before the bar of international justice".[29/]

31. In his supplementary report to the General Assembly on 24 October 1946, the Secretary-General pointed out that the Nürnberg trials had furnished a new lead in the field of the progressive development of international law and its codification. "In the interest of peace, and in order to protect mankind against future wars", he added, "it will be of decisive significance to have the principles which were employed in the Nürnberg trials, and according to which the war criminals were sentenced, made a permanent part of the body of international law as quickly as possible. From now on the instigators of new wars must know that there exist both law and punishment for their crimes. Here we have a high inspiration to go forward and begin the task of working toward a revitalized system of international law."[30/]

32. On 11 December 1946, on the basis of a proposal submitted by the United States delegation,[31/] the General Assembly adopted resolution 95 (I) in which it recognized the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations

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29/ Thirty-fourth plenary meeting of the General Assembly, p. 684.

30/ Thirty-fifth plenary meeting of the General Assembly, pp. 699-700.

31/ Document A/C.6/69.

for the purpose of encouraging the progressive development of international law and its codification. It took note of the London Agreement for the establishment of the International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis and of the Charter annexed thereto. It took note also of the fact that similar principles had been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East and continued:

/The General Assembly/

"Therefore

"Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

"Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."

33. By resolution 177 (II) at its second session on 21 November 1947, the General Assembly directed the International Law Commission to (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal, and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to those principles.

34. In pursuance of paragraph (a) of that resolution, the International Law Commission undertook a preliminary consideration of the subject at its first session in 1949. In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgement constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation of those principles as principles of international law but merely to formulate them.[32/] That

32/ Yearbook of the International Law Commission, 1949, p. 282, para. 26.

conclusion was set forth in paragraph 26 of the report of the Commission on its first session, which report was approved by the General Assembly in resolution 373 (IV) of 6 December 1949.

35. At its second session in 1950, the International Law Commission, on the basis of a report[33/] submitted by Mr. J. Spiropoulos, Special Rapporteur, adopted a formulation of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal. The text of principles I, II, VI, and VII, and of the comments thereon, is as follows:[34/]

"PRINCIPLE I

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

Comment

"This principle is based on the first paragraph of article 6 of the Charter of the Nürnberg Tribunal which established the competence of the Tribunal to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes defined in sub-paragraphs (a), (b) and (c) of article 6. The text of the Charter declared punishable only persons 'acting in the interest of the European Axis countries' but, as a matter of course, Principle I is now formulated in general terms.

"The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question whether rules of international law may apply to individuals. 'That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized', said the judgment of the Tribunal, and it added: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced'.

"PRINCIPLE II

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

33/ Ibid., 1950, Vol. II, document A/CN.4/22, p. 181.

34/ Ibid., document A/1316, p. 374.

Comment

"This principle is a corollary of Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country.

"The Charter of the Nürnberg Tribunal referred, in express terms, to this relation between international and national responsibility only with respect to crimes against humanity. Sub-paragraph (c) of article 6 of the Charter defined as crimes against humanity certain acts 'whether or not /committed/ in violation of the domestic law of the country where perpetrated'. The Commission has formulated Principle II in general terms.

"The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the 'supremacy' of international law over national law. The Tribunal considered that international law can bind individuals even if national law does not direct them to observe the rules of international law, as shown by the following statement of the judgment: '... the very essence of the Charter is that individuals have international duties which transcent the national obligations of obedience imposed by the individual State'.

"PRINCIPLE VI

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

"a. Crimes against peace:

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

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

Comment

"Both categories of crimes are characterized by the fact that they are connected with 'war of aggression or war in violation of international treaties, agreements or assurances'.

"The Tribunal made a general statement to the effect that its Charter was 'the expression of international law existing at the time of its creation'. It, in particular, refuted the argument of the defence that aggressive war was not an international crime. For this refutation the Tribunal relied primarily on the General Treaty for the Renunciation of

War of 27 August 1928 (Kellogg-Briand Pact) which in 1939 was in force between sixty-three States. 'The nations who signed the Pact or adhered to it unconditionally', said the Tribunal, 'condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who planned and waged such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact'.

"In support of its interpretation of the Kellogg-Briand Pact, the Tribunal cited some other international instruments which condemned war of aggression as an international crime. The draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923 declared, in its article 1, 'that aggressive war is an international crime'. The Preamble to the League of Nations Protocol for the Pacific Settlement of International Disputes (Geneva Protocol), of 1924, 'recognizing the solidarity of the members of the international community', stated that 'a war of aggression constitutes a violation of this solidarity, and is an international crime', and that the contracting parties were 'desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the States and of ensuring the repression of international crimes'. The Declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations declared, in its preamble, that war was an 'international crime'. The resolution unanimously adopted on 18 February 1928 by twenty-one American Republics at the Sixth (Havana) International Conference of American States, provided that 'war of aggression constitutes an international crime against the human species'.

"The Charter of the Nürnberg Tribunal did not contain any definition of 'war of aggression', nor was there any such definition in the judgment of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes.

"According to the Tribunal, this made it unnecessary to discuss the subject in further detail, or to consider at any length the extent to which these aggressive wars were also 'wars in violation of international treaties, agreements, or assurances'.

"The term 'assurances' is understood by the Commission as including any pledge or guarantee of peace given by a State, even unilaterally.

"The terms 'planning' and 'preparation' of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about

of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgment, 'planning and preparation are essential to the making of war'.

"The meaning of the expression 'waging of a war of aggression' was discussed in the Commission during the consideration of the definition of 'crimes against peace'. Some members of the Commission feared that everyone in uniform who fought in a war of aggression might be charged with the 'waging' of such a war. The Commission understands the expression to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the Tribunal.

"A legal notion of the Charter to which the defence objected was the one concerning 'conspiracy'. The Tribunal recognized that 'conspiracy is not defined in the Charter'. However, it stated the meaning of the term, though only in a restricted way. 'But in the opinion of the tribunal', it was said in the judgment, 'the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in Mein Kampf in later years. The tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan'.

"b. War crimes:

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

Comment

"The Tribunal emphasized that before the last war the crimes defined by article 6 (b) of its Charter were already recognized as crimes under international law. The Tribunal stated that such crimes were covered by specific provisions of the Regulations annexed to The Hague Convention of 1907 respecting the Laws and Customs of War on Land and of the Geneva Convention of 1929 on the Treatment of Prisoners of war. After enumerating the said provisions, the Tribunal stated: 'That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument'.

"c. Crimes against humanity:

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

Comment

"Article 6 (c) of the Charter of the Nürnberg Tribunal distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds. Acts within these categories, according to the Charter, constituted international crimes only when committed 'in execution of or in connexion with any crimes within the jurisdiction of the Tribunal'. The crimes referred to as falling within the jurisdiction of the Tribunal were crimes against peace and war crimes.

"Though it found that 'political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty', that 'the policy of persecution, repression and murder of civilians who were likely to be hostile to the Government, was most ruthlessly carried out' and that 'the persecution of Jews during the same period is established beyond all doubt', the Tribunal considered that it had not been satisfactorily proved that before the outbreak of war these acts had been committed in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. For this reason the Tribunal declared itself unable to 'make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter'.

"The Tribunal did not, however, thereby exclude the possibility that crimes against humanity might be committed also before a war.

"In its definition of crimes against humanity the Commission has omitted the phrase 'before or during the war' contained in article 6 (c) of the Charter of the Nürnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace.

"In accordance with article 6 (c) of the Charter, the above formulation characterizes as crimes against humanity murder, extermination, enslavement, etc., committed against 'any' civilian population. This means that these acts may be crimes against humanity even if they are committed by the perpetrator against his own population.

"PRINCIPLE VII

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

Comment

"The only provision in the Charter of the Nürnberg Tribunal regarding responsibility for complicity was that of the last paragraph of article 6 which reads as follows: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan'.

"The Tribunal, commenting on this provision in connexion with its discussion of count 1 of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the provision did not 'add a new and separate crime to those already listed'. In the view of the Tribunal, the provision was designed to 'establish the responsibility of persons participating in a common plan' to prepare, initiate and wage aggressive war. Interpreted literally, this statement would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action.

"On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the guilt of particular defendants."

36. By resolution 488 (V) of 12 December 1950, the General Assembly invited the Governments of Member States to furnish observations on this formulation and requested the International Law Commission "in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly[35/] and of any observations which may be made by governments.

35/ Official Records of the General Assembly, Fifth Session, Sixth Committee, 231st to 239th meetings.

C. Draft Code of Offences against the Peace and Security of Mankind

37. At its first session, in 1949, the International Law Commission, pursuant to General Assembly resolution 177 (II) (supra, para. 33), undertook a preliminary consideration of the question of a draft Code of Offences against the Peace and Security of Mankind and appointed Mr. Spiropoulos as Special Rapporteur to study that question. It decided to address to Governments a questionnaire asking them which crimes, in their opinion, other than the crimes defined in the Charter and in the judgement of the Nürnberg Tribunal should be included in the draft code envisaged in that resolution.[36] At its second session, in 1950, the International Law Commission considered the question on the basis of a first report[37] submitted by the Special Rapporteur and taking into account the replies from certain Governments to its questionnaire.[38] At its third session, in 1951, it continued its consideration of the question, basing its discussion on a second report[39] submitted by the Special Rapporteur and taking account of the observations made by Governments[40] on the formulation of the Nürnberg principles, in accordance with General Assembly resolution 488 (V) (supra, para. 36). Following that discussion, it adopted a draft Code of Offences against the Peace and Security of Mankind.[41]

38. The text of articles 1 and 2 of this draft Code, which was adopted by the Commission at its third session in 1951, and of the relevant comments, is as follows:

"ARTICLE 1

"Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable.

36/ Yearbook of the International Law Commission, 1949, p. 283, para. 30.

37/ Ibid., 1950, Vol. II, document A/CN.4/25, p. 253.

38/ Documents A/CN.4/19 and Add.1 and 2.

39/ Yearbook of the International Law Commission, 1951, Vol. II, document A/CN.4/44, p. 43.

40/ Ibid., 1951, Vol. II, document A/CN.4/45, p. 104.

41/ Ibid., document A/1858, p. 134.

Comment

"This article is based upon the principle of individual responsibility for crimes under international law. This principle is recognized by the Charter and judgment of the Nürnberg Tribunal, and in the Commission's formulation of the Nürnberg principles it is stated as follows: 'Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.'

"ARTICLE 2

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

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

Comment

"In laying down that any act of aggression is an offence against the peace and security of mankind this paragraph is in consonance with resolution 380 (V) adopted by the General Assembly on 17 November 1950, in which the General Assembly solemnly reaffirms that any aggression 'is the gravest of all crimes against peace and security throughout the world'.

"The paragraph also incorporates, in substance, that part of article 6, paragraph (a) of the Charter of the Nürnberg Tribunal which defines as 'crimes against peace', inter alia, the 'initiation or waging of a war of aggression'.

"While every act of aggression constitutes a crime under paragraph (1), no attempt is made to enumerate such acts exhaustively. It is expressly provided that the employment of armed force in the circumstances specified in the paragraph is an act of aggression. It is, however, possible that aggression can be committed also by other acts, including some of those referred to in other paragraphs of article 2.

"Provisions against the use of force have been included in many international instruments, such as the Covenant of the League of Nations, the Treaty for the Renunciation of War of 27 August 1928, the Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro, 10 October 1933, the Act of Chapultepec of 8 March 1945, the Pact of the Arab League of 22 March 1945, the Inter-American Treaty of Reciprocal Assistance of 2 September 1947, and the Charter of the Organization of American States signed at Bogotá, 30 April 1948.

"The use of force is prohibited by Article 2, paragraph 4, of the Charter of the United Nations, which binds all Members to 'refrain in their

international relations from ... the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. The same prohibition is contained in the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, which, in article 9, provides that 'every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from... the use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order'.

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

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

Comment

"This paragraph is based upon the consideration that not only acts of aggression but also the threat of aggression present a grave danger to the peace and security of mankind and should be regarded as an international crime.

"Article 2, paragraph 4 of the Charter of the United Nations prescribes that all Members shall 'refrain in their international relations from the threat... of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. Similarly, the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, provides in article 9, 'every State has the duty... to refrain from the threat... of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order'.

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

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

Comment

"In prohibiting the preparation for the employment of armed force (except under certain specified conditions) this paragraph incorporates in substance that part of article 6, paragraph (a), of the Charter of the

Nürnberg Tribunal which defines as 'crimes against peace', inter alia, 'planning' and 'preparation' of 'a war of aggression....' As used in this paragraph the term 'preparation' includes 'planning'. It is considered that 'planning' is punishable only if results in preparatory acts and thus becomes an element in the preparation for the employment of armed force.

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

"(4) The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose.

Comment

"The offence defined in this paragraph can be committed only by the members of the armed bands, and they are individually responsible. A criminal responsibility of the authorities of a State under international law may, however, arise under the provisions of paragraph (12) of the present article.

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

Comment

"In its resolution 380 (V) of 17 November 1950 the General Assembly declared that 'fomenting civil strife in the interests of a foreign Power' was aggression.

"The draft Declaration on Rights and Duties of States prepared by the International Law Commission provides, in article 4: 'Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife'.

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

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

Comment

"Article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937 contained a prohibition of the encouragement by a State of terrorist activities directed against another State.

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

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

Comment

"It may be recalled that the League of Nations Committee on Arbitration and Security considered the failure to observe conventional restrictions such as those mentioned in this paragraph as raising, under many circumstances, a presumption of aggression. (Memorandum on articles 10, 11 and 16 of the Covenant, submitted by Mr. Rutgers. League of Nations document C.A.S. 10, 6 February 1928.)

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

"(8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international régime.

Comment

"Annexation of territory in violation of international law constitutes a distinct offence, because it presents a particularly lasting danger to the peace and security of mankind. The Covenant of the League of Nations, in article 10, provided that 'the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'. The Charter of the United Nations, in Article 2, paragraph 4, stipulates that 'all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State...'. Illegal annexation may also be achieved without overt threat or use of force, or by one or more of the acts defined in the other paragraphs of the present article. For this reason the paragraph is not limited to annexation of territory achieved by the threat or use of force.

"The term 'territory under an international régime' envisages territories under the International Trusteeship System of the United Nations as well as those under any other form of international régime.

"The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

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

"(i) Killing members of the group;

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

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

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

"(v) Forcibly transferring children of the group to another group.

Comment

"The text of this paragraph follows the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

"The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

"(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

Comment

"This paragraph corresponds substantially to article 6, paragraph (c), of the Charter of the Nürnberg Tribunal, which defines 'crimes against humanity'. It has, however, been deemed necessary to prohibit also inhuman acts on cultural grounds, since such acts are no less detrimental

to the peace and security of mankind than those provided for in the said Charter. There is another variation from the Nürnberg provision. While, according to the Charter of the Nürnberg Tribunal, any of the inhuman acts constitutes a crime under international law only if it is committed in execution of or in connexion with any crime against peace or war crime as defined in that Charter, this paragraph characterizes as crimes under international law inhuman acts when these acts are committed in execution of or in connexion with other offences defined in the present article.

"The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

"(11) Acts in violation of the laws or customs of war.

Comment

"This paragraph corresponds to article 6, paragraph (b), of the Charter of the Nürnberg Tribunal. Unlike the latter, it does not include an enumeration of acts which are in violation of the laws or customs of war, since no exhaustive enumeration has been deemed practicable.

"The question was considered whether every violation of the laws or customs of war should be regarded as a crime under the code or whether only acts of a certain gravity should be characterized as such crimes. The first alternative was adopted.

"This paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the existence of a state of war is recognized by none of them.

"The United Nations Educational, Scientific and Cultural Organization has urged that wanton destruction, during an armed conflict, of historical monuments, historical documents, works of art or any other cultural objects should be punishable under international law (letter of 17 March 1950 from the Director-General of UNESCO to the International Law Commission transmitting a 'Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict', document 5C/PRG/6 Annex I/UNESCO/MUS/Conf.1/20 (rev.), 8 March 1950). It is understood that such destruction comes wthin the purview of the present paragraph. Indeed, to some extent, it is forbidden by article 56 of the regulations annexed to the Fourth Hague Convention of 1907 respecting the laws and customs of war on land, and by article 5 of the Ninth Hague Convention of 1907 respecting bombardment by naval forces in time of war.

"The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

"(12) Acts which constitute:

"(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

"(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

"(iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or

"(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article.

Comment

"The notion of conspiracy is found in article 6, paragraph (a), of the Charter of the Nürnberg Tribunal and the notion of complicity in the last paragraph of the same article. The notion of conspiracy in the said Charter is limited to the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances', while the present paragraph provides for the application of the notion to all offences against the peace and security of mankind.

"The notions of incitement and of attempt are found in the Convention on Genocide as well as in certain national enactments on war crimes.

"In including 'complicity in the commission of any of the offences defined in the preceding paragraphs' among the acts which are offences against the peace and security of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries."

39. The draft Code was communicated to Governments for their comments.[42/] At its sixth session in 1954, the Commission continued its consideration of the question on the basis of a third report[43/] submitted by the Special Rapporteur in which, taking account of the comments of Governments, he proposed certain revisions in

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42/ For the comments received, see documents A/2162 and Add.1

43/ Yearbook of the International Law Commission, 1954, Vol. II, document A/CN.4/85, p. 112.

the text of the draft Code adopted in 1951. Apart from making certain drafting changes, the Commission decided to modify the text of articles 1 and 2 of the draft Code adopted in 1951 in the following respects:[44/]

ARTICLE 1

"Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

Comment

"The Commission decided to replace the words 'shall be punishable' in the previous text by the words 'shall be punished' in order to emphasize the obligation to punish the perpetrators of international crimes. Since the question of establishing an international criminal court is under consideration by the General Assembly, the Commission did not specify whether persons accused of crimes under international law should be tried by national courts or by an international tribunal.

"In conformity with a decision taken by the Commission at its third session (see the Commission's report on that session, A/1858, paragraph 58 (c), the article deals only with the criminal responsibility of individuals.

ARTICLE 2, PARAGRAPH 4

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

Comment

"The text previously adopted by the Commission read as follows:

'The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose.'

The Commission adopted the new text as it was of the opinion that the scope of the article should be widened.

44/ Ibid., document A/2693, p. 150, para. 50.

ARTICLE 2, PARAGRAPH 9

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

Comment

"This paragraph is entirely new. Not every kind of political or economic pressure is necessarily a crime according to this paragraph. It applies only to cases where the coercive measures constitute a real intervention in the internal or external affairs of another State.

ARTICLE 2, PARAGRAPH 11

(previously paragraph 10)

"Inhuman acts such as murder, extermination, enslavement, deportation of persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

Comment

"The text previously adopted by the Commission read as follows:

> 'Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in the article.'

"This text corresponded in substance to article 6, paragraph (c), of the Charter of the International Military Tribunal at Nürnberg. It was, however, wider in scope than the said paragraph in two respects: it prohibited also inhuman acts committed on cultural grounds and, furthermore, it characterized as crimes under international law not only inhuman acts committed in connexion with crimes against peace or war crimes, as defined in that Charter, but also such acts committed in connexion with all other offences defined in article 2 of the draft Code.

"The Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connexion with other offences defined in the draft Code. On the other hand, in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State."

40. On 4 December 1954, at its ninth session, the General Assembly adopted resolution 897 (IX) in which it decided to postpone further consideration of the draft Code of Offences against the Peace and Security of Mankind until the Special Committee on the question of defining aggression (infra, para. 50) had submitted its report.

D. Prevention and punishment of the crime of genocide

41. In resolution 96 (I) of 11 December 1946, the General Assembly declared: "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations". It observed that "Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part". It affirmed that the punishment of the crime of genocide "is a matter of international concern" and that "genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable". Furthermore it invited the Member States "To enact the necessary legislation for the prevention and punishment of this crime". It recommended that "international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide" and, to that end, it requested the Economic and Social Council to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide.

42. By resolution 47 (IV) of 28 March 1947, the Economic and Social Council instructed the Secretary-General to draw up, with the assistance of experts, a draft convention on the crime of genocide. Pursuant to that resolution, the Secretary-General drew up a draft convention which was communicated to the Member States for their comments. The draft convention, together with the comments

received from Member States, was submitted to the General Assembly at its second session. By resolution 180 (II) of 21 November 1947, the General Assembly, after reaffirming its resolution 96 (I) and declaring "that genocide is an international crime entailing national and international responsibility on the part of individuals and States", requested the Economic and Social Council to continue its work concerning the suppression of that crime, including the study of the draft convention prepared by the Secretariat. At its sixth session, the Council established an Ad Hoc Committee to prepare a draft convention on the crime of genocide. At its seventh session, the Economic and Social Council, under resolution 153 (VII) of 26 August 1948, transmitted to the General Assembly at its third session the draft convention which had been prepared by the Ad Hoc Committee.[45] On 24 September 1948, the General Assembly referred the draft convention to the Sixth Committee which devoted several meetings to preparing the final text of the draft. On the recommendation of the Sixth Committee,[46] the General Assembly on 9 December 1948 adopted resolution 260 (III) whereby it:

"Approves the annexed Convention on the Prevention and Punishment of the Crime of Genocide and proposes it for signature and ratification or accession in accordance with its article XI.

"ANNEX

"TEXT OF THE CONVENTION

"The Contracting Parties,

"Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

"Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

"Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required;

"Hereby agree as hereinafter provided.

45/ Document E/794.

46/ Report of the Sixth Committee, Official Records of the General Assembly, Third Session, Annexes, agenda item 32, document A/760 and Corr.2.

Article I

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

"(a) Killing members of the group;

"(b) Causing serious bodily or mental harm to members of the group;

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

"(d) Imposing measures intended to prevent births within the group;

"(e) Forcibly transferring children of the group to another group.

Article III

"The following acts shall be punishable:

"(a) Genocide;

"(b) Conspiracy to commit genocide;

"(c) Direct and public incitement to commit genocide;

"(d) Attempt to commit genocide;

"(e) Complicity in genocide.

Article IV

"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

"Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

"The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

"Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." 47/

...

E. Question of an international criminal jurisdiction 48/

43. The question of an international criminal jurisdiction was raised and considered by the United Nations in connexion with the formulation of the principles of international law recognized in the Charter and judgement of the Nürnberg Tribunal 49/ and with the action taken by the General Assembly for the prevention and punishment of genocide. 50/

47/ In accordance with the provisions of article XIII, the Convention came into force on 12 January 1951, i.e., on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

48/ For a complete history of this question since the Paris Peace Conference (1919), see document A/CN.4/7/Rev.1 of 27 May 1949.

49/ Ibid., p. 25.

50/ Ibid., p. 30.

44. The General Assembly, in resolution 260 B (III) of 9 December 1948, considered that "in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law". It invited the International Law Commission to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and requested it, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".

45. Pursuant to that resolution, the International Law Commission studied the question at its second session in 1950. As a result of that study,[51] it decided that "the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable". It decided also that "the establishment of the above-mentioned international judicial organ is possible".[52] With regard to the question of the possibility of establishing a criminal chamber of the International Court of Justice, the Commission "decided to state that it has paid attention to the possibility of establishing a Criminal Chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it.[53]

46. On 12 December 1950, the General Assembly adopted resolution 489 (V) whereby it established a Committee composed of the representatives of seventeen Member States for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court. It requested the Secretary-General to communicate the report of the Committee to the Governments of Member States for their observations.

47. In pursuance of that resolution, the Committee met at Geneva from 1 to 31 August 1951. The Committee formulated proposals regarding some of the

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51/ Yearbook of the International Law Commission, 1950, vol. II, document A/1316, p. 378.

52/ Ibid., para. 140.

53/ Ibid., para. 145.

more important questions to which the creation of an international criminal court gives rise and gave in its report[54/] a general survey of the opinions expressed by members of the Committee. A draft statute for an international criminal court prepared by the Committee was annexed to that report. The Committee did not wish to give these proposals any appearance of finality. They were offered as a contribution to a study which, in its opinion, had yet to be carried several steps forward before the problem of an international criminal jurisdiction was ripe for decision. During the seventh session of the General Assembly, the report of the Committee was discussed in the Sixth Committee and at a plenary meeting of the General Assembly. On 5 December 1952, the General Assembly adopted resolution 687 (VII) whereby it again established a Committee composed of the representatives of seventeen Member States for the purpose of continuing the study of the question. The Committee met in New York from 27 July to 20 August 1953. It considered inter alia a compilation[55/] of comments and suggestions relating to a draft statute for an international criminal court prepared by the Secretariat, containing comments and suggestions which had been submitted in writing[56/] by certain Governments or had been made orally during the seventh session of the General Assembly. The Committee dealt with the main problems relating to the establishment of an international criminal court and re-examined the 1951 Geneva draft statute. A revised draft statute for an international criminal court was annexed to the report[57/] which it adopted.

48. By its resolution 898 (IX), adopted on 14 December 1954, the General Assembly, considering the connexion between the question of defining aggression, the draft Code of Offences against the Peace and Security of Mankind, and the question of an international criminal jurisdiction, decided to postpone consideration of the latter question until the General Assembly had taken up the report of the Special Committee on the question of defining aggression (infra, para. 50) and had taken up again the draft Code of Offences against the Peace and Security of Mankind.

54/ Official Records of the General Assembly, Seventh Session, Supplement No. 11, document A/2136.

55/ A/AC.65/1.

56/ A/2186 and Add.1

57/ Official Records of the General Assembly, Ninth Session, Supplement No. 12, document A/2645.

F. Question of defining aggression (its relation with the draft Code of Offences against the Peace and Security of Mankind and with the question of an international criminal jurisdiction)

49. The question of defining aggression has been under consideration by the General Assembly since 1950. During the debate on the item "Duties of States in the event of the outbreak of hostilities", which had been placed on the agenda of the Assembly at its fifth session in 1950 at the request of the Yugoslav delegation, the representative of the Union of Soviet Socialist Republics submitted a draft resolution containing a definition of aggression.[58] In resolution 378 (V) dated 17 November 1950, the General Assembly referred the Soviet proposal to the International Law Commission, which studied it at its third session, in 1951. The results of the Commission's study are contained in its report.[59] On 31 January 1952, during its sixth session, the General Assembly adopted resolution 599 (VI), in which it decided to include in the agenda of its seventh session the question of defining aggression and instructed the Secretary-General to prepare a report[60] in which the question would be thoroughly discussed. In resolution 688 (VII), adopted on 20 December 1962 during its seventh session, the General Assembly decided to establish a Special Committee of fifteen members, which was requested, among other things, to submit to the General Assembly at its ninth session draft definitions of aggression or draft statements of the notion of aggression. The Special Committee, which met in New York from 20 August to 21 September 1953, prepared a report[61] in which it studied various aspects of the question of defining aggression. Several texts of definitions of aggression were submitted to the Committee, which decided not to put them to a vote but to transmit them as they stood to Member States and to the General Assembly. The Committee's report was circulated by the Secretary-General to the Member States for their comments.[62]

58/ Official Records of the General Assembly, Twelfth Session, First Committee, 385th meeting, paras. 18-35 and Annexes, agenda item 72.

59/ Yearbook of the International Law Commission, 1951, vol. II, document A/1858.

60/ Official Records of the General Assembly, Seventh Session, Annexes, agenda item 54, document A/2211.

61/ Ibid., Ninth Session, Supplement No. 11, A/2638.

62/ For these comments, see ibid., Annexes, agenda item 51, document A/2689 and Add.1.

50. A second Special Committee, of nineteen members, was established by General Assembly resolution 895 (IX) dated 4 December 1954. It was requested to submit to the General Assembly a detailed report followed by a draft definition of aggression. The Special Committee met in New York from 8 October to 9 November 1956. It drew up a report[63/] containing the ideas expressed in the Committee, a survey of ideas expressed at the ninth session of the General Assembly and, in annexes, "Selected texts of definitions and draft definitions of aggression", together with the draft definitions submitted to the Committee.

51. At its twelfth session, on 29 November 1957, the General Assembly adopted resolution 1181 (XII), which reads as follows:

"The General Assembly,

"Recalling its resolutions 599 (VI) of 31 January 1952, 688 (VII) of 20 December 1952 and 895 (IX) of 4 December 1954, all referring to a definition of aggression,

"Considering that, in spite of the progress made in the study of the question, the discussion at the present session shows the need for the elucidation of other aspects of a definition of aggression,

"Considering that the report presented by the 1956 Special Committee on the Question of Defining Aggression is an important study based on the views expressed by States Members of the United Nations up to the date of the preparation of the report,

"Considering that twenty-two additional States have recently joined the Organization and that it would be useful to know their views on the matter,

"Resolves:

"1. To take note of the report of the 1956 Special Committee on the Question of Defining Aggression and to express appreciation for the valuable work done;

"2. To ask the Secretary-General to request the views of the new Member States on the question, and to renew the request to Member States to submit comments as provided in General Assembly resolution 688 (VII) of 20 December 1952, furnishing them with the documentation produced after the adoption of that resolution;

63/ Ibid., Twelfth Session, Supplement No. 16 (A/3574).

"3. To ask the Secretary-General to refer the replies of Member States to a committee composed of the Member States whose representatives have served on the General Committee at the most recent regular session of the General Assembly, which committee shall study the replies for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression, and shall report to the Secretary-General when it has determined that the time is appropriate, setting forth the considerations which led to its decision;

"4. To request the Secretary-General to place the question of defining aggression on the provisional agenda of the General Assembly, not earlier than at its fourteenth session, when the committee has advised him that it considers the time appropriate;

"5. To request the Secretary-General to convene the first meeting of the committee prior to the fourteenth session of the General Assembly."

52. At the same session, on 11 December 1957, the General Assembly adopted resolutions 1186 (XII) and 1187 (XII), dealing respectively with the draft Code of Offences against the Peace and Security of Mankind and with international criminal jurisdiction. In the first, it decided to defer consideration of the question of the draft Code of Offences against the Peace and Security of Mankind until such time as it took up again the question of defining aggression. In the second, it decided to defer consideration of the question of an international criminal jurisdiction until such time as it took up the question of defining aggression and the question of a draft Code of Offences against the Peace and Security of Mankind.

53. The Committee established in accordance with the above-mentioned resolution 1181 (XII) held three sessions, the first in April 1959,[64] the second in April 1962,[65] and the third in April 1965.[66] At the last session, it decided to reconvene in April 1967 with a view to consider recommending to the General Assembly that it should study again the question of defining aggression, unless the majority of members of the Committee, who would be consulted in writing in January 1966 by the Secretary-General, considered that it was desirable for the Committee to meet in April 1966 and requested the Secretary-General to convene it at that time.

64/ Report (A/AC.91/2).

65/ Report (A/AC.91/3).

66/ Report (A/AC.91/5).

G. Universal Declaration of Human Rights

54. Article 11 (2) of the Universal Declaration of Human Rights adopted on 10 December 1948 in General Assembly resolution 217 (III) confirms the principle of "nullum crimen, nulla poena sine lege". It reads as follows:

> "(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

55. It should be noted that article 15 of the draft Covenant on Civil and Political Rights, one of the draft International Covenants on Human Rights adopted by the Third Committee from the tenth to the eighteenth sessions of the General Assembly,[67] reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequently to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
>
> "2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." [68]

56. Paragraph 2 of this article is in substance identical to article 7 (2) of the European Convention on Human Rights referred to below.

67/ Document A/5929, 16 June 1965.

68/ The report of the Third Committee to the General Assembly states as follows: "[Some representatives expressed the view that] retention of paragraph 2 would eliminate any doubts regarding the legality of the judgements rendered by the Nürnberg and the Tokyo tribunals. It was also pointed out that the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgements of that Tribunal were affirmed by the General Assembly in resolution 95 (I). The provision of paragraph 2 would confirm and strengthen those principles and would ensure that if in the future crimes should be perpetrated similar to those punished at Nürnberg, they would be punished in accordance with the same principles." (Official Records of the General Assembly, Fifteenth Session, Annexes, agenda item 34, document A/4625, para. 16).

VII. COUNCIL OF EUROPE

A. The principle of "nullum crimen, nulla poena sine lege"

57. Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, provides as follows:[69]

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> "(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations."

58. The European Commission of Human Rights has applied paragraph 2 of this article in the case of applications directed against legislation penalizing collaboration with the enemy during the Second World War. In its decision of 20 July 1957 relating to application No. 268/57, it observed "that the travaux préparatoires for the Convention show that the purpose of paragraph 2 of article 7, quoted above, is to make clear that article 7 does not affect the legislation enacted, in the completely exceptional circumstances existing at the end of the Second World War, to punish war crimes and acts of treason and collaboration with the enemy, and is in no way intended as a legal or moral condemnation of such legislation."[70]

B. Non-applicability of statutory limitation to crimes against humanity

59. At its twenty-third sitting, held on 28 January 1965, the Consultative Assembly of the Council of Europe adopted recommendation 415 (1965) on statutory limitation as applicable to crimes against humanity,[71] which reads as follows:

69/ European Commission of Human Rights, Documents and Decisions 1955-1957, The Hague, 1959, p. 4.

70/ Ibid., p. 241. See also the decision of the Commission with regard to application No. 214/56 (Yearbook of the European Convention on Human Rights, 1958-1959, p. 214).

71/ Doc. 1868, Report of the Legal Committee (Rapporteur: Mr. Pierson).

"Whereas, in our time, the gravest crimes have been systematically perpetrated on a large scale for political, racial and religious motives, thus endangering the very foundations of our civilisation;

"Whereas such crimes, described as crimes against humanity, were committed in particular during the second world war in violation of the most elementary human rights;

"Whereas, in regard to the protection of human rights, the Council of Europe has statutory responsibilities which cannot leave it indifferent to such grave infringements of those rights as are represented by crimes against humanity;

"Whereas the laws of several member States contain a statutory limitation which will soon make it impossible in those countries to prosecute persons responsible for crimes against humanity;

"Whereas the United Nations have commenced work on codification of international penal law which it would be desirable to see concluded;

"Having noted that several member States have amended or intend to amend their legislation, so that the rules of ordinary law relating to statutory limitation for ordinary crimes shall not apply to crimes against humanity,

"Recommends the Committee of Ministers:

"(a) to invite member Governments to take immediately appropriate measures for the purpose of preventing that, by the application of the statutory limitation or any other means, crimes committed for political, racial and religious motives before and during the second world war, and more generally crimes against humanity, remain unpunished;

"(b) to instruct a Committee of Governmental Experts to draw up a Convention ensuring that crimes against humanity shall not be subject to statutory limitation.*

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* When the Committee of Ministers discussed paragraph (b) of Recommendation 415 in April 1965, though some Governments expressed themselves in favour of the Assembly's suggestion that a committee of governmental experts should be entrusted with the task of drawing up a convention intended to ensure that crimes against humanity should not be subject to statutory limitation, it was felt that as this matter was under examination by the Commission on Human Rights of the United Nations, it would be preferable to await the outcome of these discussions before deciding on the expediency of concluding a convention within a purely European framework. Consequently, it was decided to resume consideration of the matter later in the light of further developments.

VIII. PENAL SANCTIONS IN THE GENEVA CONVENTIONS OF 1949[72/]

60. The events of the Second World War led the International Committee of the Red Cross to consider the question of introducing into any Convention dealing with the laws and customs of war provisions relating to the repression of violations of the Convention concerned. This Committee drew the attention of the Conferences of Experts, which met at Geneva in 1946 and 1947, to this important question. In 1948, on the invitation of the XVIIth International Red Cross Conference, it prepared, with the help of a number of experts, a draft of some new articles to be incorporated in each of the four Geneva Conventions, dealing with the santions for persons committing breaches of those Conventions. This draft was formally submitted to the Diplomatic Conference of Geneva of 1949, which had been convened: (a) to revise the Geneva Convention of 27 July 1929, for the Relief of the Wounded and Sick in Armies in the Field, the Xth Hague Convention of 18 October 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906, the Geneva Convention of 27 July 1929, relative to the Treatment of Prisoners of War, and (b) to establish a Convention for the Protection of Civilian Persons in Time of War.

61. Each of the four Conventions[73/] adopted at Geneva on 12 August 1949 by the Diplomatic Conference (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,[74/] Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,[75/] Convention relative to the Treatment of Prisoners of War,[76/] Convention relative to the Protection of Civilian Persons in Time of War,[77/] contains the following provisions:

72/ On this subject, see Commentaire relatif à chacune des Conventions de Genève, published under the direction of Jean S. Pictet, Director of General Affairs, International Committee of the Red Cross, Geneva.

73/ United Nations, Treaty Series, Vol. 75, p. 31 et seq.

74/ Articles 49, 50.

75/ Articles 50, 51.

76/ Articles 129, 130.

77/ Articles 146, 147.

Article ...

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

"Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

"In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Article ...

"Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." 78/

78/ The definition of grave breaches is not exactly the same in the four Conventions (see infra, Part III).

IX. NATIONAL LEGISLATION AND THE QUESTION OF THE STATUTORY LIMITATION FOR WAR CRIMES AND CRIMES AGAINST PEACE AND HUMANITY

62. In reply to the note verbale addressed to them by the Secretary-General (supra, para. 4), certain States provided information on their law and practice relating to the applicability of the statutory limitation to war crimes and crimes against peace and humanity. Other States gave their views on this question. The material received is set forth in this section, which also contains the relevant available information concerning a number of States which, on 10 January 1966, had not replied to the above-mentioned note-verbale of the Secretary-General.

63. The position of these States on the question under consideration can be summarized as follows:

(a) In the following States, under their ordinary law or by virtue of special legislation, the statutory limitation is barred or may be set aside either for war crimes and crimes against peace and humanity as a whole, or for one or other of those categories of crimes: Austria, Bulgaria, China, Czechoslovakia, Denmark, France, Hungary, India, Ireland, Israel, Italy, Kenya, Nigeria, Poland, Singapore, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

(b) In the following States, the ordinary statutory limitations are apparently applicable to war crimes and to persons guilty of crimes against humanity: Cambodia, Cameroon, Japan, Malta, Morocco, Norway, Spain, Sweden, Turkey, Venezuela.

(c) The following States, which have statutory limitations for such crimes, have taken special steps which they deemed sufficient to ensure that crimes committed during the Second World War and coming within their jurisdiction would not go unpunished: Belgium, Luxembourg, Netherlands. The Federal Republic of Germany has promulgated an Act providing that the prosecution of previously undetected offences of the most serious kind will be admissible beyond 8 May 1965, until 31 December 1969.

(d) The following States have expressed the view that their domestic statutes of limitation should not apply to war crimes and to crimes against peace and humanity: Bolivia, Colombia.

64. Here now in detail is the available material on this subject, country by country.

Austria

65. In his article on "The statutory limitation for crimes against humanity and international criminal law",[79] A. Sottile states the following under the heading "Period of limitation for war crimes abolished":

> "The period of limitation for war crimes, which in Austria had been set at twenty years, was due to expire on 29 June 1965. Beyond that date, it would have been impossible to prosecute war criminals who until then had successfully concealed their identities. To prevent such a situation from arising, the Council of Ministers, referring to a recommendation of the Council of Europe, which, on 28 January 1965, expressed itself in favour of an extension of the period of limitation for war crimes, decided to abolish periods of limitation for murders in general."

Belgium

66. The following Act, promulgated on 3 December 1964, extends the period of limitation for the execution of death sentences imposed for breaches of the external security of the State committed between 9 May 1940 and 8 May 1945:

> "Article 1. Notwithstanding article 91 of the Penal Code and in so far as the period of limitation has not elapsed on the date of the entry into force of this Act, death sentences awarded for the offences or attempted offences referred to in book II, title I, chapter II, of the Penal Code and committed between 9 May 1940 and 8 May 1945, shall be subject to a limitation of thirty full years from the date of the orders or judgements under which the sentences were awarded.
>
> "Article 2. The period of limitation shall continue to be thirty years in the case of commutation, after the entry into force of this Act, to a sentence of more than twenty years."

Belgian law does not specifically define war crimes. For the purposes of the Act of 20 June 1947, war crimes are ordinary offences which are subject to special jurisdictional and procedural rules by virtue of extrinsic circumstances, which do not always in themselves constitute an offence or even an aggravating circumstance. Although they usually correspond to the international definitions of war crimes, these offences are not always identified with them. Belgian law is much wider in scope and is concerned with even relatively unimportant facts. That is why the legislature did not enact special rules regarding periods of limitation for the prosecution and punishment of such offences. Since prosecution in absentia is possible under Belgian law and was resorted to extensively after the war, the extension of the period of limitation for the

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79/ Revue de droit international (A. Sottile, Geneva), 43rd year, No. 1, January-March 1965, p. 12.

execution of certain penalties provided for in the above-mentioned Act of 3 December 1964 is sufficient to ensure that crimes committed during the occupation do not go unpunished. In addition, to make exceptions with regard to the limitation of prosecutions would hardly be justified in Belgium, where since 1944 proceedings have been carried out with sufficient vigour to ensure that at least all the most outstanding cases have been dealt with.

Bolivia

67. The non-applicability of statutory limitations for the prosecution and punishment of war crimes, crimes against humanity and crimes against peace is justified because the persons involved are not mere petty offenders but criminals who, by remaining at large, are a great permanent or temporary danger, and in respect of whom, if they are not to go unpunished, no limitation should be placed on their prosecution and punishment simply because a certain period of time has elapsed.

Bulgaria

68. The criminal law does not prescribe periods of limitation for war crimes and crimes against peace and humanity. This is sanctioned by the Decree on the non-application of periods of limitation in respect of these crimes, which was promulgated on 22 March 1965 by the Presidium of the National Assembly and which reads as follows:

> "During the Second World War, nazi and fascist criminals committed the most serious crimes against peace and humanity and war crimes which mankind will never forget. Millions of men, women, innocent children and old people were brutally massacred. National, ethnic and racial groups were totally exterminated. Prisoners were totally exterminated. Prisoners of war and great masses of civilian population were massacred, tortured and subjected to inhuman treatment. Thousands of towns, villages and cultural treasures were burnt and destroyed in the most barbarous fashion.
>
> "Criminal liability for these crimes which had outraged the conscience of mankind was established by international instruments, in particular the Moscow Declaration of 30 October 1943, the Potsdam Agreements of 2 August 1945, the London Agreement and the Charter of the International Military Tribunal of 8 August 1945. The principles and norms of these instruments were declared by the United Nations General Assembly to be universally recognized principles of international law.

"The international instruments in question and world peace and security and the protection of man and his rights require that the nazi and fascist criminals should be brought to justice and punished regardless of the time that has elapsed since those monstrous crimes were committed, so that such crimes may never occur again.

"The Bulgarian people, which like other peaceful peoples has suffered grievously from fascism, cannot tolerate that the nazi criminals should escape the punishment required by justice for the crimes which they have committed.

"Taking into consideration the principles and norms of international law and expressing the will of the entire Bulgarian people, the Presidium of the National Assembly of the People's Republic of Bulgaria

ORDERS

"The statutory limitation shall not apply to crimes against peace and humanity or to war crimes and the nazi and fascist criminals shall be punished regardless of the time that has elapsed since the perpetration of those crimes."

Cambodia

69. There are no special texts dealing with the punishment of war crimes and crimes against humanity. Any such crimes would be punished under the provisions of the Penal Code covering gang murder, looting and arson, etc. They would be subject to the normal statutory limitations, i.e. ten years in respect of criminal proceedings, and twenty years in respect of the execution of the penalty.

Cameroon

70. "In Cameroon, there are no specific provisions in positive law for the punishment of war crimes and the extradition of individuals accused of such crimes. The latter could, of course, be extradited and even (if they were Cameroonians) prosecuted in Cameroon, in so far as their acts could be classified, as they almost always can be, as ordinary crimes and prosecution and punishment were not barred by a statutory limitation of time... . In point of fact, and since the question is apparently -- for the present at least -- limited to the punishment of crimes committed under the direct aegis of the Third Reich, hence before 8 May 1945, it would seem from the relevant texts that the statutory limitation would be applicable (Act 64/LF/13, article 4 (c)) in respect of individuals who might have sought refuge in East Cameroon."

China

71. The provision of the statute of limitations in the criminal law, so far as its legislative intent is concerned, is motivated by the desire to maintain the status quo of the social order and by the fact that it is often difficult to collect evidence against the accused after a long period of time has elapsed. However, this provision is not applicable to the prosecution of war crimes and crimes against humanity, which are by their very nature serious criminal offences. There is an explicit provision in Chinese laws at present in force which states that the statute of limitations is not applicable to cases involving war crimes and crimes against humanity. Specifically, article IV, paragraph 2, of the Statute for the Punishment of War Crimes, which was promulgated on 24 October 1946 and entered into force on the same date, provides that article 80 of the Criminal Code concerning the statute of limitations is not applicable to cases involving war crimes.

Colombia

72. There is no valid justification for limitation of time or any other limitation in the case of crimes of this kind, since they are criminal acts which violate Christian morality, the customs of civilized peoples, international justice and the legal conscience of mankind.

Denmark

73. Section 7 of Act No. 368 of 6 July 1946 concerning Treason and Other Crimes against the Independence and Security of the State, provides that "no period of limitation shall apply to such crimes, neither as regards liability to punishment nor as regards the execution of sentences passed pursuant to the Act". Under section 8 of Act No. 395 of 12 July 1946 concerning the Punishment of War Crimes, "no period of limitation shall apply to liability to punishment and to execution of sentences under the Act." "It follows from the general provisions of the Criminal Code as to limitation that no limitation shall apply to liability to punishment under the Act on Genocide [No. 132 of 29 April 1955] [and the Military Criminal Code, No. 262 of 21 July 1954] whenever a penalty exceeding twelve months' imprisonment is imposed."

Spain

74. "The terms 'war crimes' and 'crimes against humanity' do not appear in Spanish statutes. This is due to the fact that these concepts, in their present acceptance, arose from certain historical facts (the World War of 1939-1945 and a number of pre-war European political regimes) in which Spain had no part. Consequently, there are no references to offences of this type in either the laws or the judicial practice of Spain.

"...

"Although the terms 'war crimes' and 'crimes against humanity' are not found in the Spanish legal system, this does not mean that, if such crimes were committed, they would remain unpunished. The crimes covered by these concepts (if the definitions of Cuello Calón are accepted) would necessarily come under some article of titles I (offences against the internal security of the State) and VIII (offences against the person) of book II of the Ordinary Penal Code, or of chapter III (offences under the law of nations) of title VIII of part II of the Code of Military Justice.

"In the case of 'war crimes' (breaches of the norms to be observed in time of war), there is no doubt that they are punishable under Spanish law, particularly military law. In addition, it should be noted that Spain is a party to the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, and to the Protocol to that Convention.

"So far as 'crimes against humanity' are concerned, since the general concept of such offences (activities aimed at the destruction of groups of people on racial, religious or other similar grounds) does not exist in Spanish positive law, it would be necessary to punish as many offences against the life or the physical integrity of the person as there were victims in the group subjected to attack. It should be added that the Spanish Government is at present considering the possibility of acceding to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

"...

"It is clear from the foregoing that the periods of limitation for the offences in question would, under Spanish positive law, be the normal periods prescribed in articles 113 and 115 of the Ordinary Penal Code (from two months to twenty years,

for the prosecution of crimes and offences, and from one year to thirty-five years for the execution of the penalties), or in articles 249 and 251 of the Code of Military Justice (from five to thirty years for both prosecution and execution of the penalties), or in articles 249 and 251 of the Code of Military Justice (from five to thirty years for both prosecution and execution of penalties).

"...

"Since, as we have already indicated, 'war crimes' and 'crimes against humanity' do not exist as positive-law concepts in Spain, any more than the social and historical facts which gave rise to specific provisions for the punishment of such crimes in the countries which took part in the 1939-1945 war, the question whether or not these crimes are subject to periods of limitation has not actually been raised either formally or by authors of treaties on criminal law.

"As we said above, if such crimes were committed in Spain, they would be punished in accordance with the ordinary codes, and the principles governing the period of limitation would also be the same as for ordinary offences.

"The question whether or not the statutory limitation is applicable to 'war crimes' and 'crimes against humanity' has in the main two aspects: a political-social aspect and a technical-legal aspect.

"From a basically political point of view, and taking into account the feelings of the peoples which suffered the consequences of this war, it is possible that the barring of the statutory limitation or at least the extension of the limitation periods for the above-mentioned offences would be both appropriate and popular.

"However, from a purely technical-legal point of view, there is no doubt that the enactment of penal legislation having retroactive effect, even if formally it can be argued that it does not violate the principle of nulla poena sine lege (since a law always cancels earlier conflicting laws), would in practice be a serious breach of that principle, since it would destroy the legal security represented by the stability of the Penal Code.

"Moreover, to recognize the right of the State to extend or bar periods of limitation for specific offences would be to establish a precedent that could be invoked in the future to justify proceedings in a similar manner in respect of other crimes or offences. It is not sufficient justification to affirm that in this case 'serious violations of the law of nations' (sixth preambular paragraph of resolution 3 (XXI) of the Commission on Human Rights) are involved, since the

question which acts are serious enough to merit this treatment is in fact an arbitrary question, which will be settled in each case in accordance with criteria that are basically political, but unfortunately in no way juridical."

United States of America

75. The following passage is taken from a publication entitled American Jurisprudence.[80]

> "In the absence of statutes of limitation specially applicable to criminal cases, a prosecution may be instituted at any time, however long after commission of the criminal act. In other words, unless a period of limitation is fixed by statute for a particular offense, or unless there exist unusual circumstances which bring high prejudice or other equitable considerations into play, a prosecution for the offense is not barred by lapse of time. However, statutes of limitation have been enacted to limit the time for commencement of most criminal proceedings. These statutes necessarily vary in their form and terms. Among various distinctions which appear may be mentioned the custom of having limitation periods for felonies different from those for lesser crimes. As a general rule, the limitations are made applicable to all or most misdemeanors and to some felonies, whereas murder is generally excepted, but sometimes all felonies, unless otherwise specially provided for, are excepted."

France

76. Under the Act of 26 December 1964, "crimes against humanity as defined by the resolution of the United Nations of 13 February 1946, which takes note of the definition of crimes against humanity contained in the Charter of the International Military Tribunal dated 8 August 1945, are by their nature not subject to any period of limitation".[81]

Grand Duchy of Luxembourg

77. There is no special legislation relating to statutory limitation in respect of war crimes. The present situation in that respect is as follows: by a Grand-Ducal Order of 6 May 1943 the running of the statutory limitation in respect of criminal offences was suspended. (The text, owing to faulty drafting, uses the

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80/ 21 American Jurisprudence 2d, Criminal Law, Section 154.

81/ Journal officiel de la République française, débats parlementaires, Assemblée nationale, 1964-1965, No. 116 A.N., December 1964, p. 6147.

term "interruption", but is interpreted in the sense of suspension.) This suspension was repealed by a Grand-Ducal Order of 23 December 1954, which reinstated the statutory limitation from 1 January 1955. Under the terms of article 636 of the Code d'instruction criminelle, the prosecution of a crime is barred after ten full years from the date on which the crime was committed, if during that interval no examination or prosecution proceedings were initiated. Under the terms of article 635 of the Code of Criminal Procedure, the period of limitation for the execution of criminal penalties is twenty-four years from the date of the judgement. Thus, prosecution in respect of acts charged to be crimes lapsed by limitation of time on 1 January 1965. The penalties for war crimes, however, will not be subject to the statutory bar until 1 January 1975. "With regard to war criminals coming under the Act of 2 August 1947 concerning the Punishment of War Crimes, it may be taken that all necessary proceedings have in fact been completed. The courts were able to try cases in adversary proceedings. In a few cases (a dozen), judgement was delivered in absentia. It may therefore be said that the question raises no particular problems in the Grand Duchy of Luxembourg, since when the ten-year period of limitation was reinstated criminal proceedings had in nearly all cases been completed and since the twenty-year limitation for penalties affects only a few individuals condemned in absentia, and does not expire until 1975."

Hungary

78. The legislative bodies of the Hungarian People's Republic have made appropriate provisions to ensure that those guilty of war crimes and crimes against humanity are not relieved of criminal responsibility under the general rules of prescription. "During the otherwise rather long period of prescription the overwhelming majority of war criminals have received their deserved punishment, while a smaller part of them have frustrated punishment by escape abroad or otherwise. In order to insure despite the passage of time, the punishment of the perpetrators of these extremely grave crimes, the Presidential Council of the Hungarian People's Republic laid down in Law-Decree No. 27 of 1964 - in conformity with the international agreements and instruments on the punishment of war crimes - that war crimes should not become prescribed. The Hungarian People's Republic holds the view that it may be considered an established thesis of contemporary international law that there is

no period of prescription for war crimes and crimes against humanity and that a national legislation which does not preclude prescription is contrary to the generally accepted principles of international law". Here is the text of legislative Decree No. 27 of 1964:

> "The Provisional National Government decreed that all those who were factors or participants of the historical catastrophe that befell the Hungarian people shall be punished as soon as possible (Decree No. 81/1945/II.5/M.E. put into force by Act VII of 1945). Since that time most of the war criminals in our country have been committed for trial and the punishment inflicted upon them have been carried out. Some war criminals, by escaping abroad or otherwise, however, have evaded criminal responsibility or the enforcement of the inflicted penalty.
>
> "In order that the perpetrators of those extremely grave crimes might be called to account despite the passage of time or that the most severe of the punishments meted out to them might be carried out, the Presidential Council decrees as follows:
>
> "Article 1 The punishability of the war crimes defined in Articles 11 and 13 of Decree No. 81/1945/II.5/M.E. put into force by Act VII of 1945 and amended and complemented by Decree No. 1440/1945/V.1/M.E. as well as the penalty of imprisonment to fifteen years or any other more severe punishment meted out for such crimes shall not become prescribed."

India

79. There is no specific legislation relating to the subject of punishment of war crimes and crimes against humanity as no such problem has arisen so far. There is no prescription or statute of limitation in India in respect of criminal law or enforcement of criminal law except several offences relating to revenue (taxation laws, etc.).

Ireland

80. There is no prescription or limitation period in Irish law for war crimes or crimes against humanity.

Israel

81. Under the terms of the section 12 of Act 5710-1950 on the punishment of the Nazis and their collaborators, as amended in 1963, the rules relating to statutory limitation for ordinary crimes are not applicable to offences under that Act.

Italy

82. "Life prison sentences are not subject to statutory limitation in Italy."[82/]

Japan

83. The laws of Japan have no specific provisions relating to the punishment of war crimes and crimes against humanity. With regard to the grave breaches provided for in the Geneva Conventions for the protection of war victims of 12 August 1949 to which Japan has acceded, such acts are punishable under the provisions of the general criminal laws of Japan. Accordingly, the question of the prescription of prosecution of persons accused of having committed such crimes is governed by general provisions of the laws. The system of prescription has traditionally been established in Japan regarding all kinds of crimes, and, from the standpoint of domestic laws there exist no special circumstances calling for abolition of, or provision of exceptions to, application of the prescription system.

Kenya

84. There is no specific legislation to deal with war criminals and crimes against humanity, but such offences are of course covered by the normal provisions of the Penal Code and persons committing such an offence in Kenya (if any) could be dealt with on charges of murder, grievous harm, assault occasioning actual bodily harm, false imprisonment, etc. There is no statutory limitation which would apply to any serious crime. The only limitation in criminal cases is that imposed by Section 219 of the Criminal Procedure Code. This limitation applies only to trials before Subordinate Courts for offences the maximum punishment for which does not exceed imprisonment for six months, or a fine of shs. 1,000, or both such imprisonment and such fine. The period of limitation is twelve months. This Section can therefore hardly apply to war criminals and crimes against humanity.

Malta

85. Maltese criminal law does not speak of war crimes and crimes against humanity as a special class by itself, distinct from the general run of ordinary crimes. Inasmuch as any such crimes would fall within the purview of crimes dealt with

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82/ From the Report on statutory limitation as applicable to crimes against humanity, Council of Europe, doc. 1868, p. 11.

generally, the prescription applicable varies in accordance with the punishment applicable to the crime de quo. The relevant provisions of the Criminal Code is section 683 which is as follows:

"Save as otherwise provided by law, criminal action is barred -

(a) by the lapse of twenty years in respect of crimes liable to the punishment of death or to hard labour or imprisonment for a term of not less than twenty years;

(b) by the lapse of fifteen years in respect of crimes liable to hard labour or imprisonment for a term of less than twenty but not less than nine years;

(c) by the lapse of ten years in respect of crimes liable to hard labour or imprisonment for a term of less than nine but not less than four years;

(d) by the lapse of five years in respect of crimes liable to hard labour or imprisonment for a term of less than four years but not less than one year;

(e) by the lapse of two years in respect of crimes liable to hard labour or imprisonment for a term of less than one year, or to a fine (multa) or to the punishment established for contraventions;

(f) by the lapse of three months in respect of contraventions, or of verbal insults liable to the punishments established for contraventions."

Morocco

86. Although the Government of Morocco acceded on 24 January 1958 with certain reservations, to the Convention on the Prevention and Punishment of the Crime of Genocide of 8 December 1948, Moroccan criminal law makes no provision for the punishment of war crimes and crimes against humanity as such, and no such case has come before the courts. However, all acts which by their nature constitute such crimes are punishable under the Criminal Code now in force. The Dahir of 1 Shaban 1378 (10 February 1959) constituting the Code of Criminal Procedure fixes the periods of limitation for both prosecution and punishment at twenty years in the case of crimes, five years in the case of less serious offences and two years in the case of petty offences. But whereas, under articles 689 to 691, the period of limitation for punishment runs from the date of the judgement and is interrupted only by the execution of the penalty, under article 4 the period of limitation for prosecution runs from the day on which the offence was committed, and is interrupted or suspended under conditions laid down in articles 5 and 6, which read as follows:

"Article 5.- The period of limitation for prosecution shall be interrupted by any examination or prosecution proceeding completed or ordered by the court.

"The same shall apply even to persons not involved in such examination or prosecution proceedings.

"A new period of limitation equal in length to that prescribed in the previous article shall run from the last proceeding by which the period of limitation was interrupted.

"Article 6. The period of limitation for prosecution shall be suspended where proceedings are barred by any provision of the law itself.

"As soon as that bar ceases to exist, the period of limitation shall resume, running for a period equal to that remaining at the time of the suspension."

It will thus be seen that the legislator makes a distinction between interruption and suspension of the period of limitation for prosecution, in that in the former case the original period of limitation is reinitiated from the date of the interruption, whereas in the latter case (resulting from parliamentary immunity, enemy occupation of the country, etc.) the time run before the suspension is counted as part of the period of limitation. In the context of the effort to establish the principle that periods of limitation should not apply to war crimes, it should be stressed that under article 5 of the Moroccan Code of Criminal Procedure, cited above, the period of limitation may be extended indefinitely where any examination and prosecution proceedings are initiated while it is running; and it is interesting to note that such proceedings have the same effect even where they are not directed against a specific accused and are only designed to determine the person responsible for the offence. For example, examination or prosecution proceedings interrupt the period of limitation even in respect of unidentified offenders.

Nigeria

87. There are no specific offences under the Nigerian Criminal Code Act, Chapter 42, which is applicable to the Nigerian Federal Territory, and none in the similar legislations in the Regions, upon which war crimes or crimes against humanity could be punished under Nigerian Law. But there are general provisions which deal with homicide or related offences ... On the question of the applicability of any prescription or statute of limitation to the trial of war crimes or crimes against humanity, it is useful to note that in Nigeria, except for few exceptions,

time does not run against the Republic for the trial and punishment of crimes under the Criminal Code Act. It is suggested, therefore, that the same idea should be applied to all crimes against humanity so that the prosecution for such offences would not be barred by lapse of time.

Norway

88. Norwegian criminal law contains no provision which specifically applies to war crimes and crimes against humanity. These crimes are, however, punishable under other provisions in the Civil Penal Code of 22 May 1902, such as the provisions relating to murder, manslaughter, assault, unlawful imprisonment, vandalism, etc. The ordinary periods of prescription laid down in Section 67 of the Penal Code apply to these offences. For the most serious offences, the period of prescription is 25 years.

Netherlands

89. "A. War crimes and crimes against humanity committed during World War II (before 15 May 1945). Section 27a of the Special Penal Law Decree, laid down by the Act of 27 June 1947, reads:

1. Those who, in the enemy's military, State or public service, have committed during the present war any of the war crimes or any of the crimes against humanity described in Article 6, paragraphs (b) and (c) of the Charter Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 (UNTS vol. 82, No. 251), and promulgated in Our Decree of 4 January 1946, shall suffer the penalty attaching to such crimes if they also contain the elements of offences punishable under Netherlands law.

2. If such a crime does not also contain elements punishable under Netherlands law, the offender shall suffer the penalty attaching to the offence under Netherlands law most nearly resembling it.

3. A superior who deliberately allows one of his subordinates to commit such a crime shall be liable to the same penalty.

Under Section 11 of the Special Penal Law Decree, in conjunction with the provisions of ordinary or military penal law, the maximum penalties for the crimes in question, if they are crimes against human life, are the death penalty (unknown in ordinary penal law), imprisonment for life or a term of imprisonment not

exceeding twenty years; in other cases the maximum penalties are imprisonment for life or a term of imprisonment not exceeding twenty years.

The usual period of limitation for the prosecution and punishment of war crimes and crimes against humanity is twenty-four years; the period started on 26 July 1947 (Section III of the Act of 10 July 1947). If the period of limitation has not been suspended or renewed it will therefore as a rule expire on 26 July 1971 under Netherlands law.

...

"B. Any war crimes or crimes against humanity committed after 30 July 1952. The provisions of the Wartime Penal Law Act (10 July 1952) are applicable to such crimes. Under Sections 8 and 9, in conjunction with Section 3 of this Act, any person committing war crimes or crimes against humanity shall be liable to punishment. These Sections read as follows:

"Section 8

"1. Any person guilty of violating the laws and practices of war shall be liable to a term of imprisonment not exceeding ten years.

"2. A term of imprisonment not exceeding fifteen years shall be imposed:

"(a) if the offence is likely to result in the death of or serious bodily harm to another person;

"(b) if the offence involves inhuman treatment;

"(c) if the offence involves compelling another person to do something, not to de something or to tolerate something;

"(d) if the offence involves pillaging.

"3. The death penalty, imprisonment for life or a term of imprisonment not exceeding twenty years shall be imposed:

"(a) if the offence results in the death of or serious bodily harm to another person, or involves rape;

"(b) if the offence involves the joint commission of acts of violence against one or more persons, or an act of violence against a dead, sick or injured person;

"(c) if the offence involves jointly destroying, damaging, making unusable or misappropriating goods belonging in whole or in part to another person;

"(d) if the offences referred to under (c) and (d) of the preceding paragraph are committed jointly;

"(e) if the offence is the outcome of a policy of systematic violence or of unlawful acts against an entire population or a certain group of that population;

"(f) if the offence involves failure to keep a promise or failure to observe an agreement entered into with an adversary as such;

"(g) if the offence involves the misuse of a flag or emblem protected by the laws and practices of war or of the military insignia or the uniform of an adversary.

"Section 9

"Any person who deliberately allows a person under his authority to commit such offences shall be liable to the penalties attaching to the offences listed in the preceding Section.

"Unless renewed or suspended, the period of limitation for the offences listed in paragraph 3 of Section 8 is twenty-four years; the period starts on the day the offence is committed.

...

"On 2 July 1964 the Convention on the Prevention and Punishment of the Crime of Genocide concluded at Paris on 9 December 1948 was approved by 'Kingdom Act' (an Act of Parliament applicable throughout the Kingdom).

...

"When genocide is committed in time of war the period of limitation is twenty-four years; at other times it is eighteen years.

...

"Under Netherlands law, the period of limitation for the prosecution of war crimes committed during the Second World War will on no account expire before July 1971. It should be borne in mind, however, that the period of limitation is renewed by another twenty-four years the moment criminal proceedings are instituted, so that for all the cases in which such proceedings have been instituted subsequent to 1947, the period of limitation will expire after July 1971. Since criminal proceedings had usually been instituted in cases where suspects escaped arrest by flight, it is unlikely that the present regulations governing the period of limitation will prevent justice being done in the years to come. In the light of the foregoing there are therefore no real reasons for considering any revision of the regulations governing the period of limitation at the moment. But if future developments in the international legal order should result in a large measure of agreement

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being reached on the principle that the law should never provide for any period of limitation with respect to the prosecution of the crimes in question, the Netherlands will conform to that principle."

Poland

90. "After the 1944 liberation, that is, almost a year before the end of the war, the Polish Committee of National Liberation stated in the Manifesto of 22 July 1944 that '... no German criminal, no traitor to the country, can remain unpunished'.

This postulate became law under the Decree of 31 August 1944 concerning the extent of the punishment to be imposed on fascist-hitlerist criminals guilty of murdering or persecuting civilians or prisoners and on traitors to the Polish Nation (Journal of Laws of 1944, no. 4, item 16).

The Decree of 31 August 1944, which had the character of special penal law, filled legal deficiencies in the provisions of the Penal Code of 1932, which did not foresee crimes which were aimed at the mass liquidation of the population; crimes which are unparalleled in the history of criminology.

...

The most severe elements regarding the punishment of nazi fascist war criminals under the Decree of 31 August 1944 were attenuated to a certain degree by the amnesty laws of 1952 and 1956.

The amnesty law of 22 November 1952 (Journal of Laws of 1952, no. 46, item 309) did not provide for a statute of limitations on crimes defined by the Decree of August 1944, but it did lessen the penalties prescribed for the

criminal offences enumerated in articles 2 and 3 [83/] of that Decree. The following changes had been made:

In cases where the death penalty was the sentence, the sentence was reduced to fifteen years' imprisonment; life sentences were reduced to twelve years' imprisonment; and in cases where the sentence was more than three years' imprisonment, the sentence was reduced by one-third of the total number of years of imprisonment. These changes concern all cases tried in the past as well as those to be tried in the future.

The amnesty Decree of 27 April 1956 (Journal of Laws 1956, Nr. 11, item 57) goes even further. It provides that proceedings in all cases of criminal offences mentioned in the Decree of 31 August 1944 concerning the punishment of nazi fascist criminals, with the exception of crimes mentioned in article 1 (1) of that Decree, will not be instituted and if instituted they should be discontinued. In all those cases where the sentences have been pronounced but not yet enforced, they should be attenuated, and in certain cases, even remitted. This does not, however, include crimes mentioned in article 1 (1) of the above-mentioned Decree.

83/ Articles 1, 2 and 3 of the Decree read as follows:

Article 1. Anyone who, acting on behalf of the authorities of the German State or of a State allied with it:
(1) Participated in the murder of members of the civilian population or of military personnel or prisoners of war;
(2) By informing against them or detaining them, harmed persons sought or persecuted by the authorities for political, ethnic, religious or racial reasons
shall be punishable by death.

Article 2. Anyone who, acting on behalf of the authorities of the German State or of a State allied with it, in any other way or under any other circumstances than those referred to in article 1, harmed the Polish State, Polish bodies corporate, members of the civilian population or military personnel or prisoners of war,
shall be punishable by imprisonment for a period of not less than three years or for life, or by death.

Article 3. Anyone who, taking advantage of conditions created by the war, extorted any benefits by the threat of occasioning persecution at the hands of the authorities of the German State or of a State allied with it, or in any other way harmed persons sought or persecuted by those authorities, shall be subject to imprisonment for a period of not less than three years or for life.

It should be pointed out that the Amnesty Law of 1956 places a limitation solely upon the prosecution of criminal offences mentioned in the Decree of August 1944, but it does not allow those crimes to be forgotten or condoned.

In consequence the Decree of 31 August 1944, as later amended, is still the legal basis for the prosecution and punishment of the most severe war crimes enumerated in it (Art. 1 (1)).

The general provisions of the Penal Code, such as the rules in respect of the statute of limitation of crimes, are applied, in accordance with art. 92 of that Code, along with the Decree of August 1944, which is in itself a special criminal statute.

According to the rules of article 86 of the Code of Criminal Procedure, a statute of limitations of twenty years was placed on the prosecution of crimes punishable by the death penalty or life imprisonment, and sentence could not be pronounced after twenty-five years (article 87 of the Code of Criminal Procedure).

However, in order to prevent nazi criminals guilty of the gravest war crimes from escaping penal responsibility, the statute of limitation for criminal prosecution and for the pronouncement of judgement, as provided for by articles 86 and 87 of the Code of Criminal Procedure, has been withheld in Poland by the Law of 22 April 1964 (Journal of Laws 1964, Nr. 15, item 86), with respect to the perpetrators of crimes defined in art. 1, para. 1 of the Decree of 31 August 1944 concerning the punishment of nazi fascist criminals, if criminal proceedings have not been initiated or conducted against them as a result of: (a) non-apprehension or discovery of the perpetrator, or (b) the lack of extradition of the perpetrator, if living abroad.

In practice therefore the gravest nazi crimes defined in article 1 (1) of the Decree of 31 August 1944, with subsequent amendments, are not subject to prescription.

Federal Republic of Germany

91. War crimes and crimes against humanity are punishable under the general provisions of the German Penal Code of 15 May 1871 as amended on 25 August 1953. The penal provisions relating to such offences are, in particular, those concerning murder, manslaughter, bodily injury, unlawful deprivation of liberty and duress. By the Act of 9 August 1954 on the accession of the Federal Republic of Germany

to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, article 220 (a) was inserted into the Penal Code as a special penal provision against genocide; however, by reason of the constitutional prohibition of ex post facto penal laws (article 103, paragraph 2, of the Fundamental Law), article 220 (a) cannot have any retroactive effect.

"A number of additional provisions are now in preparation; these are intended to supplement the terms of the German penal law in force (which are basically adequate for the purpose) and to guarantee beyond all doubt that offences for which a penalty is demanded by the law of nations can be appropriately punished in every case.

"The afore-mentioned provisions of the law in force - apart from article 220 (a) of the Penal Code - are regularly applied by German courts in trying war crimes and crimes against humanity.

"During the first years following the Second World War, the German courts - with the approval of the occupation authorities - also tried serious national-socialist offences under the provisions of Act No. 10 of the Control Council, dated 20 December 1945. Since that time, Act No. 10 of the Control Council has been declared inoperative, with the assent of the three Western former occupying Powers, by the Act of 30 May 1956 (Bundesgesetzblatt, part I, p. 437). Under the provisions of occupation laws, the competence of German courts to try serious national-socialist offences was severely limited during the first years following the Second World War, in favour of the competence of courts of the occupying Powers. Within the limits of their competence, however, German courts vigorously prosecuted these offences as early as 1945. It finally became clear from the course of individual trials that a complete clearing up of serious national-socialist offences was impossible without a systematic investigation of entire complexes of offences and without the co-ordination of information. This led to the creation in Ludwigsburg in 1958 of the Central Office of the Land Justice Administrations for the Clearing Up of Serious National-Socialist Offences. The successful activity of this Office has earned it recognition outside the confines of the Federal Republic. Up to the present time, courts of the Federal Republic of Germany have pronounced final sentences upon more than 6,100 persons for serious national-socialist offences. Criminal proceedings are still pending against about 14,000 persons.

"In addition, war crimes and crimes against humanity are prosecuted in the ordinary manner in the Federal Republic of Germany, in so far as the German penal law applies to such offences. The question whether the offenders or the victims of the offences are Germans or not is not taken into account in the prosecution. In this general domain also, the competence of German courts was severely limited during the post-war period and is, to some extent, limited even today.

/...

"German law in force distinguishes between the barring of prosecution owing to time limitation (Verfolgungsverjährung) and the barring of the execution of final sentences owing to time limitation (Vollstreckungsverjährung). The general provisions of the Penal Code respecting limitation by time are valid for offences of all kinds to which German penal law is applicable and hence, legal practice applies them also to offences which may be described as war crimes or crimes against humanity. The text of these provisions is as follows:

'Article 66 (Time limitation a bar to penal proceedings)

'Prosecution of an offence and the execution of a sentence shall be barred by time limitation.

'Article 67 (Time limitation a bar to prosecution)

'1. Prosecution shall be barred by time limitation after twenty years in the case of serious offences (Verbrechen) punishable by confinement in a penitentiary for life; after fifteen years in the case of serious offences for which the maximum penalty is deprivation of liberty for a term of more than ten years; and after ten years in the case of serious offences punishable by deprivation of liberty for a shorter term.

'2. Prosecution shall be barred by time limitation after five years in the case of less serious offences (Vergehen) punishable by imprisonment for a term of more than three months and after three years in the case of other less serious offences.

'3. Prosecution for petty offences (Übertretungen) shall be barred by time limitation after three months.

'4. The period of limitation shall begin on the date on which the act was committed, irrespective of the date of the occurrence of the effects.

'5. The power to impose measures of safety and rehabilitation by reason of the offence shall cease on the same date when prosecution is barred by time limitation.

'Article 68 (Interruption of the period of limitation)

'1. The period of limitation shall be interrupted by every action taken by the judge against the offender by reason of the offence committed.

'2. The interruption shall apply only to the person to whom the action relates.

'3. A new period of limitation shall begin after the interruption.

'Article 69 (Suspension of the period of limitation)

'1. The period of limitation shall be suspended during such time as it is impossible, under a provision of the law, to begin or to continue the prosecution. Where the beginning or continuation of criminal proceedings depends on a preliminary question which must be decided in another proceeding, the period of limitation shall be suspended until the conclusion of the latter proceeding.

'2. If, under the penal law, a complaint or authorization is required for prosecution, the period of limitation shall not be interrupted by the lack of the complaint or authorization.

'Article 70 (Time limitation and the execution of sentences)

'1. The execution of final sentences shall be barred by time limitation:

'(1) After thirty years if the penalty is confinement in a penitentiary for life;

'(2) After twenty years if the penalty is confinement in a penitentiary or incarceration (Einschliessung) for a term of more than ten years;

'(3) After fifteen years if the penalty is confinement in a penitentiary for a term of not more than ten years or incarceration for a term of five to ten years or imprisonment for a term of more than five years;

'(4) After ten years if the penalty is incarceration or imprisonment for a term of two to five years;

'(5) After five years if the penalty is incarceration or imprisonment for a term of not more than two years or a fine of more than 150 German marks;

'(6) After two years if the penalty is detention (Haft) or a fine of not more than 150 German marks.

'2. The execution of measures of safety and rehabilitation imposed pursuant to a final sentence shall be barred by time limitation after ten years. If confinement in an institution for alcoholics or drug addicts or confinement for the first time in a workhouse has been imposed, the period of limitation shall be five years.

'3. The period of limitation shall begin on the date on which the judgement became final.

'Article 71 (Suspension of the period of limitation)

'If a sentence of deprivation of liberty and a fine have been imposed simultaneously, or if a measure of safety and rehabilitation which involves deprivation of liberty has been imposed in addition to a sentence, the period of limitation for the execution of the one sentence or measure shall not expire earlier than that for the other.

'Article 72 (Interruption of the period of limitation for execution of a sentence

'1. The period of limitation shall be interrupted by every action aimed at the execution of the sentence or measure and taken by the authority responsible for the execution of the sentence, as also by the arrest of the sentenced person for the purpose of the execution of the sentence.

'2. A new period of limitation shall begin after the interruption of the execution of the sentence or measure.'

"The possibility of interruption of the period of limitation is of great practical importance in the case both of the barring of prosecution and the execution of the sentence by time limitation. In the case of war crimes and other crimes against humanity, this possibility is fully utilized irrespective of the nationality of the offender or victim and irrespective of the time at which the offence was committed. The period of limitation for prosecution is interrupted by every action taken by a German judge against a specific offender by reason of a specific offence (article 68, paragraph 1, PC). Examples of actions which interrupt the period of limitation are the summoning of a witness and the requisitioning of documents of another proceeding. After the interruption, the full period of limitation begins to run anew (article 68, paragraph 3, PC). The period of limitation for execution of the sentence is interrupted by every action for the purpose of securing execution of the sentence and taken by the authority responsible for the execution of the sentence (article 72, paragraph 1, PC). Here, also, the period of limitation begins to run anew after the interruption (article 72, paragraph 2, PC). The provision concerning suspension of the period of limitation for prosecution (article 69, PC) is also very significant, since it applies to serious national-socialist offences to the extent that the suspension of the period of limitation for prosecution is ordered for such time as 'it is impossible, by reason of statutory provisions, to begin or to continue the prosecution'.

"After the Second World War in the Länder of the zones occupied by the three Western Powers regulations applicable under the law of the Länder were issued, under which the limitation of time in the case of offences that could not be punished on political grounds during the national-socialist period, was to be considered as suspended or subject to obstruction until a prescribed date (laws respecting penalties).

/...

"A. The date as prescribed is:

"(a) 8 May 1945 in so far as articles 3 and 7 of the Order of the Central Legal Office for the British Zone for the repeal of national-socialist changes in the administration of the penal law of 23 May 1947 are applicable (Official Gazette for the British Zone, p. 65);

"(b) 1 July 1945 in so far as the Land legislation uniformly promulgated in the former United States occupation zone is applicable for the punishment of national-socialist offences (cf., e.g., articles 1 and 2 of the Act adopted by the Land of Hesse on 29 May 1946 for the punishment of national-socialist offences, Official Gazette of Acts and Ordinances, p. 136).

"B. The laws issued in the Länder of the former French zone of occupation respecting the repeal of national-socialist illegalities in the administration of the penal law - unlike the penalty laws of the Länder of the former United States and British occupation zones - contained no provision for a general restriction of the time limitation affecting offences left unprosecuted for political reasons during the period of the national-socialist rule of force. This legislation prescribes only that the expiry of the period of limitation shall not be a bar to the penalty in cases in which prosecution is begun within a fixed period (six months, or twelve months, as the case may be) after the entry into force of the relevant provisions (cf., e.g., articles 6 and 8 of the Act adopted by the Land of the Rhenish-Palatinate on 23 March 1948 for the repeal of unjust national-socialist changes in the administration of the penal law - Official Gazette of Acts and Ordinances, p. 244).

"A result similar to that of the so-called penalty law of the Länder of the former United States and British zones of occupation was reached in German court decisions (Rechtsprechung) on the ground of the afore-mentioned article 69 of the Penal Code. These decisions were based essentially on this provision, and assumed in the case of serious offences left unpunished for political reasons during the period of the national-socialist rule of force that the period of limitation had been suspended at least until 8 May 1945, the day of the German collapse. This interpretation of the law is of particular significance for the Länder of the former French zone of occupation, in which the only other statutory provisions adopted were those mentioned in paragraph B.

"The Act for the calculation of the periods of limitation under the criminal law, of 13 April 1965 (Bundesgesetzblatt, part I, p. 315) was adopted in order to prevent the period of limitation for offences of the most serious kind committed by or against Germans from expiring in the spring of 1965. This Act provides that the prosecution of previously undetected offences of the most serious kind shall be admissible beyond 8 May 1965, until 31 December 1969. [The relevant provisions are as follows]:

/...

'Article 1

'Suspension of the period of time limitation

'1. The period 8 May 1945 to 31 December 1949 shall be excluded from the calculation of the period of time limitation for the prosecution of serious offences subject to imprisonment for life. The time limitation for prosecution of these serious offences for that period shall be suspended.

'2. Paragraph 1 shall not apply to acts for which the period of limitation has already expired on the entry into force of this Law.

'Article 2

'Adaptation of the Act to the First Law Repealing the Law of Occupation

'Where the period of limitation for criminal proceedings under article 1 is suspended, article 5, paragraph 1 of the First Law Repealing the Law of Occupation of 13 May 1956 (Bundesgesetzblatt I, p. 437) shall not apply.'"

Ukrainian Soviet Social Republic

92. "War crimes and crimes against humanity are not ordinary crimes. They are exceptional crimes by virtue of the scale on which they are committed, their particular cruelty and the extraordinary danger which they represent for the cause of peace and the security of peoples. They are heinous crimes against the whole of mankind, as they threaten its very existence; and responsibility for committing them has therefore been defined in specific principles of international law, as has already been pointed out in a number of international legal documents.

"Accordingly, the Government of the Ukrainian SSR notes with satisfaction that resolution 3 (XXI) dated 9 April 1965 of the Commission on Human Rights, on the question of punishment of war criminals and of persons who have committed crimes against humanity, is based on the generally accepted rules and principles of modern international law.

"The rules of international law, including the special rules relating to nazi war criminals and persons who have committed crimes against humanity, do not recognize any period of limitation for their prosecution and punishment. Persons who have committed such crimes are subject to trial and punishment regardless of the time which has elapsed since they committed the crimes.

"In support of its conclusions, proposals and recommendations, including the recommendation for establishing 'the principle that there is no period of limitation for such crimes in international law', the Commission on Human Rights referred to the General Assembly resolution of 13 February 1946 entitled 'Extradition and Punishment of War Criminals' and to General Assembly resolution 95 (I) of 11 December 1946 entitled 'Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal'. These international legal documents do indeed contain some generally accepted and generally binding rules of international law, which are universal in character and define the responsibility of the nazis for the crimes committed by them. Resolution 95 (I) also reaffirmed the principles set forth in the Charter of the International Military Tribunal, which were reflected in the Nürnberg Tribunal's verdict.

"...

"The statement of the Government of the Ukrainian SSR of 19 January 1965 entitled 'War criminals must be punished' refers, inter alia, to a number of international legal documents dealing with questions raised by war crimes and crimes against humanity, including the non-applicability of periods of limitation for the prosecution and punishment of criminals in this category.

"Human history has never known crimes so monstrous in scale or so exceptionally cruel in the methods used, as those committed by the Hitlerites during the Second World War. Another exceptional feature of the crimes committed by the Hitlerites was the fact that the latter were in control of the State apparatus. The criminals had seized State power, turned it into a weapon for their monstrous crimes and carried them out in a particularly barbarous and cynical fashion. The International Military Tribunal at Nürnberg stated in its verdict: 'The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the high seas, and were attended by every conceivable circumstance of cruelty and horror.'

"All this explains why Governments and the United Nations, when they established and adopted rules and principles of international law relating to war crimes and crimes against humanity, did not consider that there were any grounds

for making an exception to the general rule that punishment for this kind of crime is ineluctable or for stating that specific periods of limitation could be applied for the prosecution and punishment of these crimes and that the criminals could thereby escape punishment...

"The Government of the Ukrainian SSR notes with satisfaction that the principle of the unconditional responsibility of war criminals is also reasserted in the statement that the Commission on Human Rights is deeply concerned 'that no one guilty of war crimes or of crimes against humanity of the nazi period shall escape the bar of justice wherever he may be and whenever he may be detected'.

"Thus international law, which is the basis for defining responsibility for war crimes and crimes against humanity, confirms that this responsibility is unconditional, and thereby excludes any possibility of applying periods of limitation to international crimes in these categories."

United Kingdom of Great Britain and Northern Ireland

93. "There is no prescription or statute of limitation under the criminal law of the United Kingdom which would preclude persons from being tried for war crimes or crimes against humanity because of the date of the act in question."

Singapore

94. "There is no limitation in respect of criminal offences in Singapore and no limitation would therefore apply in the case of war crimes."

Sweden

95. The following statement, made by a member of the Swedish Parliament to the Assembly of the Council of Europe in January 1965, reflects the Swedish Government's views on statutory limitation:

> "Mr. President, in my country, Sweden, statutory limitation in criminal law has existed for many years. The period of statutory limitation varies according to the seriousness of the crime and is twenty-five years for the most serious types of crime. I want to emphasize that however horrifying the crime there is always statutory limitation in Sweden. This is regarded as a fundamental principle of law. I believe that there are a number of good reasons for the justification of this principle. One is that after so long a time as twenty or twenty-five years it is very difficult to make a clear investigation. Proofs disappear and there is a risk of

judicial error. Another reason is that statutory limitation has no influence on the number of crimes committed. These are only examples. There are others. To make my position quite clear, I want to stress that I share the horror of everyone in a democracy at crimes against humanity. That, Mr. President, is one thing. It is quite another thing to give up an important principle of law. I know that those who are in favour of the draft Recommendation 84/ will answer that crimes against humanity are a very special kind of crime, but in my opinion this is not sufficient. There are other detestable crimes as well as those against humanity and I believe that we have to treat all crimes in an identical manner. There is, of course, the possibility of prolonging the time-limit, for example, from twenty to thirty years, but that would conflict with the principle of non-retroactivity of criminal law."

Czechoslovakia

96. "The prosecution of nazi and fascist war criminals was begun in Czechoslovakia immediately after the liberation in 1945. These criminals were tried... in accordance with Decrees No. 16 and 17 of 19 June 1945 of the President of the Republic... Paragraph 17 of Decree /No. 16/ contains a special and important provision under which 'the prosecution and punishment of the crimes defined in the Decree shall not be subject to any period of limitation.' This provision is an expression of one of the basic principles of international law proclaimed in the Moscow Declaration of 30 October 1943... At the present time, the prosecution of these crimes is covered by the Criminal Act of 29 November 1961 (No. 140) and by Act No. 141/1961 on Criminal Judicial Procedure. Act No. 184/1964, adopted on 24 September 1964 by the National Assembly, bars any limitation of time for criminal proceedings in respect of the most serious war crimes and crimes against peace and humanity committed for the benefit or in the service of the occupation forces. Under this Act, the generally recognized principle of international law that crimes of that kind are not subject to limitation was embodied in the Czechoslovak legal system." The text of Act No. 184 of 24 September 1964 is as follows:

'The national Assembly of the Czechoslovak Socialist Republic, acting in accordance with the existing rules of international law concerning the prosecution and punishment of war criminals and with the just demand of the Czechoslovak people that none of the war criminals and their collaborators shall ever escape their responsibility for the gravest crimes against peace, war crimes and crimes against humanity, committed in connexion with the Second World War,

'Has adopted the following Act:

84/ See supra, para. 59.

'In the case of crimes against peace, war crimes, crimes against humanity and other crimes committed between 21 May 1938 and 31 December 1946 (under the state of defence emergency) by war criminals or their collaborators for the benefit or in the service of the occupation forces,

'Which constitute crimes under the Act of 29 November 1961, No. 140 C. of L., and constituted crimes also under the laws in force at the time they were committed, as under subsequent laws,

'And which would become prescribed on 9 May 1965 or subsequently,

'Neither prosecution for their commission nor the execution of penalty imposed for them shall become prescribed.

Section 2

'The Act shall enter into effect on the day of its promulgation.'

Turkey

97. "As is known the question of the punishment of war criminals and of persons who have committed crimes against humanity has been taken up after the Second World War. The Turkish Penal Law which was enacted on 1 March 1926 does not, therefore, contain any specific provision in this field. Nevertheless, Section 9 of the Turkish Penal Law, entitled 'crimes committed against persons', can be applied to the crimes of genocide as defined in article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, to which Turkey adhered on 23 March 1950. The Geneva Conventions of 1949 have also been ratified by the Turkish Government. These crimes come within the purview of the general provisions of the Turkish Penal Law regarding prescription."

Uganda

98. There is no provision limiting the time when a person charged with committing serious offences would be prosecuted. The provision, S. 217 of the Criminal Procedure Code applies only to offences, the maximum punishment for which does not exceed imprisonment for six months or a fine of Shs1000-, the time-limit for these is twelve months.

Union of Soviet Socialist Republics

99. "The generally accepted principles and norms of contemporary international law, as set out in the declarations and agreements of the Allied Powers and in the charters and decisions of international military tribunals, and reaffirmed in the resolutions of the United Nations General Assembly, require that not a single

nazi war criminal shall escape just retribution, wherever he may hide and however much time may have elapsed since he committed his crime... In accordance with these generally accepted principles of contemporary international law, all States have an obligation to prosecute war criminals and persons who have committed crimes against peace and humanity... On 4 March 1965, the Presidium of the Supreme Soviet of the USSR adopted a Decree on the punishment of persons guilty of crimes against peace and humanity and of war crimes, regardless of when the crimes were committed. The Decree states:

> 'The nazi criminals who precipitated the Second World War inflicted untold disasters and suffering on mankind. Tens of millions of completely innocent people, including children, women and aged persons, were brutally murdered, exterminated in death camps and asphyxiated in gas chambers. The German nazi invaders were guilty of having carried vast numbers of civilians away into slavery, of inhuman treatment of prisoners of war, and of the barbarous destruction of thousands of towns and villages.
>
> 'The peoples of the Soviet Union, which suffered the greatest losses in the war, cannot allow the nazi barbarians to go unpunished. The Soviet State has unswervingly followed the generally accepted norms of international law concerning the need to punish nazi criminals, no matter where or for how long they may have hidden from justice.
>
> 'Considering that the conscience and the sense of justice of the peoples rebel against the fact that nazi criminals who committed heinous crimes during the Second World War go unpunished,
>
> 'Recognizing that these persons cannot count on having their crimes forgiven or forgotten,
>
> 'The Presidium of the Supreme Soviet of the USSR, in accordance with the generally accepted principles of international law, as set out in the Charter of the International Military Tribunal and in resolutions of the United Nations General Assembly, RESOLVES THAT:
>
> 'Nazi criminals, who are guilty of heinous crimes against peace and humanity and of war crimes, must be brought to judgement and punished, regardless of how much time has passed since they committed the crimes.'"

Venezuela

100. Under Venezuelan criminal law it would be impossible to exclude certain crimes or offences from the statutory limitation, since this is a subject intimately bound up with questions of public policy. Venezuelan judges are required in dealing with any offence (serious or petty), first to determine whether or not prosecution or punishment is barred by lapse of time. If it is, the individual concerned can be neither arrested nor prosecuted, as the case may be.

PART II

BASIS OF THE PRINCIPLE THAT THERE IS NO PERIOD OF LIMITATION FOR WAR CRIMES, CRIMES AGAINST PEACE AND CRIMES AGAINST HUMANITY

101. In its resolution 3 (XXI) on which this study is based, the Commission on Human Rights endorsed the principle that there is no period of limitation for war crimes and crimes against humanity. It did so in the conviction, as stated in the third preambular paragraph of the resolution, "that the prosecution of and punishment for [such crimes] would prevent others from the commission of similar crimes" - a point which emphasizes the preventive aspect of the principle in view. In particular, as stated in the fourth preambular paragraph of the resolution, it did so out of a deep concern "that no one guilty of war crimes or of crimes against humanity of the Nazi period shall escape the bar of justice" - which emphasizes the applicability of the principle in question to crimes already committed. It is clear from the debate, and particularly from the sixth preambular paragraph of the resolution, that generally speaking the Commission did not question the principle that there is no period of limitation for war crimes and crimes against humanity; a majority of the Commission appeared to be convinced that the principle was an established one in international law, but in order to dispel any possible doubt on that score the Commission considered it desirable to set in motion those procedures of international law which could ensure the explicit and effective recognition of the principle.[1/] It based that belief on the following main

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1/ It will be noted that at its 836th meeting, the Commission decided to establish a working group, composed of the representatives of Dahomey, Ecuador, France, the Philippines, Poland, the Ukrainian SSR, the USSR and the United States, to prepare a draft resolution, taking into account the proposals and amendments so far submitted. The working group submitted a draft resolution, the sixth preambular paragraph of which read as follows: "Considering that the United Nations must contribute to the solution of the problems raised by war crimes and crimes against humanity, which are serious violations of the law of nations, and that it must, in particular, study possible ways and means of establishing explicitly the principle that there is no period of limitation for such crimes in international law". That text was agreed upon by the majority of the working group. One representative, however, proposed the deletion of the word "explicitly". (Commission on Human Rights, Report on the twenty-first session, E/4024, E/CN.4/891, para. 553).

arguments advanced during the debate: that municipal rules of statutory limitation do not apply to serious crimes regarded as international offences, and that international law has established the principle that there is no period of limitation for such crimes.

102. In the following pages we shall study these arguments[2] and the question of the applicability of the principle to crimes "of the Nazi period".

I. INAPPLICABILITY OF MUNICIPAL RULES OF STATUTORY LIMITATION

A. Opposition to statutory limitation in municipal penal law

103. Although the municipal law of a number of countries provides for a period of limitation in criminal cases, the principle involved has always been, and still is, highly debatable in itself, quite apart from the fact that it is nowadays strongly critized internationally. Its introduction into municipal penal law appears to have been a matter of some difficulty. It is not generally believed to have existed in the legal systems of antiquity. It did not exist in Roman law for certain crimes, such as parricide. It was expressly ruled out under ancient law in the case of serious crimes. Under both Roman and ancient law, statutory limitation was always of an exceptional nature; it was regarded as merely a procedural exception; its use was hedged about with strict conditions; and it had no effect in the case of "atrocious" crimes.[3]

104. This traditional opposition found support in the writings of the authorities. Beccaria[4] makes a distinction between "atrocious crimes" and "less considerable and more obscure" crimes. "With regard to atrocious crimes," he says, "which are long remembered, when they are once proved, if the criminal have fled, no time should be allowed; but in less considerable and more obscure crimes a time should be fixed, after which the delinquent should be no longer uncertain of his fate.

2/ As stated above (para. 3), this study will relate not only to war crimes and crimes against humanity, but also to crimes against peace.

3/ On this subject, see H. Moazzami, La prescription de l'action pénale en droit français et en droit suisse, Montreux, 1952.

4/ An Essay on Crimes and Punishment, new edition, 1872, p. 112.

For in the latter case, the length of time, in which the crime is almost forgotten, prevents the example of impunity, and allows the criminal to amend, and become a better member of society". Bentham[5] however, wonders whether punishment should be extinguished by lapse of time or, in other words, whether an offender who manages to elude the law for a given time should be exempt from punishment. He acknowledges that in cases which are not serious or dangerous, "there may be no objection to forgiveness". "But", he adds, "in the case of a major offence ... it would be odious, it would be intolerable if, after a certain time, villainy were allowed to triumph over innocence. There must be no bargaining with such evil-doers... The sight of a criminal enjoying the fruits of his crime in peace, protected by the laws he has broken, is an incentive to malefactors, a cause of distress to decent people and a public affront to justice and morality. The full absurdity of impunity acquired through lapse of time will be appreciated if one imagines the law to have been drafted in the following terms: 'If, however, any person who steals, murders, or unjustly acquires the property of another succeeds in eluding the vigilance of the courts for twenty years, his cunning shall be rewarded, his security shall be restored, and the fruits of his crime shall be legitimated in his hands'." A century later, the positivists, and especially Garofalo, protested even more emphatically against the idea that certain dangerous persons should be able to escape punishment simply because they had not been detected and sentenced within a given time. "We can understand", says Garofalo,[6] "the reason for prescription in civil cases... But when we have to do with a crime, is it any reason for not molesting the criminal, that he has been successful for a given period of time in keeping out of the hands of the Police? And yet, this is exactly the theory upon which proceed all the codes, in sanctioning the prescription of prosecution after the lapse of five, ten, or twenty years, according as the offence is a misdemeanour or a felony of greater or less seriousness. Notice, then, how the law extends its protection to the enemy of society. After some notable exploit, a clever swindler changes his name and removes to a new field of operations. Finally caught, if five years have elapsed since his first offences, he can be prosecuted only for the later ones. And if for lack of evidence he cannot be convicted of these, then perforce he must be restored to his nefarious calling."

5/ Traité de législation civile et pénale, second edition, 1820, p. 148.

6/ Criminology, 1914, p. 366.

105. Even today, some authorities and the practice of many States are opposed to the institution of statutory limitation. J. Graven,7/ President of the International Association of Penal Law, Professor of Penal Law and Penal Procedure at the University of Geneva and judge of the Geneva Court of Cassation, observes that "statutory limitation with respect to criminal offences is not an essential right of the individual, much less of the accused, or even convicted, criminal. It is not a requirement of justice itself, generally recognized in the institutions of civilized peoples; it is a practice of expediency which has only quite recently, in many cases, become a rule - a rule which, furthermore, has not been accepted in some important legal systems, and which is still disputed or criticized in those systems which have accepted it... Even today, English and United States law, based on this common-law tradition, takes the view that the right to prosecute is not generally subject to limitation, since the lapse of any period of time, however long, cannot affect the exercise of a right such as the right to prosecute crime and to obtain justice, except in rare and well-defined cases".

106. It is true that a large number of countries, belonging to different legal systems, have no statutory limitation, or none except for serious offences (paras. 62 et seq., above), and that in most countries where there is a limitation for all offences it is formulated in such terms that its effectiveness is questionable, at least in the case of major offences. In Morocco, for instance, the Code of Criminal Procedure allows the period of limitation to be extended indefinitely where any preliminary examination or prosecution proceeding is initiated while it is running. Thus the initiation of such proceedings has the same effect even where they are not directed against a specific accused and are designed solely to determine the person responsible for the offence; the preliminary examination or prosecution proceedings interrupt the period of limitation even in respect of unidentified offenders (para. 86, above). In the Union of Soviet Socialist Republics, the running of the statutory limitation is suspended if the offender eludes the preliminary examination or the court proceedings; in this case, the period of limitation begins anew from the time when the offender is arrested or gives himself

7/ "Les crimes contre l'humanité peuvent-ils bénéficier de la prescription?", Revue pénale suisse, tome 8, fasc. 2, 1965, pp. 132 and 135.

up; in the case of particularly serious and dangerous crimes punishable with death, the court is entitled to disregard the statutory limitation both for prosecution and for punishment; the only restriction imposed on the court is that in that case it must replace the death penalty by deprivation of liberty.[8] "Moreover, even in France, where the new practice of generalizing the statutory limitation originated," writes J. Graven,[9] "the courts themselves view it with disfavour and tend to apply it in a distinctly penal spirit. Accordingly, they place a very broad interpretation on those provisions which allow its effects to be delayed or nullified. In many cases, for instance, they set back the date from which the limitation runs, and they continually find new grounds for interrupting or suspending the period of limitation".

B. Inapplicability of the theories underlying the statutory limitation for offences under municipal law

107. It has to be asked whether the reasons usually advanced in support of the statutory limitation in municipal law are valid in the case of war crimes, crimes against peace, and crimes against humanity. Before this question is taken up, the special nature of such crimes must be emphasized.

108. The crimes in question are intrinsically international, differing fundamentally from the general run of municipal-law offences. They constitute violations of international undertakings, or, at least, of international law as it now exists. In the vast majority of cases, they are committed "pursuant to governmental initiatives, or on administrative orders or as part of a general official policy".

109. "International crime", observes A.N. Trainin,[10] "is a complex and peculiar phenomenon. It is qualitatively different from the mass of crimes envisaged by

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8/ Information taken from the work: Sovetskoe ugolovnoe pravo, published under the direction of Professor V.D. Menshagin, Professor N.D. Durmanov and Mr. P.S. Romashkin, corresponding member of the Academy of Sciencies of the USSR, with the authorization of the Ministry of Higher and Special Secondary Education of the RSFSR, for use as a manual in faculties and institutes of law, pp. 313 et seq.

9/ Revue pénale suisse, tome 81, fasc. 2, 1965, p. 137.

10/ Hitlerite Responsibility under Criminal Law, 1945, p. 32.

national criminal legislation: theft, highway robbery, rape, murders, etc. Of course, all these crimes also differ very much one from the other... Nevertheless, in spite of essential differences between these crimes, all of them are linked by one common fundamental characteristic: these crimes represent an infringement of social relations existing within a given State. International crime has a special character. One could without difficulty point out a large number of other features also which distinguish international offences from other crimes: the foundations of responsibility, the jurisdiction, the very range of criminal actions". J.-Y. Dautricourt[11/] shows how greatly an international offence differs from an offence under municipal law. "An offence under international penal law - crimes against peace, war crimes, crimes against humanity - is generally an act punishable under municipal penal law, but committed in such circumstances that it offends not only the national social conscience of the inhabitants of the country in which it was committed, not only that of nationals of the countries of origin of the victims, not only that of the subjects of the country of which the accused is a citizen, but the conscience of the whole of mankind as a universal society. Such an offence does not necessarily injure the internal domestic order of each of those countries - for the crime may be commanded by a domestic law (e.g., the racial laws) - but it always injures a higher order common to the whole human race: the international public order or, to express it even better, the universal public order. For this reason, a crime under international penal law is always intrinsically serious. The fact that it is generally committed by nationals of one country against those of another country makes it even more serious... With rare exceptions, municipal penal law always punishes individual, single acts: homicide, bodily harm or wounding inflicted on one victim by one person, on one occasion, and in one place. But unhappy experience of the punishment of war crimes shows us that in international penal law such an individual single act is the exception... Aggressive war and genocide occur on such a scale and cause so many

11/ "L'orientation moderne des notions d'auteur de l'infraction et de participation à l'infraction en droit international pénal", Revue internationale de droit pénal, 1957, pp. 106 et seq.

victims that they attain gigantic and truly terrifying proportions, exceeding, in all their aspects, the narrow framework of municipal systems of penal law.... There is a great difference between the criminal under international penal law and the criminal under municipal penal law, both in status and in their type or personality.... Those who issue criminal orders and those who carry them out all have a common status, in that they act not as private individuals, like most criminals under municipal law, but as governors or agents of authority.... The difference in type between the criminal under municipal penal law and the criminal under international penal law is even more striking; for it is impossible to detect in those who issue criminal orders the physical and psychological defects, the emotional or social maladjustment, the poverty, the promiscuity and the corrupt environment - in short, all the factors which make the municipal-law criminal.... Strip them of their power, and those who gave the order to commit abominable crimes will thenceforth themselves commit not the slightest offence, will obey the laws and regulations, and will pay their taxes ...".

110. The next question to be considered is whether the reasons generally advanced in support of the statutory limitation in municipal penal law can apply to the international crimes under discussion. In his work published in 1952, H. Moazzami[12/] discusses these reasons, the most important of which are stated under the following headings: (1) the theory of punishment through fear; (2) the theory of the presumption of repentance and amendment by the offender; (3) the disappearance of proofs; (4) the theory of the supremacy of the law; (5) Leening's objective theory (ending of the disturbance caused by the commission of the crime); (6) changes in the personal identity of the offender; (7) the theory that the basis for statutory limitation in penal law and the social right to impose punishment are identical.

111. According to the first theory, statutory limitation is equivalent to punishment because the offender "has been sufficiently punished by the remorse which has tortured him and the anguish which has tormented his life for many long years".[13/] This theory is disputed by a number of writers. It is pointed out that, if "the

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12/ La prescription de l'action publique en droit français et en droit suisse, Etude de droit comparé, Montreux, 1952, pp. 68 et seq.

13/ For all the quotations given here in connexion with the different theories on which the statutory limitation in municipal penal law is based, see Ibid. ...

criminal is sufficiently punished by his crime itself and by the regrets he must necessarily have for it", it would be better "to abolish the penal code forthwith". To accept that theory "one must really have little experience of criminal matters". Experience has shown that "many malefactors who have succeeded in eluding prosecution or punishment experience neither the inward turmoil of conscience nor the torment of an insecure and precarious existence". From another aspect, according to a concept which is now generally accepted, "society does not punish only in order to make the offender expiate his crime, but for other purposes which such supposed expiation does not satisfy". "Although illogical and unfounded, this theory has helped to bring about the adoption of the principle of statutory limitation in penal law, for the simple reason that it is extremely popular". However, although the theory has proved to be so popular in some countries that it has succeeded in establishing the principle of statutory limitation in the case of crimes under municipal law, it is highly unlikely that it can become sufficiently popular to make statutory limitation acceptable in the case of serious crimes under international law; for it cannot seriously be claimed that the international society, the whole of which is deeply disturbed or whose very existence is threatened by such crimes, will be content to punish those responsible with a few years of "fear", "remorse" or "insomnia". Moreover "anyone who has tried war criminals or has followed ... the trials which are still in progress ... will have noted with what egoism those accused of the most atrocious crimes, committed in great numbers, ease their consciences by claiming to have acted on orders, and how easily they shift to others the responsibility for crimes they committed with their own hands. They are certainly not wracked by remorse. They obeyed". The report[14/] on statutory limitation as applicable to crimes against humanity, prepared for the Consultative Assembly of the Council of Europe, points out that the argument that the offender who has eluded justice for a long period of time has done sufficient penance for his crime "has little weight in relation to crimes against humanity because of their extreme seriousness and because their perpetrators are often without remorse (far from it, indeed)".

14/ Consultative Assembly of the Council of Europe, Report on statutory limitation as applicable to crimes against humanity (Rapporteur: Mr. Pierson), 27 January 1965, Doc. 1868, p. 12.

112. The theory of the presumption of repentance and amendment by the offender has apparently "been incorporated in some legislations, where statutory limitation is subject to the condition that the offender must not have committed any further offences during the period of limitation". Thus, the effect of applying this theory to serious crimes under international law would be to grant impunity to those who, having eluded justice after, for instance, launching a war of aggression, destroying specific groups of persons totally or partially, and committing inhuman acts against civilian populations and prisoners of war, are presumed to have repented and amended because they have not committed, or have been unable to commit, any further crimes of the same kind for ten, twenty or thirty years. R. Cassin, speaking of the "atrocities" committed during the First World War, has observed that "impunity for the major crimes of that day helped to preserve a dreadful state of mind in some who repented only of having failed and not, unfortunately, of having committed crimes".[15/]

113. The theory of the disappearance of proofs is that "it would be unfair to prosecute a case when many years have elapsed since the commission of the crime", because "with the passage of time, evidence disintegrates, testimony by witnesses becomes more difficult or even impossible, the traces of the offence are lost, and other means of proof disappear". This theory may perhaps be relevant so far as municipal law is concerned. Indeed, it might be relevant in the case of international law if, through the lapse of time, the proofs of the international crimes in question were apt to disappear as readily as the proofs of crimes under municipal law. However, international crimes, particularly crimes against humanity, have the peculiarity of being collective crimes. The proofs of guilt seem not to disappear so rapidly. There is no need for "any other proof than the fact that today, twenty years after the events, cases are still being prosecuted against persons accused of crimes against humanity, without either the prosecution or the defence finding itself hamstrung by lack of proofs". The report prepared for the Consultative Assembly of the Council of Europe, which has already been cited,[16/]

15/ Statement made at Geneva, on 13 August 1965, to a group of international jurists.

16/ Consultative Assembly of the Council of Europe, Report on statutory limitation as applicable to crimes against humanity (Rapporteur: Mr. Pierson), 27 January 1965, Doc. 1868, p. 12.

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points out that in respect of crimes against humanity the theory of the disappearance of proofs is especially unconvincing because "it is only now that some crimes committed more than twenty years ago are being brought to light and still others may be discovered in the years to come, and proofs of them, unrecognised a few years ago, have been identified through the systematic study of archives, testimony of witnesses, etc." Again, the report submitted to the French National Assembly on behalf of the Committee on Constitutional and other Legislation and on the General Administration of the Republic concerning the bill to make crimes against humanity not subject to any period of limitation (para. 76 above) contains the following observations: "The main bases in French penal law for statutory limitation, whether of prosecution or of execution of the penalty, are the disappearance of proofs and the lack of exemplarity. In the case of crimes against humanity, however, there can be no such grounds. The passage of time has not caused evidence to disappear, but has facilitated it through the accumulation of archives, documents and testimony, and through many publications. Moreover, the horror of Nazi crimes was such that, twenty years after the end of hostilities, exemplarity is completely unimpaired".[17/]

114. The theory of the supremacy of the law runs as follows: "If there is a conflict between law and fact, the former should prevail; such a conflict clearly exists when certain acts punishable by law remain unpunished in fact, merely because a certain period of time has elapsed since they were committed. This difficulty must therefore be resolved in such a way as to ensure the supremacy of the law, and the only way of achieving this is through juridical recognition of the fait accompli. If the recalcitrant fact stubbornly refuses to yield, the law then, as it were, absorbs it, marks it with its seal and lends its name to it, and thus the factitious impunity is transformed into legal impunity.... And this transformation process is made easier and more gradual through the favourable circumstance that the longer a de facto situation has existed, the nearer it draws to the law and the more it takes on the appearance of law; as a result, in particular, of long-standing impunity, the social and economic life of the offender ultimately becomes almost

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17/ Assemblée nationale, No. 1194, Constitution du 4 octobre 1958, deuxième législature, première session ordinaire de 1964-1965, annexe au procès-verbal de la séance du 26 novembre 1964, p. 3.

identical with that of the non-criminal, so much so that belated punishment would appear inappropriate, and almost unjust...".

115. One cannot fail to see how false and dangerous this theory is. To maintain that, merely through the lapse of time, a violation of the rule of law becomes a fact "absorbed" by the law, marked with the "seal" and bearing the "name" of the law, is to attempt to base the law on an idea which appears neither technically correct nor morally attractive. Time does not change the nature of the act. Crime remains crime, whatever length of time may have elapsed since it was committed. In the final analysis, according to this theory, homicide, for example, is classified as both a crime and a potential "non-crime". The criminal is given the ultimate power to decide whether his act is lawful or unlawful; he decides the question one way or the other according to the degree of his intelligence, according to the degree of his skill in eluding justice. Thus, this theory offers certain classes of criminals, the most dangerous criminals, maximum encouragement. There is no need, therefore, to point out how dangerous it would be to apply the theory to the international crimes under discussion.[18] In fact, it is under severe attack in connexion with those crimes under municipal law with respect to which it is advanced as a ground for statutory limitation. Some authorities find it very difficult "to conceive of anything weaker than a system under which something that has hitherto been called a 'fact' and an 'unlawful fact', should now be called law; the purpose is allegedly to ensure that the law prevails, and this so-called victory is won by allowing the enemy unconditional entry. There is something more, however, and this is the fundamental objection: the law cannot be created at convenience, and therefore, if the process is to be acceptable and the transformation possible, if a fact is to be deprived of its name and a right to immunity thereby fabricated, a basis and a justification must be provided for that right. Yet it is impossible to find any basis or any justification whatsoever...".

18/ In his article cited above (Revue pénale suisse, tome 81, fasc. 2, 1965, p. 158), J. Graven remarks that "it is easy to imagine the intolerable effects and scandal of applying such a theory to precisely those crimes against humanity whose victims are calling for just reparation and with respect to which all mankind rightly has such strong feelings."

116. According to the "objective" theory, "crime disturbs the legal equilibrium between citizens; the purpose of punishment is to restore the equilibrium, and this task may also be performed by the passage of time, by the perpetual changes in legal relations between the offender and other citizens, so that, in the end, punishment is no longer needed to remedy the disturbance caused by the criminal act". It is very difficult to agree that this theory is applicable to the international crimes under discussion.

117. Yet another theory which is equally inapplicable to such crimes is the one which holds that "man changes constantly. Today he is not what he was yesterday or the day before, or one year ago. Consequently, to punish one who committed an offence long before is to punish a man who possesses a different identity". "The act which was committed becomes, with the passage of time, more and more alien to the author... for that reason, punishment now would not achieve its purpose; it has ceased to be effective, as concerns both the offender and the community. Thus, punishment would seem to be a gratuitous act of severity, it would appear in some measure unjust and indeed, in certain cases, cruel. To illustrate this last point, it has rightly been suggested that, if there were no statutory limitation, age would have to do penance for the sins of youth."

118. Another line of reasoning is used to justify statutory limitation in municipal penal law. "To be legitimate," it is said, "social punishment must be necessary for the maintenance of the public order and useful by reason of the effects it produces. These conditions are not satisfied in the case of penalties applied after a lapse of time. In the first place, society has nothing to gain by punishing offences which have been forgotten. In the second place, far from having the salutary effect on the minds of the people of intimidation by example and arousing that moral satisfaction which is experienced by the public conscience whenever punishment is duly visited upon the guilty, belated punishment would arouse quite opposite feelings." Belated punishment, it is explained, would have no other moral effect than "to excite pity". But what if this reasoning were to be applied to war crimes and crimes against peace and humanity? Would not the punishment of the guilty, at whatever time it was inflicted, be "necessary for the maintenance of the international public order and useful by reason of the effects it produces"? Would the international society have nothing to "gain" by

punishing such crimes? Would belated punishment arouse "that moral satisfaction which is experienced by the (universal) public conscience whenever punishment is duly visited upon the guilty", or would it arouse a feeling of "pity" towards the criminals who are punished? In answer to these questions, one need only recall how the conscience of the world still revolts at the idea that the rules concerning statutory limitation established in the countries whose judicial and legislative competence to punish international crimes committed some twenty-five years ago has been recognized can be applied to such crimes.

119. Thus, the theories mentioned above, which usually provide the basis for statutory limitation in connexion with crimes under ordinary municipal law, do not appear adequate to justify any period of limitation in the case of serious crimes regarded as international offences. In this connexion, it will be noted that, at the time of the vote on the new Belgian Act extending the period of limitation for the execution of death sentences imposed for breaches of the external security of the State committed between 9 May 1940 and 8 May 1945 (para. 66 above), the Minister of Justice observed that "the presumptions which constitute the basis of statutory limitation are... contradicted by the facts. It is clear that the memory of the crimes committed during the 1940-1945 war by the major criminals is still fresh, because of their gravity and the number of victims. The attitude of some of the major criminals during their exile shows, moreover, that they have not reformed and that, consequently, there is no reason for impunity where they are concerned. The Government has, of course, the necessary means of prohibiting these condemned criminals from entering the country or of deporting them, but that could not always prevent the scandal which might be caused by the presence of one of them in our country, even for a short period."[19/]

120. As may be seen from part I of this study, a significant movement has been developing since the Second World War striving, at the international level, and therefore beyond and outside domestic codes of law, to evolve a special status for serious crimes against the international public order; in this status, as will be seen shortly, there is no place for any period of limitation. At the same time, there is a parallel movement seeking, at the domestic level, to abolish the statutory limitation with respect to such crimes (paras. 62 et seq. above). Thus, the ideal of justice which international penal law is trying to attain is becoming the goal of national systems of penal law.

19/ Chambre des Représentants, session 1963-1964, 16 Octobre 1964, 861 (1963-1964), No. 1.

II. THE PRINCIPLE OF THE NON-APPLICABILITY OF THE STATUTORY LIMITATION IN INTERNATIONAL PENAL LAW

A. Some observations on international penal law

121. What we are considering here is not traditional penal law in its international aspects, governing offences "which differ little from offences under municipal criminal law, except as regards the element of extraneity attaching to the offender, the victim, the scene or the object of the offence and giving rise to a conflict of laws and jurisdictions"; such law is drawn up separately by the legislator of each State and is part of municipal law. The subject of these observations is the "international penal law" which has emerged, in particular, from the international agreements concluded since the Second World War and from the progress achieved internationally since that date with regard to the punishment of war crimes, crimes against peace and crimes against humanity. Before determining the position of international penal law with respect to the problem of statutory limitation, the following comments must be made concerning the very foundations of the basic documents cited.

122. Much has been said and written about the London Agreement of 1945, the Charter annexed to it and the resulting trial - "basic texts which constitute the starting point of the contemporary evolution of international criminal law". The "law of Nürnberg" has been the subject of conflicting comment. For it marked a turning point in the history of public international law. For the first time, those responsible for a war of aggression or guilty of other crimes under international law were subjected to real penalties. For the first time, the pretext that their acts were acts of State proved ineffective. Some regard this innovation as nothing more than a "unilateral" imposition, deriving from the "purely subjective will of the victorious Powers" and based on the inadmissible foundation of "penal retroactivity". It may be pointed out that given the deficiencies of public international law, the "victorious Powers" could have forestalled such objections only by ignoring their recent painful experiences and by failing to establish an ad hoc international criminal tribunal to judge and punish those guilty of crimes which had inflicted on mankind sufferings of a magnitude almost beyond the grasp of human reason. In short, they could have done so only by simply admitting their

legal impotence before the victims and before men and women all over the world, who were demanding justice. It may be recalled that as a substitute for the judicial sentencing which they rejected certain proponents of the negative thesis advocated either a "purely police solution" or a "political solution", or a "solemn, widely publicized, spectacular declaration" in which the "victorious Powers" would simply have affirmed the criminality of the responsible rulers.

123. Some justify "the law of Nürnberg" as the product of a current of ideas which goes back to the Middle Ages, to the predecessors of Grotius, and which re-emerged, without practical results, after the First World War. Others feel that it is not always necessary to go so far back into history to justify a rule of law; such rules can and often do originate spontaneously from the simple convergence of ethics and power. "If... the rules applied at Nürenberg were not previously rules of positive international law" says Julius Stone[20] "they were at least rules of positive ethics accepted by civilized men everywhere, to which the accused could properly be held in the forum of ethics". G. Scelle[21] observes that "positive law exists only where ethics and power meet".

124. The London Agreement, the Charter annexed to it and the resulting trial reflected a "general collective feeling".[22] As has been seen, the United Nations approved them and confirmed the underlying principles.

125. Some authorities consider that the principle nullum crimen, nulla poena sine lege has absolute effect in both municipal and international penal law.[23] It may be pointed out, however, that the application of that thesis would in certain circumstances have obnoxious and dangerous consequences. It is not very difficult to imagine how world public opinion would have reacted if after the Second World War, on the basis of the principle nulla poena sine lege, the serious crimes committed

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20/ Legal Controls of International Conflict, 1954, p. 370.

21/ Manuel de droit international public, Paris, 1948, p. 8.

23/ It should be noted that nineteen countries acceded to the London Agreement after its publication (para. 21 above). Furthermore, eleven countries, three of which had not acceded to the Agreement, were represented in the International Military Tribunal for the Far East (para. 24 above), whose Charter is basically almost identical with that of the International Military Tribunal at Nürnberg. Thus before the delivery of the Nürnberg judgement twenty-six countries had approved the principles contained in the London Agreement.

23/ V.V. Pella, op. cit., p. 81.

in connexion with the war or while it was in progress had been allowed to go unpunished. As J. Graven observes,[24] the maxim nullum crimen, nulla poena sine lege is a maxim of "municipal law, appropriate to States which have completed their arsenal of penalties and have set forth in detail, in written codes, an exhaustive catalogue of offences and penalties...; its purpose was to bind the judge to that exhaustive list, to ensure his obedience to the law and to make him 'the impartial guardian of the written law'... in order to protect the citizen against charges and penalities which the legislator had clearly rejected. The establishment of this rule presupposes 'a very clearly defined conception both of the penal law and of the actual function of the judge who applies it'. How then can we apply it blindly and automatically to a sphere in which the law is not fixed but constantly evolving and in which there is no recognized code embodying an exhaustive list of offences and penalities? And why should we try to do so? That would be to distort its meaning".

126. It will thus more readily be understood why in the view of most authorities the principle nulla poena sine lege cannot, at least for the present, be transferred to the sphere of international penal law.[25] "To be able to develop, this new law must strike roots in the real life of peoples, in their existing legal order. Efforts can of course be made internationally to find formulae through which the different legal systems now in force in the various parts of the world may be reconciled; but any attempt to impose systems which no longer correspond to reality, or which remain in force in only a few countries, should be shunned. Even in municipal criminal law the principle nulla poena sine lege is "under attack"; it is showing itself to be "no longer appropriate to the political and social requirements of the life of modern States"; it is formulated and applied in such a way that its very existence may be called into question; it is suspended or set aside when the life of States is "deeply disturbed by revolutions". Even in municipal law the principle "presupposes that the life of the State is normal and peaceful". It cannot be applied "where the circumstances prevailing at the time when the criminal acts were committed were exceptional". Rules of law of

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24/ "De la justice internationale à la paix (les renseignments de Nuremberg)", Revue de droit international, (A. Sottile, Geneva), 1947, No. 1, p. 13.

25/ V.V. Pella, op. cit., pp. 93 et. seq.

high moral authority in normal circumstances may be "absurd", even "immoral, if at the given moment they conflict with the dictates of the universal conscience". If States were wrong in not agreeing to establish before the Second World War a permanent system of international penal justice, "their error would be even more serious if, by applying the familiar principle, they compelled justice again to admit its impotence in the face of crimes against peace and civilization". Among the authoritative opinions and findings here cited, another comment by J. Graven[26/] should not be omitted: "It would have been wrong to allow ourselves to be hypnotized by a principle entirely inappropriate to the circumstances or to the sphere to which, by the effect of a veritable legal colour-blindness, attempts have been made to apply it, and it would have been wrong to frustrate, by so doing, the punishment which was undoubtedly justified by the demands of the law itself. The better alternative, then, was to try to satisfy the dictates of the universal conscience and of equity by boldly setting up, where justification existed, the tribunals and the laws necessary to ensure such punishment."

127. In the European Convention for the Protection of Human Rights and Fundamental Freedoms, as is known, the principle nulla poena sine lege set forth in article 7 is clarified in important respects. The article in question is deemed not to affect "the legislation enacted, in the completely exceptional circumstances existing at the end of the Second World War, to punish war crimes and acts of treason and collaboration with the enemy", and to be in no way intended "as a legal or moral condemnation of such legislation" (paras. 57-58 above). In the draft Covenant on Civil and Political Rights, one of the draft International Covenants on Human Rights adopted by the Third Committee (para. 55 above), the General Assembly of the United Nations has defined the scope of the relevant article of the Universal Declaration of Human Rights in the same way (paras. 56-58 above).

128. More will be said below concerning the principle nulla poena sine lege and its corollary, the principle of the non-retroactivity of criminal laws. We must now determine the position of international law concerning the application of the statutory limitation to criminal cases.

26/ "De la justice internationale à la paix (les renseignements de Nuremberg)", Revue de droit international, (A. Sottile, Geneva), 1947, No. 1, pp. 14-15.

B. The position of international penal law with regard to the statutory limitation 27/

129. None of the official declarations "which constituted a warning to the criminals and a legal basis for their prosecution" contains any provisions that could be interpreted as favouring the statutory limitation. The Declaration of St. Jame's of 1942 (para. 8 above) expressed the signatories' determination "to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out". The Moscow Declaration of 1943 (para. 10 above) stated that "most assuredly" the Allied Powers "will pursue" war criminals "to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done".28/ In the Potsdam Agreements of 1945 (para. 11 above), the Parties stated that "war criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities of war crimes shall be arrested and brought to judgment". They "reaffirmed" their intention to bring major war criminals to swift and "sure" justice.

130. Nor do the declarations of Governments and statesmen contain any provision implying a period of limitation. The Declaration made in 1942 by the President of the United States of America (para. 12 above) warned war criminals that a day would come when "they shall have to stand in courts of law in the very countries they are now oppressing and answer for their acts". In a statement in the House of Lords in 1942, the Lord Chancellor of the United Kingdom (para. 13 above) said "it is fallacious to suppose that people who run to the ends of the earth thereby acquire a right of asylum". In a statement made in 1942, Marshal Stalin (para. 14 above) warned those responsible for the "vile system of hostages" and for "the massacre of civilian populations" that they "shall not escape the terrible

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27/ In this connexion see the article by J. Graven published in the "Revue pénale suisse", T. 81, fasc. 2, 1965, pp. 146 et seq.

28/ In a statement to a meeting of international jurists at Géneva on 13 April 1965, R. Cassin said that he did not affirm "that that is a legal declaration against the application of statutory limitations, but it obviously does not support such application. The latter is a rule which constitutes an exception to ordinary law and is not admissible in the absence of a statutory provision".

punishment which awaits them". In the Declaration of 1942 "concerning retribution for crimes committed against persons of Jewish race" which they issued simultaneously, the Governments of London, Moscow and Washington (para. 15), reaffirmed "their solemn resolution to ensure that those responsible for these crimes shall not escape retribution". In 1944, the President of the United States of America reiterated his determination to see to it "that none who participate in these acts of savagery", described as "the blackest crimes in history", should "go unpunished" (para. 16, above).

131. The detailed texts of the international agreements drawn up on the basis of the above-mentioned declarations make no mention of any period of limitation. The London Agreement and annexed Charter (para. 21, above), Law No. 10 of the Control Council for Germany (para. 26 above) and the Charter of the International Military Tribunal for the Far East (para. 24 above) contain no provisions setting a time-limit for prosecution or punishment. On the contrary, Law No. 10 revokes the benefits of any statute of limitation in respect of a specified period, and provides that no "immunity, pardon or amnesty granted under the Nazi regime" shall "be admitted as a bar to trial or punishment". "The effect of this provision", comments H. Meyrowitz,[29] "is not to interrupt the statutory limitation but to revoke it outright. In the absence of a provision to the contrary, the offences defined in Law No. 10 are to be considered as not subject to limitation. The law here stated, incidentally, is familiar to the Anglo-Saxon jurist: the common law knows no limitation of criminal action".

132. Neither the judgements of the International Military Tribunals nor those handed down on the basis of Law No. 10 have anything to say concerning the problem of statutory limitation. "We, participants at the Nuremberg trials, would never have believed that it could ever occur to someone to absolve the Hitlerite criminals of legal responsibility", said Mr. R.A. Rudenko, the former USSR Chief Prosecutor at Nürnberg.[30]

29/ "La répression par les tribunaux allemandes des crimes contre l'humanité", Paris, 1960, p. 234, foot-note 29.

30/ Soviet Documents, Vol. III, No. 8, 1965, p. 13.

133. Similarly, the Treaties of Peace (para. 27 above) make no provision for a period of limitation with regard to "the apprehension and surrender for trial of persons accused of having committed, ordered or abetted war crimes, and crimes against peace or humanity".

134. The texts drafted under United Nations auspices make no mention of a statutory limitation. For example, General Assembly resolutions 3 (I) and 170 (II) concerning the extradition and punishment of war criminals (paras. 28-29 above) call upon States Members and non-members of the United Nations to take all the necessary measures for the apprehension of war criminals and their removal to the countries in which their crimes were committed, for the purpose of trial and punishment.

135. The Nürnberg principles affirmed by the General Assembly (para. 32 above) and formulated by the International Law Commission (para. 35 above) likewise make no mention of statutory limitation. The punishment of persons guilty of crimes under international law is not subject to any limitation of time. In the wording of Principle I, "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".

136. The obligation to punish those guilty of crimes under international law, without any limitation of time, is stated more precisely in the draft Code of Offences against the Peace and Security of Mankind, adopted by the International Law Commission in 1954 (para. 39 above). Article 1 of that text reads: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished". In the comment on this article, the International Law Commission explains that it decided to use the words "shall be punished" in order to emphasize the obligation to punish the perpetrators of crimes under international law.

137. The Convention on the Prevention and Punishment of the Crime of Genocide (para. 42 above) likewise makes no mention of any possibility of a statutory limitation. It creates the obligation on the part of the Contracting Parties to ensure the punishment of the crime of genocide, that "odious" crime "under international law", and to ensure that persons guilty of this crime are tried by

the competent tribunals. Implicitly, in fact, the letter and spirit of the Convention seem implicitly to prohibit statutory limitation.[31] In its advisory opinion of 28 May 1951, the International Court of Justice stated that "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide 'as a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, 11 December 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. In was in fact approved on 9 December 1948, by a resolution which was unanimously adopted by fifty-six States".[32] Statutory limitation in criminal law is far from being a principle recognized by all "civilized nations". It could not be regarded as underlying the Convention, any more than it could promote "the international co-operation" the need for which is recognized by the Convention itself. This matter will be further discussed below.

31/ See in this connexion Report on statutory limitation as applicable to crimes against humanity, drawn up by the Consultative Assembly of the Council of Europe, doc. 1868, p. 14.

32/ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Reports of the International Court of Justice, 1951, p. 23.

138. The Geneva Conventions of 1949 (paras. 60-61 above) which oblige each Contracting Party to search for persons alleged to have committed or to have ordered to be committed one of the grave breaches in question, with a view to bringing them to trial, are likewise silent on the possibility of a statutory limitation.

139. Finally, it should be noted that neither the inter-allied bodies established after the Second World War to examine the question of the punishment of war criminals (paras. 17-20 above), nor the learned societies which have dealt or which deal with international criminal law, nor even specialized theoretical studies have concerned themselves with the problem of statutory limitation. This problem was raised in 1953 in the Committee on International Criminal Jurisdiction established by the United Nations General Assembly (para. 47 above). A proposal that a statutory limitation should be fixed in respect of crimes falling within the competence of the court to be established was opposed by several members of the Committee, who considered, in particular, that statutory limitation was a notion "which did not exist in present international law".33/

140. In conclusion, it seems clear that statutory limitation is not a universally accepted institution of natural law. Several countries traditionally do not recognize it. Others recognize it only for certain offences. The countries which recognize it, moreover, do so only by virtue of express provisions. However, none of the above-mentioned instruments, which form the new international penal law, include provisions recognizing this institution or even a single expression which could be interpreted in that sense. On the contrary, the expressions used and the goals pursued exclude statutory limitation. Thus it cannot be conceived that the drafters of those instruments intended that the "atrocities" committed, the "blackest crimes in history", should be subject to statutory limitation, which would have meant granting a pardon, as it were, after a certain lapse of time, to those offenders who succeeded in flouting justice and eluding punishment by flight.

33/ See Report of the 1953 Committee on International Criminal Jurisdiction, Official Documents of the General Assembly, Ninth Session, Supplement No. 12 (A/2645), para. 133. See also the summary record of the nineteenth meeting of the Committee, document A/AC.65/SR.19, pp. 13-20.

Belonging largely to countries which do not recognize statutory limitation in respect of serious crimes, they could not have had the intention of introducing that institution into the new international penal law whose principles they were establishing, particularly since they were certainly aware that to do so might paralyse the process of punishment not only in the countries which recognized statutory limitation but also in those which did not. It is known that the Moscow Declaration, confirmed by the London Agreement, established the principle of territorial jurisidction for the punishment of "ordinary" crimes, i.e. crimes to be tried by the tribunals of States. This gives rise to serious difficulties when the offender takes refuge in a foreign country. In such a case extradition becomes necessary and this creates a number of obstacles. One of the most serious derives precisely from the statutory limitation, which can be invoked as a bar to extradition when established under either the law of the requesting State or the law of the State requested. However that may be, if the Parties to the above-mentioned international undertakings had wished to fix a time-limit for prosecution and the execution of penalties they should have included an express provision to that effect. In the words of R. Cassin (para. 129 above), statutory limitation is "a rule which constitutes an exception to ordinary law and is not admissible in the absence of a statutory provision".

C. Movement in favour of the principle of the non-applicability of statutory limitation

141. When the question of statutory limitation in respect to serious crimes under international law had to be dealt with in practice it immediately aroused concern in all interested quarters.[34/]

34/ The idea of actually applying statutory limitation to "the crimes... of the Nazi period" has given rise to numerous protests from various circles. "In the countries which were the principal victims of war crimes and crimes against humanity the reaction has been violent, as was to be expected, and has taken the form not only of a protest in the name of justice and humanity but also of a fundamental objection of a legal character, in other words, a challenge of the very legality of such statutory limitation". See: Report of the Legal Committee of the Council of Europe, op. cit., p. 15, foot-note 2; Soviet documents, Vol. III, Nos. 6, 8, 12, 13; J. Graven, Revue Pénale suisse, T. 81, Fasc. 2, 1965, pp. 119 et seq.; A. Sottile, "La prescription des crimes contre l'humanité et le droit penal international", Revue de droit international (A. Sottile, Geneva), No. 1, 1965, pp. 5 et seq.

142. At the international level, it has led to the drafting of at least three instruments to ensure the non-applicability of statutory limitation to such crimes. In addition to resolution 3 (XXI) of the Commission on Human Rights,[35] which constitutes the basis of this study, and recommendation 415 (1965) of the Consultative Assembly of the Council of Europe (para. 59 above), an equally important document concerning this matter should be mentioned, namely the Declaration of the International Conference of Jurists, attended by jurists from sixteen European countries, which met at Warsaw from 5 to 7 June 1964. Paragraphs from that Declaration are given below:

> "The Conference notes... that the crimes committed by the Nazis are crimes against humanity and that the nature of those crimes is entirely different from the legal nature of ordinary crimes. The former are subject to public international law, the latter to the municipal law of States. Where such municipal law provides for a period of limitation in respect to ordinary crimes, it does so by an express provision to that effect. This does not apply to crimes against humanity, which are subject to international law, as has just been stated.
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> "In international law, there is no principle establishing periods of limitation in general and a period of limitation for the prosecution of war crimes and Nazi crimes in particular. The rules of international law permit the prosecution of such crimes before the courts and their punishment, so that mankind may be forever safe from a recrudescence of Nazi tyranny and cruelty.
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> "In accordance with this legitimate wish of the peoples as recognized by international law, the prosecution and punishment of these crimes should not be considered to fall exclusively within the domestic jurisdiction of States but should be regarded as an international and universal obligation imposed on States by international law.
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> "States may discharge this international obligation in various legal ways, according to their principles of law, their national traditions and

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35/ During the twentieth session of the General Assembly, "several members of the /Third/ Committee referred to the question of punishing war criminals and of persons who had committed crimes against humanity. There was general agreement that such criminals should be brought to justice wherever and whenever they might be found and apprehended, and all speakers welcomed resolution 3 (XXI) of the Commission on Human Rights... ". (See Report of the Third Committee, 8 December 1965, doc. A/6143, paras. 61-66.)

their constitutions. However, it would be a violation of international law if a State refused to discharge these obligations on the ground that such action would be at variance with a provision of its municipal law such as statutory limitation.

"The Conference therefore considers that it would be a violation of international law if a country, referring to the established rules concerning statutory limitation applicable to ordinary crimes, refused to prosecute Nazi crimes on the pretext that the crimes in question were merely individual homicides punishable under ordinary law." 36/

143. At the national level, a large number of countries which recognize statutory limitation in criminal law have enacted new laws in accordance with which statutory limitation is not applicable to serious crimes under international law. It is interesting to note that most of these laws refer expressly or implicitly to the principles and standards of international law pursuant to which they were enacted (supra, paras. 62 et seq.).

36/ J. Graven, "Les crimes contre l'humanité peuvent-ils bénéficier de la prescription?", Revue pénale suisse, T. 81, Fasc. 2, 1965, p. 128. "These conclusions /of the Warsaw Conference/", says this author, "appear to be fully in accord with the principles of international law and consistent also with the intentions of the international Convention of 1948 on the punishment of genocide, pursuant to which the Warsaw Committee of Experts calls on signatory States to remind all countries 'that crimes against humanity are crimes under international law and are therefore not subject to statutory limitation'" (ibid., p. 152).

III. APPLICABILITY OF THE PRINCIPLE THAT CRIMES "OF THE NAZI PERIOD" ARE NOT SUBJECT TO STATUTORY LIMITATION PRINCIPLE OF NON-RETROACTIVITY OF CRIMINAL LAW

A. Judicial and legislative competence of States

144. As may be seen from resolution 3 (XXI), pursuant to which this study has been prepared, the Commission on Human Rights is "deeply concerned" to ensure the application of the principle that there is no period of limitation for "war crimes [and] crimes against humanity of the Nazi period". The Moscow Declaration had provided that "the major criminals" were to be judged and punished by a joint decision of the Allied Governments, as was done by the international tribunals of Nürnberg and Tokyo. According to this same Declaration, "ordinary" criminals, i.e. those not included in the category of criminals to be tried by international courts, "will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein". Criminals in this category thus fall within the judicial and legislative competence of States and their prosecution and punishment are carried out in accordance with municipal law. In the case of States which do not recognize statutory limitation in respect of war crimes and crimes against humanity or, at least, in respect of serious crimes under their own ordinary law, there is no difficulty. The prosecution and punishment of offenders who are in the territory of such States cannot be barred by the passage of time. The situation is quite different in the case of States which recognize the applicability of statutory limitation to the crimes in question. For such States, there may be a question whether the ex post facto extension or abolition of the statutes of limitations which were provided for by domestic law at the time of the commission of the crime would not constitute a violation of the principle of the non-retroactivity of criminal laws. This question was taken up by the Commission on Human Rights in the course of its work.[37]

37/ Commission on Human Rights, Report on the Twenty-First Session, documents E/4024, E/CN.4/891, para. 547.

B. Article 11 (2) of the Universal Declaration of Human Rights

145. Article 11 (2) of the Universal Declaration of Human Rights (para. 54 above) has been invoked in support of an argument to the effect that the article in question means that if the law in force at the time the crime was committed laid down a time-limit for the initiation of proceedings, the criminals had an acquired right not to be prosecuted or punished after the expiration of that period. A counter-argument is that since the paragraph in question deals only with offences and the measure of punishment, i.e. substantive law, it could not be applied in respect of statutes of limitation, which were a matter of procedural law, i.e. the provisions concerning the procedures for prosecution and trial.

146. In order to clarify this matter, it is essential to examine it in the context not only of that particular provision of the Universal Declaration but also of the Declaration as a whole and in the light of the requirements of international law. If statutory limitation is considered to form part of procedural law, provisions relating to it may be amended retroactively "since there are no acquired rights where procedural rules and forms are concerned".[38/] The fact is that "most of the States recognizing statutory limitation consider that it is a feature of procedural law or rules and hence that new provisions extending statutory limitation may be retroactive".[39/]

147. However, it seems doubtful that the principle of non-retroactivity embodied in article 11 (2) of the Universal Declaration could be applied to statutory limitation, an institution which is not recognized by international law. This paragraph establishes, at the international level, the principle of the legality of charges and penalties. It provides for the observance of this principle, "with a view solely to prohibiting the 'creation' of new charges and new penalties". It makes no reference to statutory limitation. It may be noted that the Universal Declaration is proclaimed "as a common standard of achievement for all peoples and all nations" calling for the application of "progressive measures, national and international". It is addressed primarily to well organized societies, in which the application of the principle of "legality" for the observance of which it provides normally constitutes a "guarantee" of human rights and freedoms. It is most unlikely that its authors, in calling for the application of this principle at both

38/ J. Graven, Revue pénale suisse, T. 81, Fasc. 2, 1965, p. 155.

39/ See Report on statutory limitation as applicable to crimes against humanity (rapporteur: Mr. Pierson), drawn up by the Council of Europe, document 1868, p. 16, foot-note 2.

the national and international levels, meant to allow that those who, "disregarding" and "flouting" those rights and freedoms, commit acts which are "revolting to the conscience of mankind" should be able to do so with impunity.40/

148. In any event, it is difficult to see why article 11, paragraph (2), of the Universal Declaration should be interpreted as standing in the way of a system which is recognized by most countries; as was pointed out above, most of the countries which make provision for statutory limitation do so in their law of procedure, whose provisions may be changed retroactively. There is no denying that

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40/ It is pertinent to recall here the provisions and official interpretation of article 7 of the European Convention on Human Rights (paras. 57-58 above) (provisions identical to those of article 15 of the draft Convention on Civil and Political Rights adopted by the Third Committee of the United Nations General Assembly (para. 55 above)). After referring to the provisions of article 7 (2) of the European Convention in question, the Report on statutory limitation as applicable to crimes against humanity, drawn up by the Consultative Assembly of the Council of Europe (op. cit., p. 7) states the following:

"The above privision, as interpreted by the European Commission on Human Rights, was designed to reply to those who argue, on the basis of the principle of non-retroactivity in criminal law, that the prosecution of acts which were not expressly punishable under municipal criminal law is not legal. Without going more deeply into this highly controversial issue, the question nevertheless remains, in view of the very clear text of article 7 of the European Convention on Human Rights: did the authors of the Convention not regard the punishment of crimes against humanity as not only possible but, perhaps, indispensable? In any event, it is certain that a measure exempting crimes against humanity from statutory limitation, or extending the period prior to the lapse of time, may not be objected to on the ground that it is incompatible with the Convention and with article 7 in particular."

It will also be noted that in its advisory opinion on the Bill extending the period of limitation for the execution of death sentences imposed for breaches of the external security of the State committed between 9 May 1940 and 8 May 1945 (para. 66 above), the Belgian Council of State made the following declaration: "It likewise does not appear that the draft is likely to give rise to legal objections concerning article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950." After citing the text of that article, it added: "It follows therefore that while this provision prohibits a judge from imposing a penalty more severe than that which was applicable at the time when the offence was committed, it in no way prohibits the retoractivity of laws the sole purpose of which is to regulate the procedure for the execution of penalties duly imposed or their statutory limitation. It also makes an exception of persons guilty of a criminal act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations." (Chamber of Representatives, 1963-1964 session, 16 October 1964, 861 (1963-1964), No. 1).

such an interpretation is compatible with the notion of statutory limitation entertained in some countries; there are some legislations which place statutory limitation under the heading of substantive law, with the result that it may not be possible to apply the new provisions on the subject retroactively if they are less favourable to the offender than the old provisions.[41] Nevertheless an international instrument cannot be given, by interpretation, a meaning which implies recognition by that instrument of an institution which international law refuses to entertain. Even in the case of a provision of municipal law, it is an accepted rule that, unless the text of the provision implies otherwise, it must be interpreted in conformity with the principles of international law. Moreover the letter of article 11, paragraph (2), of the Universal Declaration is so clear and so categorical that any interpretation would seem superfluous. There is, in any event, no principle of interpretation that would allow the interpreter of a text to derive from it a rule for which the text does not expressly provide. As has been pointed out on several occasions, neither the Universal Declaration nor the international instruments which have preceded or followed it, and which form the new international criminal law, allow of any period of limitation. It would be a mistake, therefore, to introduce into that law, through special pleading, a derogatory rule for which it makes no provision and which, moreover, is very controversial even in municipal law. The question of the retroactivity or non-retroactivity of the rules relating to limitation does not arise in

41/ The Report on statutory limitation as applicable to crimes against humanity, prepared for the Consultative Assembly of the Council of Europe (op. cit., p. 16, foot-note 2), has the following to say: "It must be acknowledged ... that recent writers tend to place statutory limitation under the heading of substantive law, on the ground that it involves more than the form of proceedings: its application affects the possibility of punishment, that is, the substance of the law itself. According to this thesis, prolonging the time-limit would conflict with the principle of the non-retroactivity of criminal law. It would seem difficult, however, to treat the Nazi crimes - precisely because they are international crimes against humanity - as simple offences under ordinary municipal law, especially since the only basis for their 'nationalisation', as regards the law to be applied for their punishment, is a number of international declarations, and, in particular, the Moscow Declaration of 1943."

international law, since crimes having the status of international offences are not subject, under international law, to any period of limitation.

149. However, even on the hypothesis that the principle of non-retroactivity of criminal law, in both its aspects, is embodied in international law,[42] that principle does not appear to be applicable without qualification, in all cases and in all circumstances. R. Malézieux[43] remarks that the principle of non-retroactivity "was adopted in most municipal legislations, under the influence of individualistic doctrines, in order to limit the powers of the legislator. However, international society has no legislator, and the elaboration of law is particularly difficult in that environment. For that reason, international jurists are fairly ready to agree that any rule of law which meets a need of the community of nations should have retroactive effect".

150. Neither statutory limitation nor the principle of non-retroactivity should, for the purposes of international law, be available to assist those who commit serious crimes against the international public order. "The fact is," stated Judge Jackson at the Nürnberg trial, "that when the law evolves by the cases method, as did the common law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error".[44]

C. Subordination of municipal law to international law

151. The question of the applicability of the principle of non-retroactivity to the rules concerning statutory limitation may and does arise at the national level in some of the States which have jurisdiction to punish the sericus offences committed

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42/ H. Kelsen takes the view that "there is no rule of general customary international law forbidding the enactment of norms with retroactive force, so-called ex post facto laws" (Peace Through Law, 1944, p. 87). J. Stone states that "there is clearly no principle of international law embodying the maxim against retroactivity of criminal law" (Legal Controls of International Conflict, 1954, p. 369).

43/ "Le statut international des criminels de guerre", Revue générale de droit international public, tome 49, 1941-1945, pp. 173-174.

44/ The trial of German major war criminals by the International Military Tribunal, opening speeches of the chief prosecutors ..., London, 1946, p. 40.

during the Second World War and termed "Nazi crimes",[45] but whose laws on statutory limitation might prevent them from doing so. In order to discharge their international obligation to ensure the punishment of such crimes, without any limitation in time, such States would be bound to amend their laws on statutory limitation so as to prevent the guilty from using them to escape punishment. In fact a number of States have already taken legislative action for this purpose (paras. 62 et seq. above). They did so before the expiry of the period of limitation fixed by municipal law, thus averting the possibility of

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45/ In the Report on statutory limitation as applicable to crimes against humanity, prepared for the Consultative Assembly of the Council of Europe (op. cit., p. 15), the rapporteur, Mr. Pierson, states the following: "In all likelihood, no one will deny that these offences are no more than one instance of crimes against humanity. Are they also to be regarded as not subject to statutory limitation, then, in conformity with their status as crimes against humanity? I cannot but point out in this connexion that it was the desire of the three Allied Powers themselves that such crimes (except, of course, for the 'major war criminals') should be punished 'according to the laws' of the countries concerned... . Is its application [i.e., the application of statutory limitation] not a natural consequence of the 'nationalisation' of a certain category of crime against humanity, as established in the Moscow Declaration? On the other hand, despite this 'nationalisation', is it legally possible, considering that the Nazi crimes were crimes against humanity, to allow their authors to escape just punishment? Given that the Nazi crimes were international crimes, not only because the victims were representatives of all nationalities, but also because their executioners were not all members of a single people, is there any reason to prefer the law of the executioner to that of the victim? On the contrary, would it not be more logical to consider these as international crimes in every respect, and to treat them as not subject by nature to statutory limitation? Lastly, applying an ethical consideration which is elementary, not to say primitive, is it possible to allow the application of the statutory limitation when the prerequisites for statutory limitation, i.e. the abatement of passion and a desire to forget, by no means obtain?".

finding themselves compelled - according to municipal law - to accord the guilty parties, after that period expired, an "acquired right" to impunity.[46]

152. The difficulties arising from the domestic principle of non-retroactivity of criminal laws do not appear to be insurmountable, even in countries which regard statutory limitation as non-retroactive. Those difficulties can be overcome by defining, where necessary, the scope of the principle of non-retroactivity by means of constitutional or other legislation, according to whether the principle is written into the constitution or not. There is nothing unlawful or legally unsound about new texts of law recognizing that principle as not affecting the legislative action taken to punish crimes of a

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46/ J. Graven states that "statutory limitation per se is in no way a right but is governed by municipal law, together with the time-limits involved and the ways in which it is acquired, as a practice of expediency, and thus could be either abolished or amended in its terms, until such time as it is in fact acquired and henceforth constitutes an acquired right". "We believe," he explains, "that the solution which is both warranted de jure and to be recommended de facto is for the Governments of countries whose municipal law might conflict with international law to introduce a bill declaring, in conformity with the prevailing outlook of international law and the requirements of justice, that statutory limitation is not applicable to crimes against humanity, whether committed in war, in connexion with war or even independently of war; for writers on international law have, since Nürnberg, quite properly dissociated such crimes from the circumstances of war which previously surrounded them" (Revue pénale suisse, tome 81, fasc. 2, 1965, pp. 140 and 159).

A. Verdross notes that "although international law is scarcely explicit on the subject, it is clear that, de lege ferenda, periods of limitation may be prolonged or their operation suspended on the ground that such crimes should not go unpunished (Verjährung? 200 Persönlichkeiten des öffentlichen Lebens sagen Nein. Eine Dokumentation herausgegeben von Simon Wiesenthal, Europaische Verlagsanstalt, Germany, 1965, p. 150).

particular kind, such as the international crimes in question, which are different in nature from even the most serious of the ordinary offences covered by municipal law. As we have seen (paras. 62 et seq. above), a number of States conforming to international law, have enacted appropriate legislation barring the application of the ordinary rules on statutory limitation to crimes "of the Nazi period". In so doing they have not been deterred by the principle of non-retroactivity, thus creating the presumption that this principle does not apply to that particular category of crimes. Better yet, the French Act of 26 December 1964, in its sole article, declares that, by "their very nature", crimes against humanity cannot be subject to any period of limitation. The legislator, then, refused to treat this Act as exceptional legislation; in his eyes, it was merely a matter of applying the ordinary law.47/

153. It may be pointed out that the discharge of an obligation deriving from international law cannot be subordinated to practical difficulties arising out of municipal law. If international law imposes on States an obligation to ensure, without any limitation in time, the punishment of international offences within their competence, then those States cannot evade that obligation by taking refuge in the provisions of their municipal law.

154. In its comment on principle II of the Nürnberg principles (para. 35 above), the International Law Commission stated that "the principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal

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47/ When the Act was put to the vote Mr. Paul Cost-Floret, one of the sponsors of the bill, commenting on an amendment to add to the proposed text the words: "on whatever date they were committed", spoke as follows: "In my view, this amendment is defective as a piece of legal drafting and is redundant. It is defective as a piece of legal drafting ... because, in stating that these crimes cannot be subject to any period of limitation whatever their date, we appear to be making a retroactive law. It will immediately be asserted that this Act is exceptional legislation, but such is not the case; my entire line of reasoning has gone to show that it is purely and simply a matter of applying the ordinary law ... I assert here and now ... that, in stating that these crimes against humanity cannot, by nature, be subject to any period of limitation, we definitely intend to make them punishable /on whatever date they were committed/." This interpretation was confirmed by the Minister for Justice, and the text was therefore adopted as it stood (Journal de la République française, Débats parlementaires, Assemblée nationale, séance du 16 décembre 1964, pp. 6142 et seq.).

law, implies what is commonly called the 'supremacy' of international law over national law". It would therefore be inadmissible to apply the domestic rules concerning statutory limitation to crimes for which international law not only recognizes no period of limitation but makes the prosecution and punishment of the guilty parties a fundamental legal obligation.

155. Another fact to be noted is that the international crimes in question can at present be tried only in national courts. The view may be taken, however, that these courts, although national in form, are essentially international in character by reason of the functions they perform. They are, in fact, called upon to impose punishment for international offences on behalf not only of their own States but also of all other States, on behalf of the international community as a whole. They perform a task which might normally be performed by an international jurisdiction. They thus act as judicial organs of the international legal order, which is institutionally deficient. This is an application of the law of functional duality - a most unfortunate law, no doubt, but one which is inevitable in the existing state or organization of international criminal justice.

156. It is clear that the Moscow Declaration, whose principles are confirmed by the London Agreement, permits the application of municipal law to the crimes to which it refers. It is equally clear, however, that it imposes, at least implicitly, an obligation on the States concerned to enact new laws or provisions, if necessary,in order to ensure the most effective prosecution and enforcement of penalties; otherwise, the Declaration would be void of its substance. That, furthermore, is the reason why some writers believe that the Declaration, in a alluding to the municipal law of the States concerned, "refers only to the rules concerning judicial organization and procedure, to the exclusion of the substantive rules which govern the liability of war criminals".[48/] The States in question are required, in drafting their domestic laws on the subject, to comply with international law, which does not make or tolerate any rule that would operate to exempt the authors of such crimes from prosecution and punishment. States would fall short in their compliance with international law if they left unpunished, through the operation of the rules concerning the punishment of offences under ordinary municipal law, crimes of a particular nature, the prosectuion and punishment of whose perpetrators constitute an international obligation imposed by international law.

48/ R. Malézieux, "Le statut international des criminels de guerre", Revue générale de droit international public, tome 49, 1941-1945, p. 170.

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IV. CONCLUSION

157. From the preceding pages, the following conclusions may be drawn: war crimes, crimes against peace and crimes against humanity are international crimes and fundamentally different from offences under ordinary municipal law. They normally fall within the scope of international law: hence the attempt, several times repeated, to subject them to an international criminal jurisdiction. The International Military Tribunals of Nürnberg and Tokyo were examples of such a jurisdiction, and also provided an opportunity to delimit such crimes. The United Nations, following those precedents, has attempted to define the principles of international law whose violation should be punished. This has led, both within the United Nations and outside it, to the conferment of a special status on certain crimes against the international public order and to contemplation of the establishment of a permanent international criminal jurisdiction. The fact that, in the absence of such a jurisdiction, these crimes are at present subject to trial in national courts does not mean that the bringing of charges is not an international matter. It therefore appears natural and in conformity with legal principles that such crimes should not be subject to any period of limitation unless and until international law, which determines what charges can be brought, decides otherwise. In fact international law makes no such provision. On the contrary, it lays an obligation on the States concerned to ensure effective and exemplary punishment for such crimes, the reason being, no doubt, that such punishment is more necessary to the international public order than the punishment of crimes under ordinary municipal law is to the national public order.

158. Statutory limitation in criminal cases "is not a requirement of justice". It has made its way into some domestic legal systems only with great difficulty and "in many cases, in quite recent periods". Nor is it, by any means, a principle recognized by all States. A great many States either make no provision for it at all, or make no provision for it in the case of serious offences. In any event, it is applied only in virtue of express texts of law. It follows that the silence on this point of all international instruments drawn up since the Second World War on punishment of war crimes, crimes against peace and crimes against humanity, which form the new international criminal law, can be interpreted only as recognition of the principle that there is no period of limitation for such crimes.

159. Thus, the principle that there is no period of limitation does not derive only from the intention of the international "legislator", who has clearly and urgently stressed the need for the sure and effective punishment of serious crimes under international law; it does not derive only from the universal conscience, which revolts against the idea that such crimes can go unpunished; it does not derive only from the state of positive municipal law, which has often hestitated, or even refused, to recognize the institution of statutory limitation in the case of serious crimes; it derives also, and above all, from the fact that none of the reasons usually advanced in favour of statutory limitation for crimes under ordinary municipal law justifies such limitation for the international crimes in question. The latter crimes cannot, from either the legal or the moral standpoint, be placed on the same footing as the former. If a crime under municipal law, however serious, goes unpunished through the operation of the statute of limitations, the fact does not usually make itself felt even in the narrow social environment in which the crime was committed; the criminal, lawfully released for one or another of the reasons underlying the statute of limitations (remorse, forgiveness, loss of validity of proofs, etc.) quietly resumes his place in society and lives at peace with it. In contrast, impunity for a crime against peace or against humanity or for a serious war crime, whether acquired through statutory limitation or through any other means, arouses violent reactions on a very large scale; consequently, the result might be to expose the guilty party, now immune from any legal prosecution, to the "private justice" of the victims or of those bound to them by ties of blood, land, race, religion and so on. Because of the "exceptional" gravity, the "gigantic" magnitude and, above all, the "incomprehensible" motives of such international crimes, all these people, whose numbers can be readily imagined in each case, tend to be "unable ever to forget" and to be undeterred by any obstacle, legal or otherwise, from ensuring

that, once the guilty are "unmasked", they are punished as they deserve.[49] There is, therefore, every reason to consider whether the principle that there is no period of limitation for such crimes is not a rule of jus cogens, a peremptory rule, a fundamental rule of the international public order from which States can make no departure even by treaty.

160. For all these reasons, a movement is now on foot as a result of the most serious of the offences committed, in particular, during the Second World War - those which have come to be known as "nazi crimes" - to abolish, both internationally and nationally, the application of municipal statutes of limitations to serious crimes under international law. At the international level

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49/ When a certain country expressed the desire to set, in accordance with the provisions of its criminal code, a date in the near future on which immunity from prosecution for "nazi crimes" would be acquired by lapse of time, the reaction was a general outcry that "ways would be found to deal with any war criminals discovered after that date" (J. Graven, Revue pénale suisse, tome 81, fasc. 2, 1965, p. 120). It was objected further that "this is not a matter of articles /of this/ criminal code or any other codes. What is involved here is the indisputable concept of life and death, of civilization and savagery, honour and disgrace, according to which the war criminals are being tried and will be condemned by the whole of mankind.... We have heard the arguments /advanced by the country in question in support of its decision/. Let them hear now the echo of the formidable wave of protest aroused by their decision..." (Soviet Documents, vol. III, No. 8, 1965, p. 15). The difficulties of every kind encountered in bringing to book the still unpunished "crimes of the nazi period" have created a particularly significant situation which it will not be out of place to mention here: within the human communities which suffered most from those crimes, "groups" or "clandestine organizations" have sprung up which are "sworn to wipe out the remaining war criminals". A somewhat different but equally significant situation shows the extent to which both people and institutions dissociate themselves, not only from war criminals, but also from any person who goes too far in their defence and fails to take certain realities into account. As recently as 15 November 1964 the Office of the State Counsel at Hanover, under pressure from national and international public opinion, ordered the investigation of a lawyer who - as defence counsel for a person accused, with other members of the nazi security services, of the massacre of 7,000 people - had stated in his address that "Hitler himself could not be convicted of homicide", that "he had not contravened international law", that "he had not acted from base motives", and that "he had ordered the massacre /of certain human groups/ for political reasons". Despite the broad interpretation generally placed on the "rights of the defence", the lawyer was brought before an examining judge (J. Graven, op. cit., pp. 125 and 139).

important documents have been drawn up on the subject, such as resolution 3 (XXI) of the Commission on Human Rights, recommendation 415 (1965) of the Consultative Assembly of the Council of Europe, and the Warsaw Declaration of 1964. At the national level, a number of States directly concerned with the punishment of such crimes have amended, or propose to amend, their statutes of limitations in order to ensure such punishment. Hence an attempt, such as the Commission on Human Rights is making, to give explicit form, in binding international instruments, to the principle that there is no period of limitation would not conflict with the principles of the various legislations; in fact, it would merely reflect the new trend in their development. If States were left to amend their statutes of limitations as they saw fit, they would inevitably adopt a variety of solutions to the problem, not all of which would pay sufficient heed to the requirements of international law. Moreover, solutions might be arrived at only in those countries which are now competent to punish "nazi" crimes. Countries which lack such competence and which recognize statutory limitations in criminal cases might fail to take appropriate legislative action for this purpose. If such a country were to apply to international crimes the period of limitation prescribed by its legislation for ordinary crimes, it might be unwilling, once that period had expired, to extradite a person accused of an international crime and detected in its territory.[50/] This might be a common occurrence, owing to the diversity of national laws on the existence of a period of limitation, the length of the period, its starting date, and suspension or interruption of the period. The proper

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50/ In its reply to the Secretary-General's note verbale (para. 4 above), the Federal Republic of Germany observed that its efforts "to ensure the extradition of persons accused of war crimes or crimes against humanity have been successful only in a few cases. The Governments applied to justified their rejection of requests for extradition chiefly on the ground that, under the law of the State applied to, prosecution for the offences on which the applications were based had been barred by time limitation...". For some examples of rejection of requests for extradition on the ground that the period of limitation prescribed by the law of the country applied to had expired, see: the judgement rendered by the Jerusalem District Court in the Eichmann case (Criminal Case No. 40/61, para. 53); the article by J. Graven in Revue pénale suisse, tome 81, fasc. 2, 1965, p. 124, foot-note 6.

solution to the problem would therefore be an international one, binding on all States and not only on those which are directly concerned today with the punishment of "nazi crimes". Those crimes would thus have prompted international action to solve the general problem of statutory limitation with respect to war crimes, crimes against peace and crimes against humanity.

PART III

LEGAL PROCEDURES FOR THE EXPLICIT AND EFFECTIVE ESTABLISHMENT OF THE PRINCIPLE THAT THERE IS NO PERIOD OF LIMITATION FOR WAR CRIMES, CRIMES AGAINST PEACE AND CRIMES AGAINST HUMANITY

161. In exploring the legal procedures which might appropriately be taken on the international level to incorporate in national legislation the principle that there is no period of limitation for the international crimes in question, it is possible first of all to envisage a separate course of action in the case of crimes whose prevention and punishment are governed by special Conventions. War crimes, crimes against peace and crimes against humanity include some which are dealt with in Conventions concluded after the Second World War, other than the special instruments establishing the International Military Tribunals of Nürnberg and Tokyo. These are the Convention of 1948 on the Prevention and Punishment of the Crime of Genocide (para. 42 above) and the four Geneva Conventions of 1949, which form part of what are generally termed the laws and customs of war (para. 61 above). It is possible to envisage a separate course of action for each of the two categories of crimes dealt with in these Conventions. Procedures embodying a comprehensive course of action will also be considered for all the international crimes in question. We shall begin by transcribing the opinions of Governments on the question under discussion.

I. OPINIONS OF GOVERNMENTS

162. In reply to the note verbale addressed to them by the Secretary-General (para. 4 above), certain Governments expressed the opinions set out in the succeeding paragraphs with regard to the legal procedures which might appropriately be taken on the international level to ensure that no prescription or statute of limitations shall apply to war crimes, crimes against peace or crimes against humanity.

Belgium

163. "It would be appropriate to draw up an international convention, to which the Belgian Criminal Code could if necessary be adapted."

Bolivia

164. "Since there is already a fairly strong current of opinion against any lapse of the liability of criminals of this type to prosecution, it would be appropriate to adopt a resolution providing that the statute of limitations applicable to offences under ordinary law should not apply to the crimes with which we are here concerned; that the crimes in question should at no time fall under the statute of limitations on any grounds whatsoever, in order that, in view of their monstrous nature and, above all, the danger presented by the very existence of the criminals who perpetrate them, they may not go unpunished; and that, since they are extremely dangerous international crimes with the direct consequences for all mankind, their perpetrators may be tried at any time anywhere in the world. It stands to reason that war criminals and persons who have committed crimes against world peace or crimes against humanity should be severely punished... in the light of the experience gained in this matter and through other international endeavours to defend mankind, which is constantly being wronged for lack of more decisive and more effective legal protection; let it never again be said that agreements, treaties and conventions are difficult to arrive at when the entrenched interests of certain groups or individuals, undeserved privileges or a variety of concerns prevail at the expense of the common good. It should, then, be possible to overcome all obstacles and to legislate objectively, free from prejudice and with absolute respect for the principles of human solidarity and universal justice... As to the possibility of swift punishment

for the crimes in question and, to that end, of revising the procedures applicable, for example, to extradition, and as to the abolition of limitation on prosecution and on penalties, it is essential that, pending the institution of a code of international criminal procedure, no limitation should be placed on the action available against crimes already committed which call for immediate punishment."

Cambodia

165. "With regard to the legal procedures which might appropriately be taken on the international level to ensure that no prescription or statute of limitations shall apply to war crimes or to crimes against humanity, the Royal Government is of the opinion that a provision to that effect should be inserted in the Universal Declaration of Human Rights and in the international conventions concerning the law of war and the protection of mankind (for example, the Convention on Genocide)."

Cameroon

166. "The Government of Cameroon would be prepared to participate in adapting the existing provisions to meet the requirements of preventive and punitive action, if the principle of and general procedure for such action were laid down in an international convention to which the Federal Republic of Cameroon would accede."

Colombia

167. Colombia "considers that the ideal solution to the international legal problems created by war crimes and crimes against humanity would be to draw up an 'International Criminal Code' and to establish an 'International Criminal Court' under an international convention which would also be embodied in the municipal law of the various States Members of the United Nations... The Ministry of Foreign Affairs considers that the best course would be to lay down in the international convention, which would approve the International Criminal Code suggested in this note, the principle that there is no period of limitation for such crimes; there are no valid grounds for prescription or any other limitation in the case of crimes of this nature, for they are criminal acts which violate Christian morality, the customs of civilized peoples, international justice and the legal conscience of mankind."

Ivory Coast

168. "The only solution would appear to be the adoption of a resolution, which would be subject to ratification in each Member State... imposing an obligation to provide an exception, in the provisions of municipal law concerning the period of limitation, for this particular category of crimes; furthermore, a very precise definition of such crimes should be worked out in advance."

Denmark

169. "If the study of this question leads to the conclusion that international measures should be taken to ensure that no period of limitation shall apply to such crimes, this could most appropriately be done in the form of provisions - embodied in a Convention - specifying the crimes to which no period of limitation shall apply. It should be considered whether such provisions could be incorporated in existing conventions or whether a special convention should be drawn up on the subject."

Hungary

170. "Is ready to participate in any international action which would explicitly reaffirm that no prescription or statute of limitation shall apply to war crimes and crimes against humanity."

Israel

171. "Would welcome appropriate steps on the international level to ensure that no period of limitation should apply to any of the aforesaid crimes and would, therefore, support an appropriate international convention with this object in view."

Japan

172. "The views of the Japanese Government on the legal procedures which might appropriately be taken on the international level to ensure that no prescription or statute of limitations shall apply to war crimes and crimes against humanity are as follows: ... The Japanese laws have no provisions specifically applicable to the punishment of war crimes and crimes against humanity but such crimes are punishable according to general criminal laws. The system of prescription has traditionally been established in Japan regarding all kinds of crimes, and, from the standpoint of

domestic laws there exist no special circumstances calling for abolition of, or provision of exceptions to, application of the prescription system. But, in order to prevent the war crimes and crimes against humanity, such as genocide, which are atrocious, and inhumane and with regard to which any sane soul would consider it advisable to make exceptions to application of prescription, it is deemed possible to consider the advisability of making such exceptions. For this purpose, however, it would be prerequisite to define clearly the nature and scope of the crimes to which exceptions to prescription should be applied; otherwise, it would be inappropriate to discuss the advisability of exclusion of prescription with regard to such equivocal definitions as 'war crimes' or 'crimes against humanity'."

Nigeria

173. (See above, para. 87).

Netherlands

174. "If future developments in the International order should result in a large measure of agreement being reached on the principle that the law should never provide for any period of limitation with respect to the prosecution of the crimes in question /war crimes and crimes against humanity/, the Netherlands will conform to that principle."

Central African Republic

175. "The Government of the Central African Republic considers that the right course of action would be to make recommendations for the appropriate amendment of each country's municipal law."

Federal Republic of Germany

176. "Would welcome an investigation of the question whether, and to what extent, it is possible to ensure by legal measures taken at the international level that no period of limitation shall apply to war crimes and crimes against humanity in general, irrespective of the nationality of the offenders or victims and irrespective of the date of the offence."

Ukrainian Soviet Socialist Republic

177. "In the opinion of scholars and other competent authorities in the Ukrainian SSR, no formal legal enactment is required to establish the fact that modern international law does not contain any provisions imposing periods of limitation for the prosecution and punishment of war criminals and persons who have committed crimes against humanity. From the point of view of the general principles of criminal responsibility, a formal enactment is required only for exceptions to the general principle that the crime will inevitably be followed by punishment. Thus a specific kind of legal order is normally made only in cases where periods of limitation for prosecution and punishment are to be applied, if this should for any particular reason be considered necessary. But, since there are no special provisions in international law imposing periods of limitation for prosecution and punishment, the general principle of the ineluctability of punishment for war crimes and crimes against peace and humanity - i.e., the principle on which responsibility for these crimes before the law is based - must accordingly apply. Thus, the principle that there shall be no period of limitation for the prosecution and punishment of war crimes and crimes against humanity does not require special and formal legal expression which might have the significance of a source of law, since the principle concerned is already embodied in international law. ... The Commission on Human Rights ... must ... as a matter of priority ... take effective steps to ensure that the principles and rules of international law governing the prosecution and punishment of war criminals and persons who have committed crimes against humanity, irrespective of the time when they were committed, are universally applied."

United Kingdom of Great Britain and Northern Ireland

178. "Her Majesty's Government do not wish to comment on this question at this stage. They consider that the information on legal procedures at the national level which will be contained in replies from Governments to the Secretary-General's Note under reference will be the best guide to the desirability of legal procedures at the international level. They therefore propose to make their views known through the United Kingdom delegation to the twenty-second session of the United Nations Commission on Human Rights."

Czechoslovakia

179. "The pressing demand, in accordance with the principles of international law, for the just punishment of war criminals, irrespective of their place of residence and regardless of the time elapsed since they committed their crimes, is based on profound legal and moral considerations. For this reason, the Czechoslovak Government, in accordance with international law, will lend its support to the United Nations in any action calculated to secure the full satisfaction of this demand as quickly as possible ... Although, in the Czechoslovak Government's opinion, no doubts should be entertained regarding the validity of the principle that there is no period of limitation for crimes against peace, war crimes and crimes against humanity, the Czechoslovak Government favours the idea of drawing up an international convention in which this principle of international law would be expressly confirmed."

Turkey

180. "Is of the opinion that the no-application of period of limitation for offences against peace and humanity can be secured either by the conclusion of a multilateral agreement to that effect or by the inclusion of an additional article to the Convention of 1948. The present Turkish legislation lends itself favourable to any such initiative ... Regarding the retrospective effect of such a new convention, it will be appropriate to recall the general principle that newly enacted provisions prescribing punitive measures can only be applied retroactively to the extent that they are to the advantage of the accused."

Uganda

181. "Would suggest that a survey be conducted to find out the number of Member Nations that apply a time limit to such crimes. In case the number warrants action on the international level, Member Nations would be consulted on the feasibility of drafting a multilateral convention on the subject. If this procedure would involve insuperable difficulties, it could be left to individual States to alter their laws to give similar effect. This could be initiated by a resolution of the General Assembly of the United Nations, recommending the Member States passing legislation or altering their laws where necessary, in order to ensure that no prescription or statute of limitation applies to war crimes against humanity."

Union of Soviet Socialist Republics

182. "... The United Nations study on the question of war criminals, which is to be undertaken in accordance with resolution 3 (XXI) of the Commission on Human Rights, must clearly reflect the generally accepted principles and norms of international law, under which war criminals must be indicted and must receive appropriate punishment regardless of any period of limitation... On the basis of the study on the question of nazi war criminals, the United Nations will be able to prepare and to undertake the further steps required to apply and consolidate the generally accepted principles and norms of contemporary international law concerning the punishment of war criminals... It is demanded by the memory of millions upon millions of victims who were put to death in the mobile gas chambers and concentration camps. It is called for in the interests of preserving and strengthening peace and tranquillity in the world."

Venezuela

183. "The principle, advanced in the resolution of the Commission on Human Rights, that there is no period of limitation for war crimes and crimes against humanity can be established at the international level only through an international convention, which could be drafted by the Commission on Human Rights."

II. PROCEDURES FOR APPLICATION TO CRIMES PUNISHABLE UNDER SPECIAL CONVENTIONS

A. Crime of genocide (Convention of 1948 on the Prevention and Punishment of the Crime of Genocide)

184. This Convention, which was drafted in the United Nations and approved by the United Nations General Assembly, is today binding on sixty-eight States.[1] It defines the crime of genocide (article II), confirms its international character (article I),[2] provides for "international co-operation"[3] "in order to liberate

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1/ The following States have ratified or acceded to the Convention: Afghanistan, Albania, Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Burma, Byelorussian SSR, Cambodia, Canada, Ceylon, Chile, China, Colombia, Congo (Democratic Republic of), Costa Rica, Cuba, Czechoslovakia, Denmark, El Salvador, Ecuador, Ethiopia, Federal Republic of Germany, Finland, France, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Israel, Italy, Jordan, Laos, Lebanon, Liberia, Mexico, Monaco, Morocco, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Poland, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia, Sweden, Syria, Tunisia, Turkey, Ukrainian SSR, Union of Soviet Socialist Republics, United Arab Republic, Upper Volta, Venezuela, Yugoslavia.

2/ When the Sixth Committee of the General Assembly discussed article I, some representatives proposed that the reference to international law should be deleted from the article. The Netherlands representative made the following observation: "There were several reasons for maintaining those words in article I: they appeared in the General Assembly resolution 96 (I) of 11 December 1946 and also in the convention as drafted by the Ad Hoc Committee /set up by the Economic and Social Council (para. 42 above)/; a majority of the Committee wished to retain them; there was a difference in the conception of crime from the point of view of international and domestic law, a difference which affected such important questions as extradition and the right of asylum" (Official Records of the General Assembly, Third Session, Sixth Committee, 68th meeting, p. 50).

3/ In order to grasp the precise meaning and scope of the expression "international co-operation" it is necessary to refer to the preparatory proceedings. The Ad Hoc Committee on Genocide, which was set up by the Economic and Social Council (para. 42 above), submitted a draft convention, the preamble of which included a paragraph reading as follows: "Being convinced that the prevention and punishment of genocide requires international co-operation". The representative of the Union of Soviet Socialist Republics had proposed the following text: "That the campaign against genocide requires all civilized peoples to take decisive measures to prevent such crimes and also to suppress and prohibit the stimulation of racial, national (and religious) hatred and to ensure that persons guilty of inciting, committing or encouraging the commission of such crimes shall be severely punished." The Ad Hoc Committee rejected this text. It did so, however, only because of the objections raised to the passage reading: "and also to suppress and prohibit the stimulation of racial, national (and religious) hatred". Wishing to retain the general idea expressed in the text, it adopted the paragraph given above (Report of the Ad Hoc Committee on Genocide, 1948, E/794, p.4).

mankind from such an odious scourge" (preamble), and imposes on the Contracting Parties an obligation to "prevent" and "punish" genocide (article I). In the absence of an "international penal tribunal", it leaves responsibility for punishment to the competent national tribunals (article VI).[4/] However, it requires the Parties "to enact... the necessary legislation to give effect" to its provisions[5/] "and, in particular, to provide effective penalties for persons guilty" of acts of genocide (article V). Hence the domestic law of the Parties is applicable as it stands only if it contains the provisions needed to meet the obligations imposed by the Convention, including the obligation to "punish" - the word is not qualified by any time limitation - the crime of genocide. It would not appear that this crime should be made subject to provisions of domestic law, such as those relating to statutory limitation, which would destroy the effectiveness of the punitive rules laid down by the Convention.

185. The Convention, as we have seen (para. 137 above), does not refer to a time limitation and cannot be construed in favour of such a limitation, which is unknown to international law and to the domestic law of a great many States. It would seem, therefore, that the legislation which the Contracting Parties are required to enact in order to give effect to the provisions of the Convention should include new provisions designed to prevent the application of municipal statutes of limitation to the crime of genocide. To place any other interpretation on the Convention would mean conceding that it recognized statutory limitation: i.e., a derogatory rule for which it does not provide and which, moreover, is not in keeping with international law. Above all, it would divert the Convention from its purpose and, if it did not completely destroy the object of the Convention, would at all events greatly restrict it. Article 69, paragraph 1 of the draft articles on the law of treaties

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4/ It should be mentioned that, in part B of the resolution approving the Convention, the General Assembly invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" (see paras. 43 et seq. above).

5/ During the discussion of article V by the Ad Hoc Committee on Genocide, it was debated whether the text should read "for the prevention and repression of genocide" or "to give effect to the provisions of the Convention". The second wording was deemed preferable because it dealt with all the obligations imposed on States under the Convention and not merely with penal measures (Report of the Ad Hoc Committee on Genocide, 1948, E/794, p. 10).

prepared by the International Law Commission reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term: (a) In the context of the treaty and in the light of its objects and purposes; and (b) In the light of the rules of general international law in force at the time of its conclusion". In the commentary on this article, the Commission said the following "... /international/ jurisprudence... contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, /it/ has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by necessary implication, contain. Paragraph 1 /of the article in question/ contains four separate principles. The first - interpretation in good faith - flows directly from the rule pacta sunt servanda. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith: the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its objects and purposes."6/

186. There seems no need to raise here the question how the Convention on Genocide is to apply over time. The very fact that the Convention makes no provision for a period of limitation for the crime of genocide leaves intact the principle that there is no such limitation - a principle which appears to be inherently applicable to serious crimes under international law and, a fortiori, to the "odious scourge" of genocide and which, in the absence of any contrary provision in international conventions, accordingly applies to such crimes without regard to the date of their commission.

187. In short, by virtue of its provisions, its raison d'être, its "higher purposes", the nature of the crime to which it relates and the principles which it confirms, the Convention appears to preclude any possible period of limitation for this crime,

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6/ Report of the International Law Commission on the work of its sixteenth session, 1964, Official Records of the General Assembly, Nineteenth Session, Supplement No. 9 (A/5809), p. 25 (art. 69), p. 27 (commentary), paras. 9-10.

without regard to the date of its commission. Since this question is not entirely immune from controversy, it might perhaps be advisable to clarify the situation by adopting an international instrument. However, an interpretative instrument[7] (protocol, declaration, etc.) of a binding nature does not seem necessary. It might not be useful, since the States whose participation would be desired might not become parties soon enough. It might not be desirable, since those States that did not wish to become parties to it might use it to justify any hesitancy on their part in complying with the relevant obligation under the original Convention to which they are parties already.

188. However, the inapplicability of statutory limitations to the crime of genocide could be usefully confirmed in a general convention laying down that principle for all the crimes under international law which are under discussion (see paras. 201 et seq. below).

189. Pending the conclusion of such a convention, it might be desirable for the United Nations General Assembly to adopt, in the immediate future, a resolution interpreting the Convention on Genocide.[8] Article VIII of the Convention provides that any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide. An interpretative resolution by the General Assembly, which initiated the preparation of the Convention, drafted it and proposed it for signature and accession by States, should be sufficient to remove any doubt regarding the inapplicability of statutory limitations to the crime of genocide, and thus to induce the Parties to take the necessary action to give full effect to the obligation imposed upon them by article V of the Convention.

7/ The Convention on Genocide itself lays down the principle governing its own interpretation. It provides in article IX that disputes relating to its interpretation, application or fulfilment are to be submitted to the International Court of Justice at the request of any of the parties to the dispute. For this procedure to be applied, however, there must be a dispute.

8/ The Report on statutory limitation as applicable to crimes against humanity prepared by the Council of Europe (doc. 1868, p. 15) recommends an interpretative resolution. The report notes that this was the conclusion reached by Mrs. Suzanne Bastid, Professor at the University of Paris Law Department and President of the United Nations Administrative Tribunal, in her memorandum on the problem of statutory limitation in respect of crimes against humanity.

190. In such a resolution, the General Assembly might recognize that international law does not permit the application of statutory limitations to war crimes, crimes against peace and crimes against humanity, and would (1) declare that the Convention is so worded as to preclude any possibility of such a limitation on either prosecution or punishment for such crimes, whatever the date of their commission; (2) invite those Parties whose municipal law provides a statutory limitation for the crime of genocide to amend their law accordingly, if they have not yet done so, in conformity with article V of the Convention; and (3) invite those States which possess the necessary qualifications, and which have not yet acceded to the Convention, to do so. The preamble of the resolution might refer, in particular, to resolution 3 (I) on the extradition and punishment of war criminals; resolution 95 (I) affirming the principles of international law recognized by the Charter of the Nürnberg International Tribunal and the judgement of the Tribunal; resolution 96 (I) on the crime of genocide; resolution 260 A (III) approving the Convention; and article VIII of the Convention.

191. Consideration might also be given to the inclusion, in the operative part of the resolution, of a provision inviting the States Parties to the Convention to communicate to the Secretary-General, within a given time-limit, such as one or two years, for transmission to the other Parties, all legislative texts and other measures adopted to give effect to the Convention as interpreted by the resolution.

B. War crimes (Geneva Conventions of 1949)

192. As stated above (para. 61), a Diplomatic Conference convened at Geneva by the Swiss Federal Council approved on 12 August 1949 the text of the following four Conventions: (1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;[9/] (2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed

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9/ This Convention replaces the Conventions of 22 August 1864, 6 July 1906 and 27 July 1929, in relations between the Contracting Parties (art. 59).

Forces at Sea;[10] (3) Convention relative to the Treatment of Prisoners of War;[11] (4) Convention relative to the Protection of Civilian Persons in Time of War.[12] 193. These four Geneva Conventions are now binding on 107 States.[13] They set up an identical system of rules to punish violations of their provisions. The text of the two relevant articles embodied in each of these Conventions was given above (para. 61). The list of grave breaches given in one of those two articles is the same in the first two Conventions: namely, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the

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10/ This Convention replaces the Xth Hague Convention of 18 October 1907 for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, in relations between the Contracting Parties (art. 58).

11/ This Convention replaces the Convention of 27 July 1929 in relations between the Contracting Parties (art. 134), and is complementary to Chapter II of the Regulations annexed to the Hague Conventions of 29 July 1899 and 18 October 1907 respecting the Laws and Customs of War on Land, in the relations between the Powers which are bound by the said Conventions and which are Parties to the present Convention (art. 135).

12/ This Convention is supplementary to Sections II and III of the Regulations annexed to The Hague Conventions of 29 July 1899 and 18 October 1907 respecting the Laws and Customs of War on Land, in the relations between the Powers who are bound by the said Conventions and who are parties to the present Convention (art. 154).

13/ The States which have ratified or acceded to these Conventions are: Afghanistan, Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Ceylon, Chile, Colombia, Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Dahomey, Democratic People's Republic of Korea, Democratic Republic of Viet-Nam, Denmark, Dominican Republic, Ecuador, El Salvador, Federal Republic of Germany, Finland, France, Gabon, German Democratic Republic, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Laos, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mali, Mauritania, Mexico, Monaco, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, People's Republic of China, Peru, Philippines, Poland, Portugal, Republic of Viet-Nam, Romania, Rwanda, San Marino, Saudi Arabia, Senegal, Sierra Leone, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Upper Volta, Venezuela, Yugoslavia.

Field (art. 50), and the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (art. 51).

194. The list of grave breaches given in the third Convention, relative to the Treatment of Prisoners of War, reads as follows (art. 130):

> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of a hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

195. The fourth Convention, relative to the Protection of Civilian Persons in Time of War, contains the following list of grave breaches (art. 147):

> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

196. It will be seen that a comprehensive list of the grave breaches mentioned in the four Geneva Conventions covers many of what are commonly called "war crimes". It certainly seems to cover all the war crimes listed in the Charter of the Nürnberg International Military Tribunal and in Law No. 10 of the Control Council

for Germany. War crimes, at least the most serious war crimes, are thus defined[14/] in Conventions which are binding on a great number of States. Although the punishment of these crimes is left to the legislative and judicial competence of States, it is none the less governed by general international rules with which those States are bound to comply. The system of punishment common to the four Conventions rests on three basic obligations laid on the Contracting Parties, namely: (1) to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches listed; (2) to search for persons alleged to have committed, or to have ordered to be committed, such breaches; (3) to try such persons or to hand them over for trial to another Contracting Party concerned.

14/ The Commentary on the Geneva Conventions, published under the general editorship of Jean S. Pictet, Director for General Affairs of the International Committee of the Red Cross, Vol. I, 1952, p. 370, contains the following passage:

"The idea of including a definition of grave breaches [in each of these Conventions] came from the experts called in by the International Committee of the Red Cross in 1948. It was thought necessary to establish what these grave breaches were, in order to be able to ensure universality of treatment in their repression. Violations of certain of the detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case.

"It was also thought desirable - as a warning to possible offenders - to draw public attention to the list of infractions, the authors of which were to be searched for in all States. ...

"The actual expression 'grave breaches' was discussed at considerable length. The USSR delegation would have preferred the expression 'grave crimes' or 'war crimes'. The reason why the Conference preferred the words 'grave breaches' was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word 'crimes' had different legal meanings in different countries....

"As regards the list of 'grave breaches' itself, ... it is not to be taken as exhaustive, although a large number of these offences would certainly appear to be covered."

197. The Contracting States are thus under an obligation, if their criminal laws should prove inadequate, to enact the necessary legislation to ensure the punishment of the grave breaches mentioned in the Conventions. This obligation would seem to entail determining, first of all, the nature and extent of the penalty for each grave breach. This particular task is thus left to the discretion of national legislators, who must discharge it bearing in mind the general principle that the penalty should be proportionate to the seriousness of the offence.

198. The question arises whether the measures to be taken in discharge of the first obligation should, where appropriate, include provisions excepting grave breaches from the application of municipal statutes of limitations. An affirmative reply to this question would seem to be implicit in the very terms of the provision imposing obligations Nos. (2) and (3). Nothing in that provision, or in any other provision of the Conventions, sets any time-limit on the obligation to search for and bring to trial persons alleged to have committed a grave breach, or on the obligation to extradite such persons if necessary.

199. In order to eliminate any doubt on the subject, the States Parties to the Geneva Conventions should perhaps be convened for the purpose of drawing up an appropriate interpretative instrument. Since "It has always been a tradition" for the International Committee of the Red Cross to work, as it has been doing steadily for over a century, to improve the Geneva Conventions and to develop them in the light of experience, and since the Committee initiated the penal provisions of those Conventions, it would perhaps be willing to take the necessary preliminary action to that end.

200. It may be pointed out, however, that if the United Nations General Assembly should decide to take the initiative in the matter of the general international instrument discussed below, it could include in that instrument an express mention of the grave breaches covered by the Geneva Conventions.

III. PROCEDURES FOR APPLICATION TO ALL THE INTERNATIONAL CRIMES IN QUESTION

A. Opinion in favour of a convention

201. As we have seen above (paras. 162 et seq.), a number of States have directly or indirectly indicated that they favour a convention which would confirm or

enunciate the principle that there is no period of limitation for the international crimes in question. If this principle is considered to be already established in international law, but it is desired to ensure that the principle is effectively and generally applied under national legislations, it might be advisable to make it explicit, by means either of an international convention or of a resolution by the United Nations General Assembly. If it should be decided to conclude a convention, the General Assembly might conceivably take the initiative, possibly draft the instrument and, by a resolution, approve it and propose it for signature and for ratification or accession. If, on the other hand, it is felt that the conclusion of a convention would be a long and difficult process, and if it is deemed necessary in the present circumstances to find an immediate solution to the problem, a resolution could be adopted; just as it confirmed the Nürnberg principles by a resolution, the General Assembly could use the same means to confirm the principle that there is no period of limitation for the international crimes in question. If the latter course were adopted, the text suggested below for a convention - an instrument proposed by a number of States - could be cast in the form of a resolution.

B. Content of the convention

202. Some States, while advocating the conclusion of a convention, have said that the convention should include a definition of the crimes to which it would apply. That question should raise no undue difficulty. It will be remembered that crimes against peace, war crimes and crimes against humanity are defined by the Charters of the International Military Tribunals of Nürnberg (para. 21 above) and Tokyo (para. 24 above) and by Law No. 10 of the Control Council for Germany (para. 26 above). In addition, the Convention on the Prevention and Punishment of the Crime of Genocide defines genocide (para. 42 above). A definition of grave war crimes is supplied by the Geneva Conventions of 1949 (para. 61 above).

203. The United Nations General Assembly, by its resolution 3 (I) of 13 February 1946, took note of the definition of war crimes and crimes against peace and against humanity contained in the Charter of the Nürnberg International Military Tribunal (para. 28 above). By its resolution 95 (I) of 11 December 1946, it affirmed the principles of international law recognized by the Charter and judgement of that Tribunal (para. 32 above).

204. In compliance with resolution 177 (II), adopted by the General Assembly on 21 November 1947, the International Law Commission formulated the "Nürnberg principles"; "principle VI" confirms the definition of crimes against peace, war crimes and crimes against humanity given in the Charter of the Nürnberg International Military Tribunal (para. 35 above).

205. By its resolution 488 (V) of 12 December 1950, the General Assembly invited the Governments of Member States to furnish their observations on this formulation and requested the International Law Commission "in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by Governments" (para. 36 above).

206. In accordance with resolution 177 (II) adopted by the General Assembly on 21 November 1947, the International Law Commission prepared and adopted a draft code of offences against the peace and security of mankind. At different stages in the preparation of this draft, Governments communicated their observations, which the International Law Commission took into consideration (paras. 37 and 39 above).

207. Article 2 of the draft code contains a definition of crimes against the peace and security of mankind. This definition repeats in substance the three categories provided for in the Charter of the Nürnberg International Military Tribunal.[15/] The draft also repeats verbatim the definition of the crime of genocide given in the Convention on the Prevention and Punishment of the Crime of Genocide.

208. As stated above (para. 52), the General Assembly by its resolution 1186 (XII) and 1187 (XII) dated 11 December 1957, decided to defer consideration both of the draft code of offences against the peace and security of mankind and of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression.

15/ See para. 38 above, comment on article 2, paras. 1, 3, 10 and 11. There are some differences between the text of the definition given in the Charter of the Nürnberg International Military Tribunal and the corresponding provisions of article 2 of the draft code; these differences are brought out in the comment on that article (see para. 39 above, comment on article 2, para. 11).

209. Until such time as the draft code is adopted and settles the problem of the application of a period of limitation to the crimes it deals with, the proposed convention could take over the definition of the crimes in question embodied in the code. That, certainly, would be a desirable way out, for this definition is the best at present available; but the thought inevitably occurs that such a definition might well fail to win the necessary votes for its adoption. However, there are definitions already established in international law which would be readily used in the convention. In particular, there is the definition given in the Charter of the Nürnberg International Military Tribunal and affirmed by the General Assembly, the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide, and the definitions embodied in the 1949 Geneva Conventions. Those definitions could be incorporated in a provision so worded as to allow of their adaptation to the evolution of international law.

210. As regards crimes against mankind, including genocide, which is a particular case or such crimes, the convention should take account of the fact that they ought no longer to be regarded, as they were in the law of Nürnberg, as a category of offences accessory to crimes against peace and war crimes.

211. Thus, by means of the convention the contracting parties could:

(1) Declare, in conformity with international law, to be not subject by their intrinsic nature to a period of limitations, at whatever date they may have been committed,[16/] crimes against peace, crimes against mankind whether committed in time of war or in time of peace, and war crimes, as defined in the following texts or any other texts of international law:

(a) The Charter of the Nürnberg International Military Tribunal, the principles of which were affirmed by resolution 95 (I) of the General Assembly and which defines crimes against peace, war crimes and crimes against humanity;

(b) The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, defining the crime of genocide;

(c) The 1949 Geneva Conventions, defining serious war crimes;

16/ The phrase "at whatever date they may have been committed" would doubtless be technically superfluous, the point involved being already stated in unambiguous terms in the text of the declaration, in which the principle of the inapplicability of a period of limitation would be founded on "international law" and on the "intrinsic nature" of the crimes in question. Nevertheless, it might be desirable to retain the phrase in order to avoid any possible misunderstanding.

(2) Pledge themselves to adopt any legislative measures necessary to ensure the observance in their municipal law of the principle of the non-applicability of a period of limitation to the crimes in question.

212. It might be useful to include in the convention a provision whereby the parties would undertake to communicate within a given time-limit, such as a year or two, to the Secretary-General, for transmission to the other parties, all legislative and other measures adopted in implementation of the convention.

213. It would be desirable for the convention to limit itself to the solution of this one aspect of the "question of punishment of war criminals and of persons who have committed crimes against humanity". Any attempt to resolve other aspects of the question in the same instrument might well prevent the convention, and therefore the principle of the inapplicability of a period of limitation embodied in it, from winning the requisite universal support. It should be borne in mind that a convention limited to the affirmation of that principle could be accepted without great difficulty, for on the one hand it would be in line with the tradition of a great many countries in which the period of limitation is unknown or does not apply to serious crimes, and on the other hand it would express the present trend in a great many countries which accept this institution for all crimes towards preventing its application to the international crimes in question.

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214. To sum up, in order to ensure the incorporation of the principle of the inapplicability of a period of limitation in municipal laws, it might be desirable to proclaim the principle explicitly:

1. As regards the crime of genocide in particular, by means of a General Assembly resolution interpreting the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (paras. 184-191 above);

2. As regards all war crimes and crimes against peace and against humanity, either by means of an international convention (paras. 201-203 above), or by means of a General Assembly resolution (para. 201 above).
