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

Rapporteur: Mr. Igor Lukashuk

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 11 to 13]

Article 11

Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

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

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

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

(d) to be tried without undue delay;

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

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

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

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

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Commentary

(1) The 1954 draft Code did not address the procedures to be followed in the investigation and prosecution of alleged perpetrators of the crimes referred to therein. The draft Code was envisaged as an instrument of substantive criminal law to be applied by a national court or possibly an international criminal court in accordance with the rules of procedure and evidence of the competent national or international jurisdiction.

(2) Rules of criminal procedure and evidence are characterized by their complexity and their diversity in various legal systems. The lack of uniformity of the procedural and evidentiary rules of various domestic jurisdictions is a consequence of the rules having been adopted primarily at the national level to facilitate and regulate the administration of justice by national courts in the context of the legal system of a particular State. In addition, the ad hoc international criminal tribunals have operated under specific rules of procedure and evidence adopted for each of the tribunals. Thus, in the absence of a uniform code of criminal procedure and evidence, the procedural and evidentiary rules that are required to conduct judicial proceedings are tailor-made for the courts of each jurisdiction and vary accordingly. The difficulty of reconciling the different rules for conducting criminal proceedings in the civil law and the common law systems has been encountered by the Commission in elaborating the draft Statute for an international criminal court.

(3) The Commission maintains the position that persons charged with a crime contained in the present Code should be tried in accordance with the rules of procedure and evidence of the competent national or international jurisdiction. Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions, every court or tribunal must comply with a minimum standard of due process to ensure the proper administration of justice and respect for the fundamental rights of the accused. There are various national, regional and international standards concerning the administration of justice and the right to a fair trial that must be applied by a particular court or tribunal. The Commission considered it appropriate to ensure that the trial of an individual for a crime covered by the Code would be conducted in accordance with the minimum international standard of due process.

(4) The principle that a person charged with a crime under international law has the right to a fair trial was recognized by the Nürnberg Tribunal after the Second World War. Article 14 of the Nürnberg Charter sets forth certain uniform procedural rules with a view to ensuring a fair trial for every defendant. 1/ The Nürnberg Tribunal confirmed the right of a defendant to receive a fair trial in its judgement which stated as follows: "With regard to

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1/ Nürnberg Charter, art. 14.

the constitution of the Court all that the defendants are entitled to ask is to receive a fair trial on the facts and the law." 2/ The Commission recognized the general principle of fair trial in relation to persons charged with crimes under international law in its formulation of the Nürnberg Principles. Principle V states that "Any person charged with a crime under international law has the right to a fair trial on the facts and law." 3/ (5) The principles relating to the treatment to which any person accused of a crime is entitled, and to the procedural conditions under which his guilt or innocence can be objectively established have been recognized and further developed in a number of international and regional instruments adopted after the Second World War, including: the International Covenant on Civil and Political Rights (article 14); 4/ the European Convention for the Protection of Human Rights and Fundamental Freedoms (articles 6 and 7); 5/ the American Convention on Human Rights (articles 5, 7 and 8); 6/ the African Charter of Human and Peoples' Rights (article 7); 7/ the Geneva Conventions of 1949 (article 3, common to the four Conventions); 8/ and Additional Protocols I (article 75) and II (article 6) to the Geneva Conventions. 9/

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2/ Nürnberg Judgment, at p. 48.

3/ Yearbook...1950, vol. II, p. 375.

4/ United Nations, Treaty Series, vol. 999, p. 171.

5/ United Nations, Treaty Series, vol. 213, p. 221.

6/ United Nations, Treaty Series, vol. 1114 , p. 123.

7/ International Legal Materials, vol. 21, p. 59 [to be published in United Nations, Treaty Series, vol. 1520, p. ...]

8/ Geneva Convention I, United Nations, Treaty Series, vol. 75, p. 31; Geneva Convention II, United Nations, Treaty Series, vol. 75, p. 85; Geneva Convention III, United Nations, Treaty Series, vol. 75, p. 135; Geneva Convention IV, United Nations, Treaty Series, vol. 75, p. 287.

9/ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I], June 8, 1977, United Nations, Treaty Series, vol. 1125, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Additional Protocol II], United Nations, Treaty Series, vol. 1125, p. 609.

(6) The Commission considered that an instrument of a universal character, such as the present Code, should require respect for the international standard of due process and fair trial set forth in article 14 of the International Covenant on Civil and Political Rights. The essential provisions of article 14 of the Covenant are therefore reproduced in article 11 to provide for the application of these fundamental judicial guarantees to persons who are tried by a national court or an international court for a crime against the peace and security of mankind contained in the Code. However, some provisions of the Covenant have been omitted or slightly modified for purposes of the present Code, as explained below.

(7) Paragraph 1 indicates the scope of application of the judicial guarantees provided for in article 11. These guarantees are to apply to "An individual charged with a crime against the peace and security of mankind". The provision is framed in non-restrictive terms so as to indicate that it applies irrespective of which competent court or tribunal may be called upon to try an individual for such a crime.

(8) The opening clause of the paragraph also provides that an individual who is accused of a crime covered by the Code is presumed innocent with respect to that accusation. The prosecution has the burden of proving the responsibility of the individual for the crime concerned as a matter of fact and law. If the court is not satisfied that the prosecution has met its burden of proof, then the court must find that the person is not guilty as charged. This presumption of innocence is consistent with article 14, paragraph 2 of the Covenant.

(9) This clause is also intended to ensure that the minimum judicial guarantees listed in article 11 will apply equally to any person who is accused of a crime covered by the Code. Every person charged with a criminal offence is entitled as a human being to the right to a fair trial. The phrase "shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts" confirms the equal protection of the law with respect to the fundamental judicial guarantees that are essential to ensure a fair trial. This phrase is formulated as a non-discrimination clause to emphasize the prohibition of any discrimination. The reference to "the law and the facts" is to be understood as relating to

"the applicable law" and "the establishment of the facts". The principle of the equal protection of the law with respect to the right to a fair trial is consistent with article 14, paragraph 3, of the Covenant.

(10) The expression "minimum guarantees" is used in the opening clause of paragraph 1 to indicate the non-exhaustive character of the list of judicial guarantees set forth in paragraph 1 (a) to (h). Thus, a person charged with a crime under the Code may be provided additional guarantees other than those expressly identified. Furthermore, each of the guarantees listed represents the minimum international standard for a fair trial and does not preclude the provision of more extensive protection with respect to the guarantees that are included in the list.

(11) Paragraph 1 (a) sets forth the fundamental right of the accused to a fair and public trial conducted by a court which is competent, independent, impartial and duly established by law. The right to a public trial subjects the proceedings to public scrutiny as a safeguard against any procedural irregularities. The Commission notes, however, that article 14, paragraph 1 of the Covenant permits a court to exclude the public or the press from the proceedings in a limited number of exceptional circumstances. The competence of the court is a prerequisite for its authority to conduct the proceedings and to render a valid judgement in the case. The independence and impartiality of the court is essential to ensure that the merits of the charges against the accused are determined, as a matter of fact and law, in a fair and objective manner. The court must be duly established by law to ensure its legal authority and the proper administration of justice. This provision is drawn from article 14, paragraph 1 of the Covenant.

(12) The text of paragraph 1 (a) adopted on first reading contained a specific reference to a court established "by law or by treaty" to take into account the possibility of a permanent international criminal court being established in the future by means of a treaty. The Commission has deleted the phrase "by treaty" in view of the establishment of two ad hoc international criminal tribunals by means of a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations. The Commission recognized that there were various methods by which an international criminal jurisdiction could be established. The essential requirement for purposes of the judicial guarantees required for a fair trial is that the court be "duly established by law".

(13) Paragraph 1 (b) guarantees the right of the accused to be informed promptly, meaningfully and in sufficient detail of the charges against him. This is the first of a series of rights that are intended to enable the accused to defend against the charges. The accused must be informed promptly of the charges against him to be able to respond thereto at any preliminary proceeding and to have adequate time to prepare his defence. The accused must be informed of the nature and cause of the charges in a meaningful way so as to be able to fully comprehend the alleged wrongdoing and to respond to the allegations. This requires that the accused be informed of the charges in sufficient detail and in a language that he understands. The provision is drawn from article 14, paragraph 3 (a) of the Covenant.

(14) Paragraph 1 (c) is intended to ensure that the accused will have a sufficient opportunity and the necessary means to effectively exercise the right to defend against the charges. This right will only be meaningful if the accused is guaranteed the time, the facilities, and the legal advice that may be required to prepare and present a defence during the trial. It was emphasized in the Commission that the freedom of the accused to communicate with his counsel would apply equally to defence counsel chosen by the accused or assigned by the court under paragraph 1 (e). The present provision is drawn from article 14, paragraph 3 (b) of the Covenant.

(15) Paragraph 1 (d) guarantees the right of the accused to be tried without undue delay. A person who has been charged but not convicted of a crime should not be deprived of liberty or bear the burden of alleged wrongdoing for an extended period of time as a consequence of any unreasonable delay in the judicial process. The international community as well as the victims of the serious crimes covered by the Code also have a strong interest in ensuring that justice is done without undue delay. This provision is drawn from article 14, paragraph 3 (c) of the Covenant.

(16) Paragraph 1 (e) provides for the right of the accused to be present during the trial and to defend against the charges. There is a close relationship between the right of the accused to attend the proceedings and to offer a defence to the charges. The presence of the accused during the proceedings makes it possible for him to view the documentary or other physical evidence, to know the identity of the witnesses for the prosecution and to hear their testimony against him. The accused must be informed of the evidence presented in support of the charges against him in order to be able

to defend against those charges. The accused may present his own defence to the court or engage the counsel of his choice to represent him before the court in defending against the charges.

(17) There may be situations in which an accused prefers to be represented by counsel and to receive legal assistance in defending against the charges, but lacks the necessary means to pay for such assistance. In such a situation, the accused would be entitled to receive the legal assistance of a defence counsel assigned by the court without being required to pay for this assistance. An accused who is not represented by counsel must be informed of the right to assigned counsel and to free legal assistance if he does not have sufficient means to pay for it. This provision is based on article 14, paragraph 3 (d) of the Covenant. The present article does not reproduce the qualifying phrase "in any case where the interests of justice so require" or the related phrase "in any such case" which appear in the Covenant. The Commission considered that the appointment of counsel for the defence, either by the accused or *ex officio* by the court, was necessary in all cases, by reason of the extreme seriousness of the crimes covered by the present Code and the probable severity of the commensurate punishment.

(18) Paragraph 1 (f) seeks to ensure the right of the accused to defend against the charges in relation to the presentation of witness testimony during the trial. It guarantees that the defence will have an opportunity to question the witnesses who testify against the accused. It also guarantees the right of the defence to obtain the attendance of witnesses on behalf of the accused and to question these witnesses under the same conditions as the prosecution with respect to its witnesses. This provision is drawn from article 14, paragraph 3 (e) of the Covenant.

(19) Paragraph 1 (g) seeks to ensure the ability of the accused to understand what takes place during the proceedings by providing for the right to free interpretation if the proceedings are conducted in a language that the accused does not understand or speak. The accused must be able to comprehend the testimony or other evidence presented in support of the charges against him during the trial in order to be able to effectively exercise the right to defend against those charges. Furthermore, the accused has the right to be heard and to free interpretation to enable him to do so if he is unable to speak or understand the language in which the proceedings are being conducted. The right of the accused to the assistance of an interpreter applies not only



to the hearing before the trial court, but to all phases of the proceedings. This provision is drawn from article 14, paragraph 3 (f) of the Covenant.

(20) Paragraph 1 (h) prohibits the use of a threat, torture or other means of coercion to force the accused to testify against himself during the proceedings or to obtain a confession. The use of coercive measures to compel an individual to make incriminating statements constitutes a denial of due process and is contrary to the proper administration of justice. Furthermore, the reliability of any information obtained by such means is highly suspect. This provision is drawn from article 14, paragraph 3 (g) of the Covenant.

(21) Paragraph 2 provides that any individual who is convicted of a crime covered by the Code is entitled to have the conviction and the resulting sentence reviewed according to law. The right of appeal was not envisaged in the present article as adopted on first reading. The Nürnberg Charter did not provide for the right of a defendant to appeal a conviction or sentence to a higher tribunal. The Nürnberg Tribunal was established as the highest court of international criminal jurisdiction to try the major war criminals of the European Axis. <sup>10/</sup> There was no "higher tribunal" competent to review its judgements. The Commission noted the legal developments that had taken place since Nürnberg concerning the recognition of the right of appeal in criminal cases in the Covenant and in the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda established by the Security Council. It was also recalled that the draft Statute for an international criminal court elaborated by the Commission provided for the right of appeal. The Commission considered it appropriate to provide for a right of appeal for persons convicted of a crime covered by the Code, given the serious nature of these crimes and the commensurate severity of the corresponding punishment. The right of appeal extends to both the conviction and the sentence imposed by the court of first instance. This provision is drawn from article 14, paragraph 5 of the Covenant. The reference to a "higher tribunal" contained in the Covenant is not reproduced in the present provision to avoid possible confusion since the appeal may be conducted by a higher court which is part of the same judicial structure comprising a single "tribunal" as in the case of the two ad hoc tribunals established by the Security Council. The essence of the right of appeal is the right of a

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<sup>10/</sup> Nürnberg Charter, article 1.

convicted person to have the adverse judgement and the resulting punishment reviewed by a "higher" judicial body which has the authority as a matter of law to conduct such a review and, where appropriate, to reverse the decision or revise the punishment with binding legal effect. The present provision does not address the hierarchical structure of a particular national or international criminal justice system since a national criminal justice system is governed by the national law of the State concerned and an international criminal justice system is governed by the constituent instrument which provided for the establishment of the international tribunal or court.

Article 12

Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(a) by an international criminal court, if:

(i) the act which was the subject of the judgment in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(b) by a national court of another State, if:

(i) the act which was the subject of the previous judgment took place in the territory of that State; or

(ii) that State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Commentary

(1) Criminal law provides a standard of conduct which the individual must respect bearing in mind the threat of prosecution and punishment for violations of this standard. Just as every State has an interest in effectively enforcing its criminal law by prosecuting and punishing the individuals who are responsible for violations of this law, the international community has an interest in ensuring that the individuals who are responsible for the international crimes covered by the Code are brought to justice and punished.

(2) The concurrent jurisdiction envisaged in article 8 for an international court and the national courts of States parties to the Code with respect to the crimes set out in articles 17 to 20 of Part II gives rise to the possibility that a person could be tried and punished more than once for the same crime. In addition, this possibility is not completely ruled out with respect to the crime of aggression set out in article 16 since the exclusive jurisdiction of an international criminal court envisaged for this crime does not preclude a limited exception for the national courts of the State which committed aggression according to article 8. The possibility of multiple trials conducted in the national courts of different States as well as an international criminal court raises the question of whether the *non bis in idem* principle should be applicable under international law. The Commission recognized that this question involved theoretical and practical issues. In theoretical terms, it was noted that this principle was applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State for final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State. In practical terms, it was pointed out that a State could provide a shield for an individual who had committed a crime against the peace and security of mankind and who was present in its territory by acquitting him in a sham trial or by convicting and sentencing him to a penalty which was not at all commensurate with the seriousness of the crime, but which would enable him to avoid a conviction or a harsher penalty in another State and, in particular, in the State where the crime was committed or in the State which was the main victim of the crime.

(3) The application of the *non bis in idem* principle under international law is necessary to prevent a person who has committed a crime from being prosecuted or punished more than once for the same crime. This fundamental guarantee protects an individual against multiple prosecutions or punishments for the same crime and is reflected in the International Covenant on Civil and Political Rights (article 14 (7)). A person who has been duly tried and acquitted of criminal charges should not be required to go through the ordeal of a criminal prosecution a second time. In addition, a person who has been duly tried and convicted of a crime should be subject to a punishment that is commensurate to the crime only once. To impose such a punishment on an individual on more than one occasion for the same crime would exceed the requirements of justice and would violate the general principle of proportionality.

(4) As a compromise, the Commission decided to include the *non bis in idem* principle in the present article subject to certain exceptions which were intended to address the various concerns regarding the principle. Some members of the Commission considered the exceptions provided for in article 9 as inconsistent with the *non bis in idem* principle while others viewed these exceptions as necessary. The Commission has attempted to strike an appropriate balance between, on the one hand, the need to preserve to the maximum extent possible the integrity of the *non bis in idem* principle and, on the other hand, the requirements of the proper administration of justice. The Commission noted that the application of this principle at the international level is provided for in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 10) and for Rwanda (article 9). The Commission also recalled that this principle has been included in the draft Statute for an international criminal court (article 42).

(5) Article 12 provides for the application of the *non bis in idem* principle in relation to the crimes covered by the Code in two different situations depending on whether an individual is first prosecuted by an international criminal court or a national court.

(6) Paragraph 1 addresses the situation in which an individual has already been tried for a crime covered by the Code as such by an international criminal court and has been either convicted or acquitted of the crime. In such a case, the *non bis in idem* principle applies fully and without any exception to the decisions of the international criminal court. Thus, an

individual who has already been tried by an international court for a crime under the Code could not be tried again for the same crime by any other court, whether national or international. This paragraph is intended to take into account the possible establishment of an international criminal court that would be entrusted with the implementation of the Code. In this context the term "international criminal court" is used to refer to an international court that is competent to prosecute individuals for crimes under the Code and has been established by or with the support of the States parties to the Code or the international community at large, as discussed in the commentary to article 8.

(7) The phrase "finally convicted or acquitted" is used in paragraphs 1 and 2 to indicate that the *non bis in idem* principle would apply only to a final decision on the merits of the charges against an accused which was not subject to further appeal or review. In particular, the word "acquitted" is used to refer to an acquittal as a result of a judgment on the merits, not as a result of a discharge of proceedings.

(8) Paragraph 2 addresses the situation in which an individual has already been tried for a crime by a national court and has been either convicted or acquitted of the crime by that court. It provides that an individual may not be tried for a crime under the Code arising out of the same act (or omission) that was the subject of the previous criminal proceedings before the national court. While paragraph 1 of article 12 does not recognize any exceptions to the *non bis in idem* principle with respect to the judgment of an international criminal court, paragraph 2 of the same article does not require as strict an application of this principle with respect to the judgments of national courts. Paragraph 2 affirms this principle with respect to national court judgments while at the same time envisaging certain limited exceptions set forth in subparagraphs (a) and (b).

(9) Paragraph 2 provides for the application of the *non bis in idem* principle to a final decision of a national court on the merits of the case which is not subject to further appeal or review. The application of this principle with respect to a final conviction does not require the imposition of a commensurate punishment or the complete or partial enforcement of such a punishment. The failure to impose a punishment that is proportional to the crime or to take steps to enforce a punishment may indicate an element of fraud in the administration of justice. The Commission decided to preserve

the *non bis in idem* principle in the present paragraph to the maximum extent possible and to address the possibility of the fraudulent administration of justice under the exception to the principle provided for in subparagraph 2 (a) (ii).

(10) Subparagraph 2 (a) recognizes two exceptional cases in which an individual could be tried by an international criminal court for a crime under the Code notwithstanding the prior decision of a national court. First, an individual may be tried by an international criminal court for a crime against the peace and security of mankind arising out of the same act that was the subject of the previous national court proceedings if the individual was tried by a national court for an "ordinary" crime rather than one of the more serious crimes under the Code. In such a case, the individual has not been tried or punished for the same crime but for a "lesser crime" that does not encompass the full extent of his criminal conduct. Thus, an individual could be tried by a national court for murder and tried a second time by an international criminal court for the crime of genocide based on the same act under subparagraph 2 (a) (i).

(11) Second, an individual could be tried by an international criminal court for a crime set out in the Code arising out of the same act or even for the same crime that was the subject of the previous national court decision if "the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted". In such a case, the individual has not been duly tried or punished for the same act or the same crime because of the abuse of power or improper administration of justice by the national authorities in prosecuting the case or conducting the proceedings. The international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process. It is important to note that these exceptions only permit subsequent proceedings by an international criminal court. Subparagraph 2 (a) (ii) is similar to the corresponding provisions contained in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 10 (2)) and for Rwanda (article 9 (2)).

(12) Subparagraph 2 (b) recognizes two exceptional cases in which an individual could be tried by a national court for a crime under the Code notwithstanding the prior decision of a national court of another State.

These two exceptions recognize that although any State party to the Code would be competent to prosecute an alleged offender, there are two categories of States which have a particular interest in ensuring the effective prosecution and punishment of the offenders. First, the State in the territory of which the crime was committed has a strong interest in the effective prosecution and punishment of the responsible individuals because the crime occurred within its territorial jurisdiction. The territorial State is more directly affected by the crime in this respect than other States. Second, the State which was the primary target of the crime, the nationals of which were the primary victims of the crime or the interests of which were directly and significantly affected also has a strong interest in the effective prosecution and punishment of the responsible individuals. The State which is the "main victim" of the crime has incurred a greater and more direct injury as a result of the crime as compared to other States. Subparagraphs 2 (b) (i) and (ii) provide that the territorial State or the State which was the victim or whose nationals were the victims may institute criminal proceedings against an individual for a crime set out in the Code even though that individual has already been tried by the national court of another State for the same crime. Either State has the option of instituting subsequent proceedings if, for example, it considers that the previous decision did not correspond to a proper appraisal of the acts or their seriousness. Neither State is under an obligation to do so if it is satisfied that justice has already been done.

(13) Paragraph 3 requires a court that convicts an individual of a crime under the Code in a subsequent proceeding to take into account in imposing an appropriate penalty the extent to which any penalty has already been imposed and enforced against the individual for the same crime or the same act as a result of a previous trial. There are two ways in which the court could take into account the extent of enforcement of the previous penalty. First, the court could impose a penalty that is fully commensurate to the crime set out in the Code for which the individual has been convicted in the subsequent proceeding and further indicate the extent to which this penalty is to be implemented in the light of the punishment that has already been enforced. Second, the court could determine the penalty that would be commensurate to the crime and impose a lesser penalty to reflect the previous punishment. Under the second approach the court could still indicate the fully commensurate penalty to demonstrate that justice had been done and to seek a

degree of uniformity in punishing persons convicted of crimes covered by the Code. This paragraph is equally applicable in the event of a subsequent conviction by a national court or an international criminal court. It is similar to the corresponding provisions contained in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 10 (3)) and for Rwanda (article 9 (3)).

### Article 13

#### Non-retroactivity

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

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

#### Commentary

(1) The fundamental purpose of criminal law is to prohibit, to punish and to deter conduct which is considered to be of a sufficiently serious nature to justify the characterization of an act or omission as a crime. This law provides a standard of conduct to guide the subsequent behaviour of individuals. It would clearly be unreasonable to determine the lawfulness of the conduct of an individual based on a standard that was not in existence at the time the individual decided to pursue a particular course of action or to refrain from taking any action. The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullum crimen sine lege*. This principle has been embodied in a number of international instruments, such as the Universal Declaration of Human Rights (article 11 (2)), the International Covenant on Civil and Political Rights (article 15 1)), the European Convention on Human Rights (article 7 (1)), the American Convention on Human Rights (article 9) and the African Charter on Human and Peoples' Rights (article 7 (2)).

(2) The Commission noted that there are different views as to the meaning of the term "law" in determining the application of the principle of the non-retroactivity of criminal law. While there is a school of thought that narrowly interprets the word "lex" in the principle "*nullum crimen sine lege*"



as relating to written law (treaties or national legislation), another school broadly interprets the word "lex" as covering written or unwritten sources of law (customary law and general principles of law).

(3) The principle of the non-retroactivity of criminal law is recognized with respect to the present Code in article 13. This principle would be violated if the Code were to be applied to crimes committed before its entry into force. Paragraph 1 is intended to avoid any violation of the principle by limiting the application of the Code to acts committed after its entry into force. It would therefore not be permissible to try and possibly convict an individual for a crime "under the present Code" as a consequence of an act committed "before its entry into force". The Commission noted that an individual may incur criminal responsibility as a result of an unlawful act or omission, as discussed in the commentary to article 2.

(4) The present paragraph applies only to criminal proceedings instituted against an individual for an act as a crime "under the present Code". It does not preclude the institution of such proceedings against an individual for an act committed before the entry into force of the Code on a different legal basis. For example, a person who committed an act of genocide before the Code entered into force could not be prosecuted for a crime against the peace and security of mankind under that instrument. This individual could, however, be subject to criminal proceedings for the same act on a separate and distinct legal basis. Such an individual could be tried and punished for the crime of genocide under international law (Genocide Convention or customary law) or the crime of murder under national law. The possibility of instituting criminal proceedings for an act committed before the entry into force of the Code on independent legal grounds provided by international law or national law is addressed in paragraph 2.

(5) In formulating paragraph 2 of article 13, the Commission was guided by two considerations. On the one hand, it did not want the principle of non-retroactivity set out in the present Code to prejudice the possibility of prosecution, in the case of acts committed before the entry into force of the Code, on different legal grounds, for example a pre-existing convention to which a State was a party, or again, under customary international law. Hence the provision contained in paragraph 2. On the other hand, the Commission did not want this wider possibility to be used with such flexibility that it might give rise to prosecution on legal grounds that are too vague. For this

reason, it preferred to use in paragraph 2 the expression "in accordance with international law" rather than less concrete expressions such as "in accordance with the general principles of international law".

(6) Paragraph 2 also envisages the possibility of the prosecution of an individual for a crime under pre-existing national law if this law is in conformity with international law. This requirement is a consequence of the general principle of the supremacy of international law. The term "national law" should be understood as referring to the application of national law in conformity with international law.

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