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

CHAPTER IV

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

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CHAPTER IV

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

1. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment 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 the principles mentioned in (a) above. The Commission, at its first session, in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.
2. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 1/
3. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.
4. The General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.
5. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the

1/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 2/

6. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 3/ The Commission, from its thirty-fifth session, in 1983, to its forty-second session, in 1990, received eight reports from the Special Rapporteur. 4/

7. During these sessions, the Commission took certain preliminary decisions regarding the content ratione personae and the content ratione materiae of the draft Code. 5/ It also referred to the Drafting Committee articles 1 to 17, X and Y contained in the Special Rapporteur's reports. 6/ In addition, at those sessions, the Commission provisionally adopted the following articles:

2/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English. Accordingly, the title of the topic in English reads "Draft Code of Crimes against the Peace and Security of Mankind".

3/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (Official Records of the General Assembly, thirty-eighth session, Supplement No. 10, (A/38/10), paras. 26 to 41).

4/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377. Yearbook ... 1985, vol. II (Part One), document A/CN.4/387; Yearbook ... 1986, vol. II, document A/CN.4/398; Yearbook ... 1987, vol. II (Part One), document A/CN.4/404; Yearbook ... 1988, vol. II (Part One), document A/CN.4/411 and Yearbook ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr. 1 and 2 (Spanish only); Yearbook ... 1990, vol. II (Part One), document A/CN.4/430 and Add.1

5/ Yearbook ... 1984, vol. II (Part Two), p. 17, document A/39/10, para. 65.

6/ For a more detailed account of the Commission's work on the topic at these sessions, see the Reports of the International Law Commission on the work of its thirty-seventh session, (Official Records of the General Assembly, fortieth session, Supplement No. 10 (A/40/10), paras. 34 to 101), thirty-eighth session (Ibid., forty-first session, Supplement No. 10 (A/41/10), paras. 77 to 185), thirty-ninth session (Ibid., forty-second session, Supplement No. 10 (A/42/10), paras. 25 to 66), fortieth session (Ibid., forty-third session, Supplement No. 10 (A/43/10), paras. 211 to 280), forty-first session (Ibid., forty-fourth session, Supplement No. 10 (A/44/10), paras. 83 to 217) and forty-second session (Ibid., forty-fifth session, Supplement No. 10, (A/45/10), paras. 27 to 158).

1 (Definition); 2 (Characterization); 3 (Responsibility and punishment); 4 (Obligation to try or extradite); 5 (Non-applicability of statutory limitations); 6 (Judicial guarantees); 7 (Non bis in idem); 8 (Non-retroactivity); 10 (Responsibility of the superior); 11 (Official position and criminal responsibility); 12 (Aggression); 13 (Threat of aggression); 14 (Intervention); 15 (Colonial domination and other forms of alien domination); 16 (International terrorism); 18 (Recruitment, use, financing and training of mercenaries) and X (Illicit traffic in narcotic drugs), with the commentaries thereto. 7/

B. Consideration of the topic at the present session

8. At the present session, the Commission had before it the Special Rapporteur's ninth report on the topic (A/CN.4/435 and Add. 1 and Corr. 1), which consisted of two parts. In Part One, the Special Rapporteur dealt with "penalties applicable to crimes against the peace and security of mankind". In this part of his ninth report, the Special Rapporteur pointed out that the principle nulla poena sine lege required that provision should be made for penalties in the draft Code, an undertaking which, however, entailed certain difficulties tied in with the diversity of legal systems or with procedural problems. In the case of difficulties related to the diversity of legal systems, the Special Rapporteur indicated that, whereas in domestic law, there was in each State a certain unity of moral and philosophical concepts that justified a single system of punishment applicable to all offences, in international law the diversity of concepts and philosophies was such as to be hardly conducive to a uniform system of punishment. Certain punishment current in some countries was unknown in others. As examples of this diversity, he examined in particular the differing attitudes in various countries and regions of the world towards the death penalty and towards other afflictive penalties, such as physical mutilation. He concluded that it was extremely difficult to institute a single internationally and uniformly applicable system of punishment. As to procedural difficulties, the Special Rapporteur wondered whether a penalty should be specified for each crime against the peace and security of mankind or whether, since all of the

7/ For the text of the articles see Section D.I below.

crimes in question were marked by the same degree of extreme seriousness, a general formula should be adopted which stipulated the same penalty for all crimes, with a minimum and a maximum, depending on whether or not there were extenuating circumstances. Other procedural problems lay in determining whether the provisions of the Code, including those on penalties, should be directly incorporated into domestic law or whether penalties should be included in the Code itself, which would be adopted by an international convention. The Special Rapporteur favoured the latter solution. He submitted, at the end of Part One, a single draft article (draft article 2) on penalties applicable to all crimes against the peace and security of mankind.

9. In Part Two of his ninth report, the Special Rapporteur pointed out that, on the one hand, in resolution 45/41 of 28 November 1990 the General Assembly invited the Commission "to consider further and analyse the issues raised in its report on the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism". On the other hand, the General Assembly had refrained, at least at that stage, from choosing between resort to a system of universal jurisdiction, the establishment of an international criminal court or the establishment of some other trial mechanism. Consequently, the Special Rapporteur did not submit a draft statute for an international criminal court. He none the less wanted a more in-depth discussion in the Commission of two major issues that had to be solved in order to provide him with the necessary guidance in drafting a possible statute. The two issues were the court's jurisdiction, and the requirements for instituting criminal proceedings. Accordingly, he submitted in his report two draft provisions on these two issues that were intended as a basis for discussion and would perhaps reveal an overall trend that would be a useful guide to him.

10. The Commission considered the Special Rapporteur's ninth report at its 2207th to 2214th meetings. After hearing the Special Rapporteur's presentation, it considered draft article 2, on applicable penalties, and the part of his report on the possible establishment of an international criminal court. At its 2214th meeting, the Commission decided to refer draft article 2 to the Drafting Committee for consideration in the light, more particularly, of the specific proposals made by members of the Commission, including the

Special Rapporteur, during the discussion. The comments and observations of members of the Commission on the Special Rapporteur's ninth report are summarized in Section C.I, II and III below.

11. At its 2207th to 2241st meetings, the Commission, after considering the report by the Chairman of the Drafting Committee, provisionally adopted articles 11 (Order of a Government or a superior), 14 (Defences and extenuating circumstances), 19 (Genocide), 20 (Apartheid), 21 (Systematic or mass violations of human rights), 22 (Exceptionally serious war crimes) and 26 (Wilful and severe damage to the environment). The Commission also provisionally adopted a new article 3 (Responsibility and punishment) and divided the larger part of the text of former article 3 into two new articles, namely article 4 (Motives) and article 5 (Responsibility of States).

12. The Commission also renumbered several articles provisionally adopted at earlier sessions: former article 4 (Obligation to try or extradite) became article 6; former article 5 (Non-applicability of statutory limitations) became article 7; former article 6 (Judicial guarantees) became article 8; former article 7 (Non bis in idem) became article 9; former article 8 (Non-retroactivity) became article 10; former article 10 (Responsibility of the superior) became article 12; former article 11 (Official position and criminal responsibility) became article 13 (Official position and responsibility); former article 12 (Aggression) became article 15; former article 13 (Threat of aggression) became article 16; former article 14 (Intervention) became article 17; former article 15 (Colonial domination and other forms of alien domination) became article 18; former article 16 (International terrorism) became article 24; former article 18 (Recruitment, use, financing and training of mercenaries) became article 23; and former article X (Illicit traffic in narcotic drugs) became article 25.

13. Again, in connection with the draft articles relating to crimes that had already been adopted at earlier sessions, the Commission either added an introductory paragraph or slightly recast the articles to cover the question of attributing the crimes to individuals and of punishment. This applies to the following draft articles, in the new numbering: 15 (Aggression); 16 (Threat of aggression); 17 (Intervention); 18 (Colonial domination and other forms of alien domination); 23 (Recruitment, use, financing and training of mercenaries); 24 (International terrorism) and 25 (Illicit traffic in

narcotic drugs). It was agreed that, as a result of adding a paragraph or slightly recasting the text, purely editing changes would be made in the commentaries to these articles.

14. In addition, the Commission made the following changes in the text of draft articles provisionally adopted at earlier sessions: in the footnote to the title of article 6 (Obligation to try or extradite) (former article 4), the word "jurisdiction", in the French version, was replaced by "tribunal"; the same change was made in the footnote to paragraph 1 of article 9 (Non bis in idem) (former article 7) and the word "jurisdiction" was replaced by the word "tribunal"; in the chapeau of paragraph 4 of article 15 (Aggression) (former article 12), the words "In particular", appearing in square brackets, were removed.

15. With regard to structure, the Commission decided to divide the Code into two parts. Part I consists of two chapters, chapter 1 entitled "Definition and characterization" (articles 1-2), and chapter 2 entitled "General principles" (articles 3-14). Part II is entitled "Crimes against the peace and security of mankind" (articles 15-26). It was agreed in the Commission that the order adopted in the draft for presenting the articles relating to crimes did not in any way whatsoever seek to indicate any kind of order of seriousness of the crimes involved.

16. The Commission decided to defer the question of applicable penalties to the second reading of the draft, so as to examine it in the light of the discussion held in the Commission at the present session (see paragraphs ... to ... of this report) and bearing in mind the comments and observations of Governments on the matter.

17. The Commission also decided that, on second reading of the draft and in the light of the comments and observations of Governments, it would discuss the issue connected with paragraph 3 of draft article 3, namely whether all of the crimes under the draft Code or only a number of them could involve attempt, and in the latter case, what the crimes were.

18. The Commission adopted the draft as a whole on first reading at its 2241st meeting, on 12 July 1991. In doing so the Commission is none the less mindful that the draft Code is still open to some improvements, which can be made on second reading, with the benefit of further points made in the comments and observations by Governments. The draft is reproduced below, in Section D.I of this chapter.