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

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Addendum

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GE.93-61781 (E)

General observations

1. Several members expressed their satisfaction and their admiration at the conscientious and delicate work done by the Special Rapporteur, who, after several years of preliminary exploratory work, had succeeded in formulating a draft statute of an international criminal court which invited the Commission to undertake its task with pragmatism, realism and flexibility.

2. Commenting in general terms and in a preliminary way on the orientation of the work, several members stressed that the draft statute should, in regard to the composition and the jurisdiction of the court, the applicable law, the investigation, the administration of the evidence and the procedure in the court, including the execution of penalties, provide the foundations and legal guarantees for an impartial judicial institution based on the principles of the primacy of law and should be free, as far as possible, from political considerations - a point which was viewed as especially important inasmuch as the cases referred to the court would be mostly of a political nature. The remark was made in this context that the moral integrity, independence and competence of the members of the court were factors of the highest importance.

Nature of the Court

3. As at previous sessions of the Commission, it was noted that the question whether an international criminal court ought to be a permanent organ or an ad hoc institution was a matter that would need consideration.

4. Some members objected to the resort to ad hoc courts. A first argument was that the members of a court established in response to a particular situation might be influenced by that situation and fail to observe the rules of objectivity and impartiality. Furthermore, at the internal level, ad hoc or "special" criminal courts were essentially tools used by despotic regimes and resort to such courts at the international level would set a bad example, to the detriment of human rights and the rule of law.

5. A second argument was that ad hoc courts would not be enough of a deterrent particularly as some time was needed to establish a court, however short-lived. Furthermore deterrence was apparent in any clearly proclaimed intention of the General Assembly and the Security Council to investigate crimes that were being committed in specific contexts and it was therefore not absolutely essential to set up institutions that would perhaps not be unimpeachable from the legal standpoint.

6. Other members pointed out that there was, in certain circumstances, a need for promptness and effectiveness which had in the past led to the establishment of ad hoc tribunals. The remark was made in this connection that a single monolithic permanent court, designed to take account of widely diverse needs might very well fail to meet any of those needs satisfactorily.

7. Some members felt that the court whose statute the Commission was to formulate under the mandate given to it in paragraph 6 of resolution 47/33 should be a permanent institution. Concern was expressed in this connection that the search for excessively flexible solutions regarding the jurisdiction and composition of the court might ultimately lead to an unacceptable result, namely the creation of ad hoc courts. Other members felt that at this juncture, and particularly as it was uncertain whether a permanent international criminal court was likely to be utilized to the degree that would justify the funding it would require, it would be more realistic to envisage a court that would not be in permanent session rather than a permanent court.

Mode of creation of the court

8. Some members felt that an international criminal court should be established by way of a multilateral convention under the auspices of the United Nations and not by a decision of the Security Council, taking into account the general principles of criminal law and the functions of the Security Council under the Charter. Other members however stressed that the Security Council was empowered in the framework of its mandate under the Charter to take the steps needed to respond appropriately to a perceived need.

Relationship to the United Nations

9. The question of the relationship that should obtain between the Court and the United Nations was recognized as being of fundamental importance. One view, also shared by the Special Rapporteur, was that the Court, for a number of very substantial reasons, should be a subsidiary organ of the United Nations. Such an approach, it was stated, would clearly demonstrate acceptance of the principle of the criminal responsibility of the individual towards the world community, confer the requisite authority on the Court, open the way to universal recognition of its jurisdiction and guarantee that it functioned in the general interest. Some members observed that if the Court was to be an organ of the United Nations, its establishment would require either an amendment of the Charter, which did not seem very likely, or

a resolution of the General Assembly (Article 22 of the Charter) or of the Security Council (Article 29). Joint establishment by similar resolutions of both of those bodies was described as an appropriate solution to which there was no impediment under the terms of Articles 10 and 24 of the Charter.

10. Some members disagreed with this approach, which, it was stated, had been rejected by the Commission at the previous session. The view was expressed in this context that it was not possible to establish an international criminal court as a judicial organ of the General Assembly or the Security Council under a resolution adopted by either of those bodies, which, it was stated, were not empowered to do so by the Charter. In the view of the members in question, the Court should be an entity established by inter-State treaty, separate in status from the United Nations but having, nevertheless, under appropriate agreements, a close cooperative relationship with the United Nations. The remark was made that such a course, unlike the establishment of the court by the General Assembly, would avoid questions as to whether amendment of the Charter was necessary. The view was also expressed that such a course (namely establishment of the court by inter-State treaty with closest possible cooperation between the court and the United Nations under appropriate agreement) was clearly desirable if only because it would avoid the very difficult questions that would otherwise be raised as to whether or not amendment of the Charter would be necessary.

Law to be applied by the Court

11. The Special Rapporteur drew attention to what appeared to him to be concurrence in the Commission that the Court should apply international conventions and agreements relevant to the crimes within its jurisdiction; but, in his view, that was as far as concurrence appeared to go.

12. Some members felt that the Commission should broaden the sources of applicable law and include therein the general principles of law and custom. Mention was also made in this context of internal law, and it was recalled that in the 1992 report of the Working Group there had been a reference to the law enacted by organs of international organizations, in particular the United Nations. The question was asked whether it would not be preferable, in so far as the substantive law to be applied by the Court was concerned, for the Statute to directly define what would be regarded as international crimes for the purpose of the Statute, rather than deal with such a matter through a provision on applicable law. The law to be applied by the Court was viewed as

including substantive law on what constituted the relevant international crimes; rules of evidence and procedure to be followed and applied by the Court in the conduct of its proceedings; and national laws to which the Court would need to have regard in determining the sentences it would impose.

Jurisdiction

13. On the question of the personal jurisdiction (ratione personae) of the court, it was agreed that the jurisdiction of the Court would apply solely to individuals.

14. As regards the subject-matter jurisdiction (ratione materiae) of the court, the Special Rapporteur proposed in his draft statute that, pending the adoption of a code of crimes, offences falling within the jurisdiction of the Court should be defined by special treaties between States parties or in a unilateral instrument of a State. According to that proposal, treaties or unilateral instruments would determine and clearly define the offences for which one or more States recognized the jurisdiction of the Court.

15. The notion that the court's jurisdiction should be founded on the principle of its acceptance was supported by some members, although emphasis was placed on the need to supplement it by a provision recognizing the jurisdiction of the Court on the basis of pre-existing multilateral conventions such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, which conferred jurisdiction on an international court in respect of disputes arising out of their application.

16. Other members expressed reservations in this connection. The remark was made that it was difficult to admit that States could, by special treaties or by a unilateral instrument, specify which offences were to fall within the jurisdiction of the court. The court's jurisdiction should be clearly defined and should not depend on whether such or such a State accepted it or not.

17. As regards the State or States whose consent would be required for the court to be competent to try an accused person, the Special Rapporteur proposed, in his draft statute, that the court be given jurisdiction to try any individual, provided the State of which he was a national and the State on whose territory the crime had presumably been committed agreed to its jurisdiction. Some members emphasized that territorial jurisdiction was the

rule most usually applied and should be favoured, since the consent of the State of which the accused was a national was simply a residual rule that should operate only in certain cases.

18. Other members expressed doubts on the Special Rapporteur's proposal as a whole. In their opinion, making the court's jurisdiction conditional upon acceptance by the State of which the individual was a national and on the territorial State would markedly diminish the court's effectiveness and paralyse the court if one of the two States refused to agree to its jurisdiction. In the opinion of those members, it should be enough for the State lodging a complaint about a crime to be able to express its readiness to hand the perpetrator over to the court, which would be free to engage in proceedings or not.

Appointment of judges

19. The Special Rapporteur's proposal that each State party to the statute of the court should appoint a judge fulfilling certain conditions and that the Secretary-General of the United Nations prepare an alphabetical list of the judges appointed by States met with reservations. The formula was viewed as possibly justifiable for an organ such as the Permanent Court of Arbitration, but inappropriate for an international criminal court, whose judges would have in their hands the honour, reputation and freedom of individuals and would be exposed to pressure and threats of all kinds. Objections were raised to a judicial system that would provide first, for judges to be appointed to an international criminal court by their own Governments, outside any impartial international election process, and second, for them to be assigned to their national residence without any guarantee of security when the court was not sitting.

20. Some members favoured a formula whereby judges would be elected by the General Assembly of the United Nations. Such a formula, it was stated, would contribute to the independence and impartiality of judges, while strengthening the links between the United Nations and the court.

Structure of the court

21. A number of questions were raised and points made, in light of the proposals contained in the Special Rapporteur's report, as to whether the court should be composed of chambers, and what their responsibilities, number and composition should be; whether there should be a bureau of the court, consisting of the President and Vice-Presidents of the court for overall

supervisory responsibilities; whether the prosecuting authority should be a part of the overall structure of the court; and whether there should be established a registry for administrative responsibilities.

22. As to the seat of the court, it was noted that the Special Rapporteur viewed the issue as an essentially political one to be discussed by the Sixth Committee, which would make proposals to the General Assembly. While there was no disagreement with this view, the remark was made that the statute should allow for the court to sit elsewhere than at the place of its seat and the question was asked whether, in cases where the court would have to try a national of the State in which it had its seat, such proximity would not be detrimental to the serenity of the proceedings.

Submission of cases to the court

23. With reference to the Special Rapporteur's proposal that a case should be submitted to the court on the complaint of a State, i.e. any State, whether or not a party to the statute, the remark was made that the solution to be adopted in this connection would have repercussions on the prosecution procedure: if the prosecution was to be conducted by States, it was logical that States should submit cases to the court, as the Special Rapporteur proposed; if, on the other hand, an organ of the court or a prosecuting authority was to conduct the prosecution, the right to submit a case could be open to complainants other than States - for instance, international organizations, and possibly certain non-governmental organizations of a humanitarian character. It was suggested to enable the United Nations, and more particularly the Security Council and the General Assembly to submit cases to the court.

Prosecuting authority

24. On this point, two alternatives were considered in the Special Rapporteur's report: one, that the complainant State (the State referring a case to the court) should also be responsible for the prosecution of the case before the court; the other, that prosecution of a case before the court should be the responsibility of a prosecuting authority, independent of the complainant State and the court.

25. The second alternative was generally preferred. Mention was made in this context of the requirements of neutrality and impartiality and of the importance of interposing a "filter" between prosecution and judgement. A prosecuting authority representing the international community, acting quite

independently and over and above any political considerations was viewed as essential to the proper functioning of the court and the serenity of the proceedings.

Investigation

26. In his draft statute, the Special Rapporteur proposed that, if the court deemed the complaint admissible, it should summon the accused to appear before it and, after having heard the accused and considered the evidence, decide whether or not to institute an investigation.

27. The remark was made that instead of asking the whole court to decide whether or not a complaint was admissible, it might be preferable to entrust that responsibility to the Bureau of the court. It also asked which authority would decide whether or not an investigation should be instituted.

Handing over of an accused person to the court

28. The Special Rapporteur's draft statute provided that each State party to the statute would have to hand over to the court, at its request, any person against whom the court had instituted proceedings for crimes that fell within its jurisdiction; at the same time that State would ensure that the proceedings had not been instituted on political, racial, social, cultural or religious grounds; that the accused did not enjoy immunity from prosecution; and that the handing over would not be contrary to the principle of non bis in idem.

29. The remark was made that the Special Rapporteur's proposal did not take account of cases where the accused had fled the territory of the complainant State nor of cases where the accused was in the territory of a State which was not a party to the statute. It was proposed that, in such cases, the court be authorized by its statute to request the Security Council to secure the handing over of the accused.

30. Doubts were furthermore expressed on whether the State requested to hand over the accused could affirm that a decision of the court had been taken on political, racial, social, cultural or religious grounds. Attention was also drawn to the legal impediments that might derive from treaties of extradition.

Trial proceedings

31. There was general agreement that the statute should ensure a fair and impartial trial, conducted in accordance with the applicable rules, with due regard to the rights of the accused and the necessary judicial guarantees as provided in international conventions, such as the International Covenant on

Civil and Political Rights. The importance of a trial being public and that an accused be tried in his presence was emphasized by the Special Rapporteur, even though he noted that provision would need to be made for the case where an accused might through deliberate absence successfully evade the jurisdiction of the Court.

32. As regards the latter point, the remark was made that, if judgement by default was not permitted, all the accused would have to do to escape proceedings was to take refuge in a State which was not a party to the statute of the court. That State might simply take no action and allow the accused to leave for a friendly country, so as not to have to extradite or try him, a result which was particularly to be feared in the case of political leaders. Judging by default, on the other hand, would mean that threat of arrest would hang over the accused like the sword of Damocles. It was also said that if the court was empowered to judge by default, it could, in view of its moral and legal authority, be able to reach decisions that would have a definite political weight and would also bring to the attention of world public opinion facts of which it had previously only had partial knowledge. The suggestion was made that, in order to avoid any conflict with the provisions of certain international instruments, particularly the International Covenant on Civil and Political Rights, the possibility should be considered of not automatically applying the penalty imposed if the accused subsequently agreed to appear before the court, in which case the sentence might be reviewed in his presence and confirmed or rejected, as appropriate.

Penalties

33. In his report, the Special Rapporteur noted that having regard in particular to the principle nulla poena sine lege, it was necessary, in the absence of an international code of crimes prescribing penalties, that the Statute should, as regards penalties, provide for reference to appropriate national laws such as the national law of the accused or the law of the State in which the crime was committed.

34. Some members stressed that it was necessary in this area to refer to national law since none of the international instruments to which reference might be made provided for penalties. Attention was drawn, in particular, to territoriality, i.e. the application by the court of the penalties stipulated by the criminal law of the State in whose territory the crime was committed. The remark was made in this context that where a State left it to an

international criminal court to judge the perpetrator of a crime committed in its territory, that transfer of jurisdiction entailed a transfer of the provisions of that States's criminal law and of the rules applicable to penalties. It was also said that the territoriality criterion would avoid what might be described as "à la carte" penalties, as might be the case if several persons were accused of having committed the same crime in the territory of the same State and the court decided to apply the penalties stipulated by the criminal law of the State of which each of the accused was a national. A further observation was that referring to national law in connection with penalties would be incompatible with the international nature of the court. Various views were expressed on the Special Rapporteur's proposal that the death penalty should be ruled out.

Revision and appeal

35. The Special Rapporteur noted that he had in his report presented alternative provisions: one, for revision alone, should, for example, a fact of decisive importance to a case, unknown prior to the judgment of the Court, be discovered thereafter; the other for revision, as well as for appeal.

36. The remark was made that a principle of human rights legislation was that it should always be possible to appeal against a judgment pronounced by a court and that revision was, therefore, not sufficient. The view was on the other hand expressed that revision alone would provide enough of a guarantee because of the court's high standards and because the trial would necessarily take place in the presence of international observers and would be reported on at length by the international media. A further observation was that the question of remedies and that of the jurisdiction of the court were closely related and should be dealt with together.

Right of pardon and conditional release

37. The Special Rapporteur proposed in his draft statute that the right in question be exercised by the State in charge of executing the sentence, after consultation with the other States concerned. The remark was made that the wording of that proposal did not clearly indicate whether the State in charge of executing the sentence had the initiative for granting pardon and conditional release or whether it had to follow the advice offered in its consultations with the other States concerned.

38. At the end of the discussion on his eleventh report, the Special Rapporteur noted that there was general agreement on the need to provide for a link between the court and the United Nations. He observed that the court, aside from the fact that it would need the United Nations logistical support for its administrative functioning, would have jurisdiction in matters of direct concern to the United Nations, such as war crimes and crimes against the peace and security of mankind, and would necessarily have to take into account the Charter of the United Nations and the resolutions of the Security Council. As to the applicable law, the Special Rapporteur pointed out that at the Commission's previous session, the Working Group had concluded that the applicable law should be confined to agreements and conventions, a view which he did not share, as his earlier reports made clear. Some matters were not ripe and it would be necessary to have recourse to national law. For instance, no appropriate formulation had yet been found for penalties, which varied greatly, depending on the State and the philosophy involved. If the court was to respect the principle of nulla poena sine lege, it would have to refer to a State's national law when it found that it was faced with a legal vacuum.

39. With regard to the State or States whose consent was necessary for the court to have jurisdiction to try an accused person, the Special Rapporteur noted that differences of opinion had emerged in the Commission. In his view, a court could not be created without taking into consideration the existence and jurisdiction of States. Some form of compromise thus had to be found because the court could only function with the agreement of States. Jurisdiction could perhaps be dependent on acceptance by the State in whose territory the accused was found, for without such acceptance, the court would constantly be judging by default.

40. In the matter of the organization of the court, the Special Rapporteur had no strong views on whether judges should be appointed or elected, as long as they were afforded certain guarantees, for instance, that they could not be removed or could not be sanctioned for the decisions they took.

41. With regard to the prosecution, the Special Rapporteur pointed out that he had proposed a text providing that the complainant State should be responsible for conducting the prosecution, not a prosecutor general. He had

done so because experience indicated that, even in courts in which the prosecutor general was responsible for prosecution, the complainant took part in the proceedings, pleading the case and bringing forward evidence in support of allegations made.

42. So far as the investigation procedure was concerned, the Special Rapporteur had proposed that the investigation be carried out by the court itself, at the hearing. If a case was too complex, a court might appoint a special committee from among its members to conduct the investigation. He had, however, no objection to an investigative body even though such a body would not make for the small, flexible structure called for by the 1992 Working Group. He viewed the system of the examining magistrate as unsatisfactory because it entailed the risk of arbitrary decisions concerning the freedom of an individual. If the investigation was to respect human rights, the powers of the examining magistrate had to be limited as much as possible and another arrangement had to be found in which the magistrate reached his decision not according to his mood, but in accordance with the law. Hence, in the Special Rapporteur's view, the investigation should be carried out not behind closed doors, but at a public hearing.

43. With regard to the handing over of the accused to the court, the Special Rapporteur indicated that, in providing in the relevant draft article that the State requested must ensure "that the accused does not enjoy immunity from prosecution", he had merely been referring to one of the conclusions of the 1992 Working Group.

44. As to remedies, the Special Rapporteur noted that revision had been generally accepted during the discussion and that no member of the Commission had been categorically opposed to appeal.

2. Establishment of the Working Group on a draft statute for an international criminal court

45. The Commission at its 2298th meeting on 17 May 1993 decided to reconvene the Working Group it had established at the previous session. At its 2300th meeting on 17 June 1993 it decided that the name of the Working Group should henceforth be "Working Group on a draft statute for an international criminal court".

46. The mandate given by the Commission to the Working Group was as provided in paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992.

3. Outcome of the work carried out by the Working Group on a draft statute for an international criminal court

47. The Working Group referred to in paragraph 45 above submitted a report which was introduced by its Chairman at the 2325th meeting of the Commission on 21 July 1993. The report of the Working Group is annexed to the present report.

48. The Commission considered that the report of the Working Group represented a substantial advance over that of the 1992 Working Group on the same topic presented to the forty-seventh session of the General Assembly. 1/ The present report placed the emphasis on the elaboration of a comprehensive and systematic set of draft articles with brief commentaries thereto. Though the Commission was not able to examine the draft articles in detail at the current session and to proceed with their adoption, it felt that, in principle, the proposed draft articles provided a basis for their examination by the General Assembly at its forthcoming forty-eighth session.

49. The Commission would welcome comments by the General Assembly on the specific questions referred to in the commentaries to the various articles, as well as on the draft articles as a whole. The Commission furthermore decided that the draft statute should be transmitted, through the Secretary-General, to Governments with a request that their comments be submitted to the Secretary-General by 15 February 1994. These comments are necessary to provide guidance for the subsequent work of the Commission with a view to completing the elaboration of the draft statute at the forty-sixth session of the Commission in 1994, as contemplated in its plan of work.

1/ See Report of the International Law Commission to the General Assembly on the work of its forty-fourth session, Geenral Assembly Official Records, Forty-seventh session, Supplement No. 10 (A/47/10), paras. 339-557.