Draft Code of Offences against the Peace and Security of Mankind with commentaries

1954

Text adopted by the International Law Commission at its sixth session, in 1954, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 54). The report, which also contains commentaries on some of the draft articles, appears in *Yearbook of the International Law Commission, 1954*, vol. II. The commentaries on the remaining draft articles are reproduced in *Yearbook of the International Law Commission, 1951*, vol. II, at para. 59ff

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1951

Volume II

Documents of the third session including the report of the Commission to the General Assembly

---

UNITED NATIONS

paragraph (*a*) of resolution 177 (II). By resolution 488 (V) of 12 December 1950, the General Assembly invited the governments of Member States to express their observations on the formulation, and requested the Commission:

> "In preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by governments."

55. The preparation of a draft code of offences against the peace and security of mankind was given preliminary consideration by the Commission at its first session, in 1949, when the Commission appointed Mr. Spiropoulos special rapporteur on the subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to governments inquiring what offences, apart from those recognized in the Charter and judgment of the Nürnberg Tribunal, should be included in the draft code.

56. At its second session, in 1950, Mr. Spiropoulos presented his report (A/CN.4/25) to the Commission, which took it as a basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and Add.2) to its questionnaire. In the light of the deliberations of the Commission, a drafting committee, composed of Messrs. Alfaro, Hudson and Spiroupolus, prepared a provisional text (A/CN.4/R.6) which was referred by the Commission without discussion to Mr. Spiropoulos, who was requested to continue the work on the subject and to submit a new report to the Commission at its third session.

57. At the third session, in 1951, Mr. Spiropoulos submitted a second report (A/CN.4/44) containing a new draft of a code and also a digest of the observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. The Commission also had before it the observations received from governments (A/CN.4/45 and Corr.1, A/CN.4/45/Add.1 and Add.2) on this formulation. Taking into account the observations referred to above, the Commission considered the subject at its 89th to 92nd, 106th to 111th, 129th and 133rd meetings, and adopted a draft Code of Offences against the Peace and Security of Mankind as set forth herein below.

52. In submitting this draft code to the General Assembly, the Commission wishes to present the following observations as to some general questions which arose in the course of the preparation of the text:

(*a*) The Commission first considered the meaning of the term "offences against the peace and security of mankind", contained in resolution 177 (II). The view of the Commission was that the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security. For these reasons, the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters; nor does it include such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc.

(*b*) The Commission thereafter discussed the meaning of the phrase "indicating clearly the place to be accorded to" the Nürnberg principles. The sense of the Commission was that this phrase should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code. The Commission felt that the phrase did not preclude it from suggesting modification or development of these principles for the purpose of their incorporation in the draft code. It was not thought necessary to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft code. Only a general reference to the corresponding Nürnberg principles was deemed practicable.

(*c*) The Commission decided to deal with the criminal responsibility of individuals only. It may be recalled in this connexion that the Nürnberg Tribunal stated in its judgment: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

(*d*) The Commission has not considered itself called upon to propose methods by which a code may be given binding force. It has therefore refrained from drafting an instrument for implementing the code. The offences set forth are characterized in article 1 as international crimes. Hence, the Commission has envisaged the possibility of an international tribunal for the trial and punishment of persons committing such offences. The Commission has taken note of the action of the General Assembly in setting up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court. Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts. Such a measure would doubtless be considered in drafting the instrument by which the code would be put into force.

Text of the draft Code

59. The draft Code of Offences against the Peace and Security of Mankind, as adopted by the Commission, reads as follows:

Article 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international

law, for which the responsible individuals shall be punishable.

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

Article 2

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

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

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

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

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

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

The use of force is prohibited by Article 2, paragraph 4, of the Charter of the United Nations, which binds all Members to "refrain in their international relations from ... the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". The same prohibition is contained in the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, which, in article 9, provides that "every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from ... the use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".

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

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

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

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

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

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

In prohibiting the preparation for the employment of armed force (except under certain specified conditions) this paragraph incorporates in substance that part of article 6, paragraph (*a*), of the Charter of the Nürnberg Tribunal which defines as "crimes against peace", *inter alia*, "planning" and "preparation" of "a war of aggression. ..." As used in this paragraph the term "preparation" includes "planning". It is considered that "planning" is punishable only if it results in preparatory acts and thus becomes an element in the preparation for the employment of armed force.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Killing members of the group;

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

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

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

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

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

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

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

This paragraph corresponds substantially to article 6, paragraph (*c*), of the Charter of the Nürnberg Tribunal, which defines "crimes against humanity". It has, however, been deemed necessary to prohibit also inhuman acts on cultural grounds, since such acts are no less detrimental to the peace and security of mankind than those provided for in the said Charter. There is another variation from the Nürnberg provision. While, according to the Charter of the Nürnberg Tribunal, any of the inhuman acts constitutes a crime under international law only if it is committed in execution of or in connexion with any crime against peace or war crime as defined in that Charter, this paragraph characterizes as crimes under international law inhuman acts when these acts are committed in execution of or in connexion with other offences defined in the present article.

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

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

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

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

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

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

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

(12) Acts which constitute:

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

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

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

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

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

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

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

Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.

This article incorporates, with modifications, article 7 of the Charter of the Nürnberg Tribunal, which article provides: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Principle III of the Commission's formulation of the Nürnberg principles reads: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."

The last phrase of article 7 of the Nürnberg Charter "or mitigating punishment" was not retained in the above-quoted principle as the question of mitigating punishment was deemed to be a matter for the competent court to decide.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.

Principle IV of the Commission's formulation of the Nürnberg principles, on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter, states: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

The observations on prineiple IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article, which is based on a clear enunciation by the Nürnberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.

Article 5

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

This article provides for the punishment of the offences defined in the Code. Such a provision is considered desirable in view of the generally accepted principle *nulla poena sine lege*. However, as it is not deemed practicable to perscribe a definite penalty for each offences, it is left to the competent tribunal to determine the penalty, taking into consideration the gravity of the offence committed.

Chapter V

REVIEW BY THE COMMISSION OF ITS STATUTE

60. By resolution 484 (V), adopted on 12 December 1950, the General Assembly,

"*Considering* that it is of the greatest importance that the work of the International Law Commission should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results.

"*Having regard* to certain doubts which have been expressed whether such conditions exist at the present time,

"*Requests* the International Law Commission to review its Statute with the object of making recommendations to the General Assembly at its sixth session concerning revisions of the Statute which may appear desirable, in the light of experience, for the promotion of the Commission's work."

In compliance with this request, the International Law Commission has devoted its 83rd, 96th, 97th, 112th, 113th, 129th and 133rd meetings to such a review of its Statute.

61. By way of introduction, it may be said that the members of the Commission fully share the view that the work of the Commission "should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results". It is hardly necessary for the Commission to observe that with reference to some of the matters falling within its competence—particularly some of the topics selected for codification—quick and positive results may be most difficult of achievement. Those matters require extensive research into the practice of States, the relevant materials need to be carefully weighed and evaluated, successive drafts must be discussed, and reflection concerning them cannot be unduly hurried. Expedition of the work of the Commission is a constant desideratum with its members. Yet hopes for "rapid results" are to be indulged only with appreciation of the magnitude of the task of developing or codifying international law in a satisfactory manner.

68. It is understandable that the record of the Commission over the past three years has engendered "cer-

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1954

Volume II

Documents of the sixth session including the report of the Commission to the General Assembly

---

UNITED NATIONS

39. The Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality.

40. The Special Rapporteur expressed before the Commission his appreciation of the valuable assistance rendered by Dr. P. Weis, legal adviser to the Office of the United Nations High Commissioner for Refugees, to him and his predecessor, Mr. M. O. Hudson, in the work on the topic " Nationality, including statelessness ".

Chapter III

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

41. By resolution 177 (II) of 21 November 1947, the General Assembly decided :

> " To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly ",

and 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 on the principles mentioned in sub-paragraph (*a*) above."

The Commission's report to the General Assembly at the latter's fifth session in 1950 [4] contained the formulation of the Nürnberg principles. By resolution 488 (V) of 12 December 1950, the General Assembly asked the Governments of Member States to comment on the formulation, and requested the Commission :

> " In preparing the draft Code of Offences against the Peace and Security of Mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by Governments."

42. The preparation of a draft Code of Offences against the Peace and Security of Mankind was given preliminary consideration by the Commisison at its first session, in 1949, when the Commission appointed Mr. J. Spiropoulos Special Rapporteur on the subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those recognized in the Charter and judgment of the Nürnberg Tribunal, should be included in the draft code.

43. The Special Rapporteur's report to the second session in 1950 (A/CN.4/25) was taken as the basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from Governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and 2) to its questionnaire. In the light of the debate, a drafting committee prepared a provisional text (A/CN.4/R.6) which was referred, without discussion, to the Special Rapporteur, who was requested to continue his research and to submit a new report to the Commission at its third session in 1951.

44. The Special Rapporteur's report to the third session (A/CN.4/44) contained a revised draft and also a digest of the relevant observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. The Commission also considered the observations received from Governments (A/CN.4/45 and Corr. 1, and Add.1 and 2) on this formulation. After debating these comments at its 89th to 92nd, 106th to 111th, 129th and 133rd meetings, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind which was submitted to the General Assembly in the Commission's report on its third session.[5]

45. The question of the draft Code was included in the provisional agenda of the sixth session of the General Assembly, but was, by a decision of the Assembly at its 342nd plenary meeting on 13 November 1951, postponed until the seventh session.

46. By a circular letter to the Governments of the Member States, dated 17 December 1951, the Secretary-General drew their attention to the draft Code and invited their comments thereon. Comments were received from fourteen Governments and were reproduced in documents A/2162 and Add.1. The Secretary-General also included the question of the draft Code in the provisional agenda of the seventh session of the General Assembly. The item was, however, by a decision taken by the General Assembly at its 382nd plenary meeting on 17 October 1952, omitted from the final agenda of the seventh session on the understanding that the matter would continue to be considered by the International Law Commission.

47. The Commission again took up the matter at its fifth session in 1953 and decided to request the Special Rapporteur to undertake a further study of the question and to prepare a new report for submission at the sixth session.

48. The Special Rapporteur's report to the sixth session, entitled " Third Report relating to a draft Code of Offences against the Peace and Security of Mankind " (A/CN.4/85), discussed the observations received from Governments and, in the light of those observations, proposed certain changes in the text of the draft Code previously adopted by the Commission. The comments submitted by the Government of Belgium (A/2162/Add.2) were received too late to be discussed in the Special Rapporteur's report but were taken into consideration by the Commission.

---

[4] See *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316).

[5] *Ibid., Sixth Session, Supplement No. 9* (A/1858).

49. The Commission considered the draft Code at its 266th to 271st, 276th and 280th meetings, and decided to make certain revisions in the previously adopted text. The revised provisions are set forth below with some brief comments. The full text of the draft Code as revised by the Commission is reproduced at the end of this chapter. For commentaries on those provisions of the draft Code which were not modified by the Commission, see paragraph 59 of the Commission's report on its third session (A/1858).

50. Apart from making certain drafting changes, the Commission decided to modify the previous text of the draft Code in the following respects.

Article 1

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

Comment

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

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

Article 2, paragraph 4

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

Comment

The text previously adopted by the Commission read as follows :

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

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

Article 2, paragraph 9

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

Comment

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

Article 2, paragraph 11

(previously paragraph 10)

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

Comment

The text previously adopted by the Commission read as follows :

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

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

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

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

Comment

The text previously adopted read as follows:

" The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him."

Since some Governments had criticized the expression " moral choice ", the Commission decided to replace it by the wording of the new text above.

51. In addition, the Commission decided to omit article 5 of the previous text as it felt that, at the present stage, the draft Code should simply define certain acts as international crimes and lay down certain general principles regarding criminal liability under international law. The Commission considered that the question of penalties could more conveniently be dealt with at a later stage, after it had been decided how the Code was to become operative.

52. With reference to a suggestion made by one Government, the Commission confirms that the terms of article 2, paragraph 12 (old paragraph 11), should be construed as covering not only the acts referred to in The Hague Conventions of 1907 but also any act which violates the rules and customs of war prevailing at the time of its commission.

53. In their observations on the draft Code, several Governments expressed the fear that the application of article 2, paragraph 13 (old paragraph 12), might give rise to difficulties. The Commission, although not overlooking the possibility of such difficulties, decided not to modify the wording of the paragraph as it felt that a court applying the Code would overcome such difficulties by means of a reasonable interpretation.

54. The full text of the draft Code as adopted [6] by the Commission at its present session is reproduced below:

Article 1

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

Article 2

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

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

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

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

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

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

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

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

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

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

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

(i) Killing members of the group;

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

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

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

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

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, com-

[6] Mr. Edmonds abstained from voting for reasons stated by him at the 276th meeting (A/CN.4/SR.276). Mr. Lauterpacht abstained from voting and, in particular, recorded his dissent from paragraphs 5 and 9 of article 2 and from article 4, for reasons stated at the 271st meeting (A/CN.4/SR.271). Mr. Pal abstained from voting for the reasons stated in the course of the discussions (A/CN.4/SR.276). Mr. Sandström declared that, in voting for the draft Code, he wished to enter a reservation in respect of paragraph 9 of article 2 for the reasons stated at the 280th meeting (A/CN.4/SR.280).

mitted against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

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

(13) Acts which constitute:

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

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

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

Chapter IV

REGIME OF THE TERRITORIAL SEA

I. Introduction

55. At its third session in 1951 the International Law Commission decided to initiate work on the topic " régime of territorial waters " which it had selected for codification and to which it had given priority pursuant to a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949. Mr. J. P. A. François was appointed Special Rapporteur on this topic.

56. The Commission was greatly assisted by the work done at the Conference for the Codification of International Law held at The Hague in March and April 1930, which had amongst other subjects considered the régime of the territorial sea. Owing to differences of opinion concerning the extent of the territorial sea, it had proved impossible to conclude a convention relating to this question; nevertheless, the reports and preparatory studies of that Conference were a valuable basis on which the Commission has largely relied.

57. At the fourth session of the Commission in 1952, the Special Rapporteur submitted a " Report on the Régime of the Territorial Sea " (A/CN.4/53) which contained a draft regulation consisting of twenty-three articles, with annotations.

58. The Commission took the Special Rapporteur's report as the basis of discussion and considered certain aspects of the régime of the territorial sea from its 164th to its 172nd meetings.

59. During its fourth session in 1952, the Commission considered the question of the juridical status of the territorial sea; the breadth of the territorial sea; the question of base lines; and bays. To guide the Special Rapporteur, it expressed certain preliminary opinions on some of these questions.

60. So far as the question of the delimitation of the territorial sea of two adjacent States is concerned, the Commission decided to ask Governments for particulars concerning their practice and for any observations which they might consider useful. The Commission also decided that the Special Rapporteur should be free to consult with experts with a view to elucidating certain technical questions.

61. The Special Rapporteur was asked to submit at the fifth session a further report containing a draft regulation and comments revised in the light of opinions expressed at the fourth session.

62. In compliance with this request, the Special Rapporteur, on 19 February 1953, submitted a " Second Report on the Régime of the Territorial Sea " (A/CN.4/61).

63. The group of experts mentioned above met at The Hague from 14 to 16 April 1953, under the chairmanship of the Special Rapporteur. Its members were :

Professor L. E. G. Asplund (Geographic Survey Department, Stockholm);

Mr. S. Whittemore Boggs (Special Adviser on Geography, Department of State, Washington, D.C.);

Mr. P. R. V. Couillault (Ingénieur en Chef du Service central hydrographique, Paris);

Commander R. H. Kennedy, O.B.E., R.N. (Retd.) (Hydrographic Department, Admiralty, London), accompanied by Mr. R. C. Shawyer (Administrative Officer, Admiralty, London);

Vice-Admiral A. S. Pinke (Retd.) (Royal Netherlands Navy, The Hague).

The group of experts submitted a report on technical questions. In the light of their comments, the Special Rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1) in which the report of the experts appear as an annex.

64. The Secretary-General's inquiry addressed to Governments concerning their attitude to the delimitation of the territorial sea of two adjacent States elicited a number of replies which are reproduced in documents A/CN.4/71 and Add.1 and 2.

65. Owing to lack of time the Commission was unable to discuss the topic at its fifth session and referred it to the sixth session.

66. At its sixth session the Special Rapporteur submitted a further revised draft regulation (A/CN.4/77)