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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

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CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

D. Draft Code of Crimes against the Peace and Security of Mankind

[Articles 14 to 15]

GE.96-62832 (E)

Article 14

Defences

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Commentary

(1) Article 14 relates to defences, in other words, to facts which, if they were established, would wipe out the criminal character of a specific act. The classic defence for a crime is self-defence. However, the individual and collective self-defence of States provided for in Article 51 of the Charter should not be confused with self-defence, as was sometimes invoked by individuals prosecuted for crimes against the peace and security of mankind after the Second World War. This notion of self-defence, which is not recognized in the charters of the international military tribunals established after the Second World War was discussed by the United Nations War Crimes Commission. According to that Commission, a plea of self-defence may be entered by someone charged with violence committed against the person of another human being resulting in death or serious injury if this use of force was necessary to avoid an immediate threat of death or serious injury caused by another human being.

(2) However, a defence which wipes out the criminal character of an act and operates as if the act had never existed should not be confused with cases of exculpation, in which the crime continues to exist and in which the perpetrator's responsibility disappears or is mitigated. In contrast to defences which, other than the case of self-defence, are not admissible in international criminal law, pleas of exculpation are more common. These are duress or state of necessity, superior orders, mistake of fact or the immaturity of the perpetrator on account of his age.

(3) For the purposes of admissibility, duress must, according to the jurisprudence of the international military tribunals, meet three requirements:

(a) There had to be a serious and unavoidable danger to the perpetrator of the crime;

(b) There was no other means of escape than to commit the crime;

(c) The act committed to escape the danger was not disproportionate to the evil that the perpetrator wanted to escape.

(4) Superior orders, to constitute a case that excludes responsibility, should be assimilated to duress. The judgment of the Nürnberg Tribunal stated: "That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." 1/ In other words, an individual who was responsible in some measure for the existence or non-existence of the order or whose participation exceeded the requirements thereof cannot claim to have been deprived of a moral choice as to his conduct. 2/ The admissibility of the plea of superior orders is consequently subject to extremely strict requirements in accordance with the jurisprudence of military tribunals.

(5) The same is true of state of necessity. The jurisprudence of the military tribunals sometimes rejected and sometimes admitted the exception of state of necessity, depending on the circumstances of the case. In the case of labour from an occupied territory recruited for military operations, the Tribunal stated that "such a view would eliminate all humanity and decency and all law from the conduct of law and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations". 3/ However, the Tribunal recognized a plea of necessity as an exculpatory factor in relation to charges of spoliation because the prohibition of

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1/ Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945-1 October 1946, Nürnberg, 1947.

2/ The United States Military Tribunal which conducted the trial in the *I.G. Farben* case, discussed the relevance of superior orders in determining the validity of a defence of necessity as follows: "From a consideration of the IMT, Flick, and Roechling judgments, we deduce that an order of a superior officer or a law or governmental decree will not justify the defense of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative."

3/ Law Reports, vol. XII, p. 93 ... .

this type of devastation was formulated in terms of conduct that was not justified by military necessity. 4/

(6) A mistake of fact was also recognized as a possible defence or exculpatory factor in some of the war crime trials conducted after the Second World War. A mistake of fact may provide a basis for exculpation only when it involves a material fact which relates to an element of the crime. For example, the status of an individual as a protected person under international humanitarian law relates to an element of various war crimes involving the mistreatment of protected persons. In addition, a mistake of fact constitutes a valid defence or exculpatory factor only when it is the result of a reasonable and honest error of judgment rather than ignoring obvious facts. 5/

4/ The United States Military Tribunal discussed the plea of military necessity in relation to the charge of spoliation as follows: "The devastation prohibited by the Hague Rules and usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operation and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge." Law Reports, vol. XII, pp. 93-94.

The expression "A great deal of latitude must be accorded to him under such circumstances" proves that the notion of necessity is a question of fact that depends largely on the circumstances in which the act has been committed. For this reason, the plea of a state of necessity is sometimes admitted and sometimes rejected.

5/ The United States Military Tribunal which conducted the *Hostages Trial* recognized mistake of fact as a possible exculpatory factor in the following circumstances: "In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence." *Law Reports*, vol. XV, p. 184.

(7) The notion of the age of criminal responsibility recognizes that individuals below a certain minimum age are incapable of fully comprehending the nature and consequences of their conduct and therefore cannot be held criminally responsible for that conduct. The United Nations War Crimes Commission did not conduct an exhaustive analysis of the ages of the persons convicted in the war crime trials conducted after the Second World War, but stated that persons as young as fifteen years of age were convicted and punished in some of the these trials. 6/ Thus, the competent court may have to decide whether the fact that an accused was of a young age when he committed an act that would otherwise constitute a crime covered by the Code constitutes an exculpatory factor in accordance with general principles of law and in the light of the character of that crime under the present article if this question is raised in a particular case. 7/ The Commission noted that it was difficult to imagine a young person committing some of the crimes set out in Part II, notably the crime of aggression.

(8) In short, apart from self-defence, the other pleas by the accused, namely duress or state of necessity, superior orders, mistake of fact or the age of perpetrator do not constitute defences and may only be entered as pleas for mitigation of criminal responsibility.

6/ *Law Reports*, vol. XV, p. 185.

7/ The general principle of a minimum age requirement for criminal responsibility was recognized in Rule 4.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). General Assembly resolution 40/33, annex. The Beijing Rules did not, however, establish an international standard for the age of criminal responsibility. Moreover, the definition of a juvenile for purposes of excluding the application of criminal law varies greatly in different legal systems, ranging from 7 years to 18 years or above. The commentary to Rule 4.1 suggests that the current trend is to consider "whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour." *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, p. 172.

Article 15

Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

Commentary

(1) The general principle of the liability of an individual to punishment for a crime covered by the present Code is set forth in article 3. The competent court which convicts an individual of such a crime is entrusted with the task of determining an appropriate punishment for that crime in accordance with the relevant provisions of its applicable substantive and procedural criminal law. In this regard, the court is required to take into account the character and the gravity of the crime covered by the Code in considering the punishment to be imposed on a convicted person for that crime in accordance with article 3.

(2) Whereas article 3 is intended to ensure that the punishment contemplated by the court is commensurate with the crime, article 15 is intended to ensure that the court considers any relevant extenuating circumstances or mitigating factors before taking a final decision on the question of punishment. The fundamental aim of criminal law with respect to the punishment of an individual who is convicted of violating this law is justice. The interests of justice are not served by imposing an excessive punishment which is disproportionate to the character of the crime and the degree of culpability.

(3) The extenuating circumstances pertain to general categories of factors which are well-established and widely recognized as lessening the degree of culpability of an individual or otherwise justifying a reduction in punishment. For example, the court may take into account any effort made by the convicted person to alleviate the suffering of the victim or to limit the number of victims, the less significant form of criminal participation of the convicted person in relation to other responsible individuals or the refusal to abuse a position of governmental or military authority to pursue the criminal policies. The Nürnberg Tribunal considered such mitigating factors in deciding to impose prison sentences rather than the death penalty on some convicted persons. 8/ The Commission noted that the extensive jurisprudence of the military tribunals and the national courts which conducted the

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8/ Nürnberg Judgment, pp. 134, 158-159 and 161.

subsequent war crime trials after the trial of the major war criminals by the Nürnberg Tribunal could provide some indications to the competent court of extenuating circumstances. In this regard, the United Nations War Crimes Commission noted that in the subsequent war crime trials conducted after the Second World War some convicted persons entered pleas for mitigation of sentence based on their age or family responsibilities. 9/ Moreover, the fact that the accused provided substantial cooperation in the prosecution of other individuals for similar crimes could also constitute a mitigating factor, as provided for in the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia (Rule 101) 10/ and Rwanda (Rule 101). 11/

9/ *Law Reports...*, vol. XV, p. 187.

10/ United Nations document IT/32/Rev.8, p. 62.

11/ United Nations document ITR/3/Rev.1, p. 91.