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Fifth report on the draft code of offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 5]

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Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

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CONTENTS

I. Introduction

1. In the present report, the Special Rapporteur considers and, where necessary, modifies the articles constituting the introduction to the draft code, which he submitted to the International Law Commission at its thirty-eighth session.[1] The introduction deals with the definition and characterization of offences against the peace and security of mankind and with general principles.

2. It would appear useful to make the following observations:

(*a*) The draft articles are followed by commentaries, briefly summarizing the questions raised;

(*b*) Certain draft articles submitted at the Commission's thirty-eighth session have been modified to take

* Incorporating document A/CN.4/404/Corr.1.

[1] See the Special Rapporteur's fourth report, *Yearbook . . . 1986*, vol. II (Part One), p. 53, document A/CN.4/398, part V.

into account the discussions held at that session[2] and in the Sixth Committee at the forty-first session of the General Assembly.[3]

3. These changes are as follows:

(*a*) *Article 3.* It has been specified that the perpetrator of an offence against the peace and security of mankind, within the meaning of the draft, is an individual.

(*b*) *Article 4.* In the light of the objections raised concerning the expression "universal offence" in paragraph 1 of the former text, the first sentence of that paragraph has been deleted.

(*c*) *Article 6.* The jurisdictional guarantees have been listed. This list cannot, of course, be exhaustive, but it does contain the essential guarantees.

(*d*) *A new article 7* is devoted to the rule *non bis in idem*. Observance of this rule appears conceivable, however, only under the system envisaged in article 4, paragraph 1, and not in the context of an international jurisdiction. The question is open to debate.

(*e*) *Article 8 (former article 7).* Paragraph 2 has been slightly modified and now exactly reproduces article 15, paragraph 2, of the International Covenant on Civil and Political Rights.[4]

(*f*) *Article 9 (former article 8).* The negative wording has been replaced by a positive formulation. In addition, subparagraph (*a*) has been deleted and is replaced by the new article 11. As to the substantive conditions for exceptions, the following alternatives are possible: either, as in the former draft, to list them in the body of the article, or to restrict them to the commentary accompanying the article.

(*g*) *Article 10 (former article 9).* There has been no change to this article except its number.

(*h*) *A new article 11* is devoted to the official position of the perpetrator. This does not constitute an exception to the principle of responsibility. It was thus by error that the former article 8 contained, in subparagraph (*a*), a provision concerning the official position of the perpetrator.

[2] See *Yearbook . . . 1986*, vol. II (Part Two), pp. 42 *et seq.*, paras. 80-184.

[3] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-first session of the General Assembly" (A/CN.4/L.410), sect. E.

[4] United Nations, *Treaty Series*, vol. 999, p. 171.

II. Draft articles

CHAPTER I

INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.

Commentary

(1) The offences referred to in the draft code constitute the most serious crimes in the scale of criminal offences. But seriousness is a subjective concept. It is deduced either from the *character* of the act defined as a crime (cruelty, atrocity, barbarity, etc.), or from the *extent* of its effects (its mass nature, when the victims are peoples, populations or ethnic groups), or from the *intention* of the perpetrator (genocide, etc.). Whatever the aspect considered, however, offences against the peace and security of mankind present, in general, the same profile: they are crimes which affect the very foundations of human society.

(2) It seems difficult, and it might be pointless, to introduce this concept of seriousness into a code, precisely because of its subjective nature. It is not quantifiable. All that can be said is that the reaction to an act by the international community at a given time and the depth of the reprobation elicited by it are what make it an offence against the peace and security of mankind.

Article 2. Characterization

The characterization of an act as an offence against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.

Commentary

(1) The principle of the autonomy of international criminal law was affirmed by the Judgment of the Nürnberg International Military Tribunal. It was then confirmed by the Commission in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[5] (Principle II).

(2) The question needs to be examined from two points of view: that of substance and that of application of punishment.

(a) *Consideration of the question from the point of view of substance*

(3) If there is a conflict between internal criminal law and international criminal law, the latter should prevail.

[5] Hereinafter referred to as "Nürnberg Principles"; reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

Commenting on the Judgment of the Nürnberg Tribunal, Pierre-Henri Teitgen, the then French Minister of Justice, wrote:

> This time, international law is no longer at the mercy of the State, but is well and truly above the State . . . This fundamental principle makes such a contribution to the development . . . and the consolidation of international penal law that it may be said of this Judgment of Nürnberg that it is bound to mark a decisive stage in history.[6]

Similarly, Francis Biddle, formerly the United States of America's member of the Nürnberg Tribunal, said:

> It seems to me that the domestic law cannot be permitted to stand in face of the higher international law, just as with us the state statute which conflicts with the Federal Constitution is invalid. If any other result were achieved, international law, by definition, would become meaningless.[7]

(4) The present draft code would itself become meaningless if it did not rest on the assumption of the supremacy of international criminal law.

(5) Yet the affirmation of this principle does not eliminate all the difficulties. The question has arisen, not without reason, as to what would become of the rule *non bis in idem*. Two situations may be envisaged: an act which is characterized as an offence under international criminal law is not so characterized under internal criminal law; or the same act is so characterized under both legal systems.

(6) In the first situation, the rule *non bis in idem* would be irrelevant.

(7) In the second situation, the question might indeed be asked whether dual prosecution would be possible. Because of the autonomy of international law, there would be nothing to prevent criminal proceedings being instituted. To use the rule *non bis in idem* to oppose international prosecution would be the very negation of international criminal law and would, in practice, completely paralyse any punitive system based on the code. As Vespasien Pella noted:

> It would be too easy for a State to cause its nationals who are guilty of international offences to be tried by its own courts, so that they could then plead such judicial decisions in order to escape international justice.[8]
> . . . Moreover, these crimes are often committed in an abusive exercise of sovereignty. To try to punish them by applying municipal law would, in many cases, be tantamount to asking the offender to punish himself. . . .[9]

It therefore seems that the *non bis in idem* rule cannot be invoked where there is a conflict between internal and international law.

(b) *Consideration of the question from the point of view of application of punishment*

(8) In such a situation, the international judge would in no way be precluded from taking into account the punishment imposed by a domestic court: he may render a decision declaring culpability without passing sentence, if he considers that the punishment already inflicted fits the crime.

(9) The *non bis in idem* rule in article 7 of the present draft is included solely to cover instances where there is no international criminal jurisdiction and where the internal jurisdiction of each State is recognized as having competence, a situation which would make the offender liable to prosecution in several forums.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and penalty

FORMER TEXT:

Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

NEW TEXT:

Any individual who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

Commentary

In order to avoid any ambiguity as to the content *ratione personae* of the draft, which is limited at this stage to physical persons, it was considered necessary to reformulate the former article 3.

Article 4

FORMER TEXT:

Universal offence

1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudge the question of the existence of an international criminal jurisdiction.

NEW TEXT:

Aut dedere aut punire

1. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudge the establishment of an international criminal jurisdiction.

Commentary

(1) Under paragraph 1 of draft article 4, two options would be available to a State which has in custody the perpetrator of an offence against the peace and security of mankind: it must either extradite him or try him. Paragraph 2 leaves open the possibility of recourse to an international criminal jurisdiction.

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[6] Cited in the memorandum on the draft code of offences against the peace and security of mankind prepared in 1950 by V. V. Pella at the request of the Secretariat; original French text published in *Yearbook . . . 1950*, vol. II, p. 310, document A/CN.4/39.

[7] *Ibid.*

[8] *Ibid.*, p. 311.

[9] *Ibid.*, p. 310.

(2) Obviously, none of the envisaged approaches is problem-free.

(3) The rule laid down in paragraph 1 has met with some criticism. One objection is that decisions rendered are at times contradictory, which is apparently inevitable when there are several jurisdictions. Another objection is that it is difficult to secure extradition, especially when offences are politically motivated.

(4) No doubt such imperfections exist, but no system is absolutely perfect. Contradictory decisions are also a fact of life at the domestic level. Even in cases where there is a supreme jurisdiction to harmonize judicial decisions, its own decisions vary as time goes by: what was considered right yesterday may appear wrong tomorrow. Moreover, States would not be precluded from introducing into their internal legislation procedural and substantive rules of the code—in fact, they would be welcome to do so—as well as a uniform scale of penalties, including conditions of detention.

(5) The difficulty of securing extradition would be no greater than it is in the present state of international society, and the adoption of a code will probably lead to more progressive thinking in that regard. If the clock were to be turned back to 1945, when the winners and the losers were the only judges and defendants, then the code would have to be abandoned. But the seriousness of the offences under consideration and the growing sense of outrage which they provoke are likely to prompt States to be more co-operative and forthcoming as far as extradition is concerned.

(6) The option envisaged in paragraph 2 would obviously be more consistent with the overall philosophy of the draft. But is the international community ready to accept it? Many drafts of the statute of a criminal jurisdiction are gathering dust, even though they were very cautious about an international criminal jurisdiction in that they gave exclusive competence to States and the Security Council and, before that, to the Council of the League of Nations. Moreover, those drafts gave such a jurisdiction only optional competence.

(7) In any event, rejection of both the solutions envisaged in draft article 4 would rob the code of any effectiveness by making it impossible to implement.

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Commentary

(1) A study of comparative law shows that statutory limitations constitute neither a general nor an absolute rule. They do not feature in some legal systems (for example, Anglo-American law) and are not absolute in others. For instance, in France they do not apply to serious military offences or to offences against national security. Futhermore, there is no unanimity among jurists as to the scope of the rule governing statutory limitations. Is it a substantive rule? Is it a procedural rule?

(2) It was only quite recently that international law turned to the question of statutory limitations on criminal jurisdiction. The 1945 London Agreement establishing the International Military Tribunal was silent on that point. No declaration issued during the 1939-1945 war (neither the St. James nor the Moscow Declaration) mentioned statutory limitations.

(3) Subsequent developments prompted the international community to take an interest in statutory limitations applicable to crimes. The need to prosecute those who had committed abominable crimes during the Second World War and the obstacle to such prosecution posed by the rule of statutory limitations in certain national legal systems led to the introduction of the rule of non-applicability of statutory limitations into international law with the Convention of 26 November 1968.[10] Some States have acceded to the Convention without restriction. Some have restricted non-applicability to crimes against humanity, to the exclusion of war crimes. However, the problems with such a restriction emerged clearly during the Klaus Barbie trial. Indeed, the exclusion of certain war crimes from the rule of non-applicability of statutory limitations in France provoked a strongly emotional reaction by public opinion, and the Cour de cassation, in its judgment of 20 December 1985,[11] had recourse to a broad interpretation of the notion of a crime against humanity, including crimes committed by an occupying régime against political opponents, "whatever the form of their opposition", which includes armed opposition.

(4) It is true that it is not always easy to draw a distinction between war crimes and crimes against humanity. These concepts sometimes overlap when crimes against humanity are committed during an armed conflict. The Charter of the Nürnberg Tribunal made a distinction between crimes committed against a "civilian population of or in occupied territory", which were described as war crimes, and crimes "committed against any civilian population . . . on . . . racial or religious grounds", which were crimes against humanity. Such a distinction is not very watertight. Crimes committed against a population in occupied territory are, of course, war crimes; but they may also constitute crimes against humanity because of their cruelty, irrespective of any racial or religious element. The distinction between war crimes and crimes against humanity is therefore neither systematic nor absolute. In any case, for the purposes of the present draft code, the notion of an offence against the peace and security of mankind is an indivisible one and consequently the distinction between a war crime and a crime against humanity does not apply.

Article 6. Jurisdictional guarantees

FORMER TEXT:

Any person charged with an offence against the peace and security of mankind is entitled to the guarantees ex-

[10] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (United Nations, *Treaty Series*, vol. 754, p. 73).

[11] *Fédération nationale des déportés et mutilés résistants et patriotes et autres* v. *Klaus Barbie, La Gazette du Palais* (Paris), 7-8 May 1986, p. 247.

tended to all human beings and particularly to a fair trial on the law and facts.

NEW TEXT:

Any person charged with an offence against the peace and security of mankind shall be entitled to the guarantees extended to all human beings with regard to the law and the facts. In particular:

1. In the determination of any charge against him, he shall be entitled to a fair and public hearing by an independent and impartial tribunal duly established by law or by treaty, in accordance with the general principles of law.

2. He shall have the right to be presumed innocent until proved guilty.

3. In addition, he shall be entitled to the following guarantees:

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

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

(*c*) To be tried without undue delay;

(*d*) 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, in any case where the interests of justice so require, and without payment by him, in any such case if he does not have sufficient means to pay for it;

(*e*) 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;

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

(*g*) Not to be compelled to testify against himself or to confess guilt.

Commentary

(1) The jurisdictional guarantees are formulated in several international instruments, including:

(*a*) the Charter of the Nürnberg International Military Tribunal[12] (art. 16) and the Charter of the International Military Tribunal for the Far East[13] (arts. 9 *et seq.*);

(*b*) the International Covenant on Civil and Political Rights[14] (arts. 14 and 15);

(*c*) the European Convention on Human Rights[15] (arts. 6 and 7);

(*d*) the American Convention on Human Rights[16] (arts. 5, 7 and 8);

(*e*) the African Charter on Human and Peoples' Rights[17] (art. 7);

(*f*) the 1949 Geneva Conventions[18] (art. 3 common to the four Conventions);

(*g*) Additional Protocols I (art. 75) and II[19] (art. 6) to the Geneva Conventions.

(2) One might ask whether, in the current state of international law, the guarantees provided for in draft article 6 have not become rules of *jus cogens*. In a recent work,[20] Mohamed El Kouhene notes the trend towards promoting judicial guarantees to the status of sacrosanct norms. The question is a valid one, since these guarantees are part of the irreducible minimum without which human rights would be devoid of substance.

(3) It is interesting to note in this respect that the punitive tribunals established after the Second World War to prosecute war crimes and crimes against humanity went even further by extending the concept of sacrosanct norms beyond judicial guarantees. For example, a United States military tribunal[21] convicted senior officials and magistrates of the German Ministry of Justice of knowing participation in a system of cruelty and injustice in violation of the laws of war and of humanity.[22]

(4) There were two aspects to such participation: enforcement of unjust laws, and unjust enforcement of laws.

(5) A law can be part of the positive legislation of a State and still constitute an unjust law if it violates humanitarian principles. The Supreme Court of the British Zone noted an "obvious and striking contrast" between humanitarian principles and Nazi internal law.[23] German jurists had for the most part reflected this legal approach. According to Gustav Radbruch, while the primacy of positive law was to be admitted in principle, the gulf between positive law and justice should not become so intolerably wide that legislation

[12] Annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[13] Hereinafter referred to as the "Tokyo Tribunal"; see *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

[14] See footnote 4 above.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (United Nations, *Treaty Series*, vol. 213, p. 221).

[16] The "Pact of San José, Costa Rica", signed on 22 November 1969 (*ibid.*, vol. 1144, p. 123).

[17] Adopted at Nairobi on 26 June 1981 (see OAU, document CAB/LEG/67/3/Rev.5).

[18] Geneva Conventions of 12 August 1949 for the protection of war victims (United Nations, *Treaty Series*, vol. 75).

[19] *Ibid.*, vol. 1125, pp. 3 and 609, respectively.

[20] *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme* (Dordrecht, Martinus Nijhoff, 1986).

[21] The reports of the trials conducted by the United States military tribunals are published in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949)* (15-volume series, hereinafter referred to as "American Military Tribunals") (Washington (D.C.), U.S. Government Printing Office, 1949-1953).

[22] The *Justice* case, American Military Tribunals, case No. 3, vol. III, p. 985; cited in H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi n° 10 du Conseil de contrôle allié* (Paris, Librairie générale de droit et de jurisprudence, 1960), pp. 252-253.

[23] Judgment of 15 November 1949, *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (O.G.H. br. Z.)*, vol. 2, p. 273; cited in Meyrowitz, *op. cit.*, p. 338.

based on unjust law had to be overridden by justice. As he saw it, "entire sections of National Socialist law were never worthy of becoming obligatory law".[24] Herbert Kraus, although a defence lawyer at the Nürnberg trial, said that a judge who applied a criminal pseudo-law was guilty of a crime against humanity. Hellmuth von Weber, for his part, said that a judge was guilty if he applied a law that was "null and void because it is in conflict with the concept of what is right".[25]

(6) There therefore appear to exist unformulated principles linked to the concept of justice and humanity. By violating them, a judge becomes criminally liable, and they may be violated even when a judge is applying positive law. This theory entails more than the violation of rules relating to judicial gurantees. It concerns the very essence of laws. A judge is asked to consider whether the law conforms to high principles of justice, to a supreme ethical code. Flagrant and striking failure to conform constitutes sufficient motive for the judge not to apply the law. He would, in a manner of speaking, have a monitoring power similar to that involved in monitoring the constitutionality of laws. But in the present case, the laws in question would not be written laws, but laws of conscience.

(7) Admittedly, this power can be given to judges only in exceptional circumstances, otherwise it would be counter-productive. This concept of positive law having to conform to what is right is an earth-shaking concept that is likely to have reverberations with incalculable consequences. A necessary counterweight to the criminal liability of the judge is his right to enter an objection for reasons of conscience, specifically by exercising his veto.

(8) It would not be absurd for one to ask, without venturing to that level of speculation, whether the violation of judicial guarantees does not constitute a violation of *jus cogens*, precisely because they represent the minimum guarantees to which every human being is entitled. If there is a violation of *jus cogens*, draft article 6 would merely be an affirmation of a pre-existing principle, and the question might arise as to whether it is necessary. In any case, according to an old dictum, what goes without saying is even better said.

Article 7. Non bis in idem [new article]

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of a State.

Commentary

(1) This is a new article. It concerns the rule *non bis in idem*.

(2) It is first and foremost a rule of internal criminal law. No one, within the territory of a State, may be prosecuted twice for the same deed.

(3) But a single offence may also be of concern to several States: the one in whose territory it was committed; the one of which the perpetrator is a national; and the one whose interests have been damaged by the offence. The offender thus runs the risk of being prosecuted as many times as there are States involved. Hence the importance of the *non bis in idem* rule in inter-State relations. The risk can be eliminated by treaty.

(4) However, the circumstances are different with regard to the application of the *non bis in idem* rule in the context of the code. Here we are in the sphere of international criminal law, and the offences in question are offences under international law. These are not situations in which the direct interests of two or three States are harmed. The international community itself is affected.

(5) Two systems may be envisaged to prosecute an offence under international law.

(6) Any State which detains an offender can be placed under the obligation to punish or extradite him. In such a situation, once sentence is passed, no other State should be able to prosecute him for the same deeds.

(7) Alternatively, an international criminal jurisdiction could be established that would be competent to consider such offences. In such a situation, it would apparently have to be admitted that the *non bis in idem* rule should not impair the competence of such a jurisdiction, otherwise the idea of an offence under international law would become totally meaningless. This, of course, would not prevent procedural solutions from being envisaged, for example in the context of the punishment imposed, as stated in the commentary to draft article 2. But such solutions cannot call into question the competence of the international jurisdiction.

Article 8. Non-retroactivity

FORMER TEXT (former article 7):

1. No person shall be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. The above provision does not, however, preclude the trial or punishment of a person guilty of an act or omission which, at the time of commission, was criminal according to the general principles of international law.

NEW TEXT:

1. No person may be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Commentary

(1) The rule of non-retroactivity of criminal law, whether or not formulated in internal judicial systems, today forms part of the fundamental guarantees. It is

[24] Cited in Meyrowitz, p. 338.

[25] *Ibid.*, p. 339.

the subject of article 11, para. 2, of the Universal Declaration of Human Rights;[26] article 15, para. 1, of the International Covenant on Civil and Political Rights;[27] article 7, para. 1, of the European Convention on Human Rights;[28] article 9 of the American Convention on Human Rights;[29] and article 7, para. 2, of the African Charter on Human and Peoples' Rights.[30] It was already embodied in the Nürnberg Judgment.[31]

(2) The controversy stirred up by the Nürnberg Judgment has today died down. Subsequent international instruments have established the general principles as sources of international law together with custom and treaties.

(3) Draft article 8 could simply form a paragraph of article 6, concerning jurisdictional guarantees. But it seemed preferable to include it as a separate provision, since those guarantees also relate to substantive rules.

Article 9. Exceptions to the principle of responsibility

FORMER TEXT (former article 8):

Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

(*a*) The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility;

(*b*) Coercion, state of necessity or *force majeure* do not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(*c*) The order of a Government or of a superior does not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(*d*) An error of law or of fact does not relieve the perpetrator of criminal responsibility unless, in the circumstances in which it was committed, it was unavoidable for him;

(*e*) In any case, none of the exceptions in subparagraphs (*b*), (*c*) and (*d*) eliminates the offence if:

(i) the fact invoked in his defence by the perpetrator is a breach of a peremptory rule of international law;

(ii) the fact invoked in his defence by the perpetrator originated in a fault on his part;

(iii) the interest sacrificed is higher than the interest protected.

NEW TEXT:

The following constitute exceptions to criminal responsibility:

(*a*) self-defence;

(*b*) coercion, state of necessity or *force majeure*;

(*c*) an error of law or of fact, provided, in the circumstances in which it was committed, it was unavoidable for the perpetrator;

(*d*) the order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator.

Commentary

(a) *Self-defence*

(1) Here it is a question of *self-defence by the individual* invoked by physical persons governing a State in respect of acts whose performance was ordered by them or which they carried out in response to an act of aggression directed against their State.

(2) In such a case, self-defence precludes both international responsibility on the part of the State invoking self-defence and individual criminal responsibility on the part of the leaders of that State. However, here it is a question only of the leaders' criminal responsibility.

(b) *Coercion, state of necessity or* force majeure

(3) Although some legal systems differentiate somewhat between these concepts, others do not draw a clear distinction between them. Judges use one or the other concept without differentiation in referring to the existence of a grave and imminent peril that could be escaped only through perpetration of the act in question.

(4) Jurists have closely examined the differences between the concepts of coercion, state of necessity and *force majeure*. According to Henri Meyrowitz:

> . . . however rational these distinctions may be, it is tricky to use them in the sphere of international law. For they relate to concepts that do not have an identical content in comparative law. Although little differentiation is made in Anglo-American law, there are different definitions of the concepts in question in French and German law.[32]

In the addendum to his eighth report on State responsibility, the then Special Rapporteur, Mr. Ago, devoted considerable attention to the distinction between *force majeure* and state of necessity.[33]

(5) Some internationalists, Mr. Ago pointed out, regard state of necessity and *force majeure* as different concepts. However, others use one of the two expressions exclusively. In actual fact, some of those who use the expression "state of necessity" include instances of *force majeure*.

(6) According to Mr. Ago, in this process the distinction between *force majeure* and state of necessity inevitably became blurred in many cases. Moreover, lack of precision in the drafting of judicial decisions, State

[26] General Assembly resolution 217 A (III) of 10 December 1948.

[27] See footnote 4 above.

[28] See footnote 15 above.

[29] See footnote 16 above.

[30] See footnote 17 above.

[31] See H. Donnedieu de Vabres, "Le jugement de Nuremberg et le principe de légalité des délits et des peines", *Revue de droit pénal et de criminologie* (Brussels), 27th year (1946-1947), p. 813; and C. Lombois, *Droit pénal international*, 2nd ed. (Paris, Dalloz, 1979), p. 49, para. 45.

[32] *Op. cit.* (footnote 22 above), p. 401.

[33] *Yearbook . . . 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7.

policy and international legal decisions has not made it any easier for jurists to draw a clearer distinction between the concepts in question. Furthermore, such expressions as "the plea of coercion or necessity", in which no distinction is drawn between the two concepts in question, are to be found in the judicial decisions of the criminal courts.

(7) Having considered these terminological aspects of the matter, the substantive conditions for these exceptions to the principle of responsibility must now be examined.

(8) During the trial of Field Marshal von Leeb and others, the United States military tribunal stated these conditions in the following terms:

> . . . To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.[34]

(9) However, the application of this general principle is adjusted to the specific circumstances in each particular case. Account is taken of such elements as the extent to which the person invoking the exception is at *fault* and the *proportionality* between the interest sacrificed and the interest safeguarded. Accordingly, the means of defence based on the exceptions in question cannot be admitted "where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative",[35] or furthermore when the will of the perpetrator of the wrongful act "coincides with the will of those from whom the alleged compulsion emanates".[36] The same applies in cases where the perpetrators make "a choice favourable to themselves and against the unfortunate victims", or in other words in cases where "the disparity in the number of the actual and potential victims" is thought provoking.[37]

(10) Before the Second World War, German legal decisions and doctrine (Reichsgericht judgment of 11 May 1927)[38] had given rise to the so-called theory of *supralegal* state of necessity, which was based on a comparative evaluation of juridical interests. The comparison is drawn first of all on the basis of positive law, seen in the light of the punishments for the acts in question or, failing that, in the light of "supralegal considerations based on general cultural concepts and, ultimately, on the concept of law itself".[39] Moreover, in some situations the perpetrator who invokes the exceptions in question is required to display superhuman conduct in "overriding his instinct of self-preservation". Accordingly, the Supreme Court of the British Zone decided that a secret agent who had knowingly accepted such an exceptionally dangerous role could not justifiably invoke coercion.[40] Similarly, a soldier cannot invoke state of necessity if he commits a war crime owing to the pressure of hazards normally associated with military action.

(11) Although these exceptions may be admissible in the case of war crimes, they are far less easily admissible in the case of crimes against humanity, owing to the nature of the latter crimes.

(c) *Error*

(12) There are errors of law and errors of fact.

(13) Two different situations should be considered in the case of errors of law, depending on whether the wrongfulness of the act is obvious.

(14) If the wrongfulness of the act is obvious, the individual who perpetrates it without coercion commits an offence against the peace and security of mankind.

(15) But the wrongfulness of the act is not always obvious. There are two ways in which such a situation may arise: either the laws and customs of war have controversial or unclear aspects or there are lacunae in them; or legal issues, particularly issues pertaining to international law, are involved, knowledge of which cannot reasonably be required of all soldiers. In these latter cases, error may be admitted as a plea.

(16) However, in the case of crimes against humanity, it is hard to imagine such situations, since such offences are a matter of conscience, regardless of any issues relating to positive law.

(17) The Supreme Court of the British Zone laid down the principle of an absolute duty to recognize that an act was criminal in cases where such criminal nature was evident, as in the case of crimes against humanity. For example, it declared that "when an offence against humanity has been committed, no one may exonerate himself from blame by pleading that he did not detect or was blind to it. He has to answer for that blindness."[41]

(18) In a judgment of 18 March 1952 of the full criminal court, the German Federal Court defined the concept of *insurmountable* error. "Exertion of the conscience" is required of the individual. If, despite such exertion of the conscience, the individual could not detect, on the basis of the specific circumstances in question, the wrongfulness of an order, he might be excused. If, on the other hand, as a result of exerting his conscience, he should have recognized the wrongfulness of an act, he must be regarded as guilty.[42] The wrongfulness of such crimes as those committed by the Nazis was obvious.

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[34] The *High Command* case, American Military Tribunals, case No. 12, vol. XI, p. 509. Concerning this judgment and those cited in the following paragraphs, see Meyrowitz, *op. cit.*, pp. 404-406 and *passim*.

[35] The *I. G. Farben* case, American Military Tribunals, case No. 6, vol. VIII, p. 1179.

[36] The *Krupp* case, *ibid.*, case No. 10, vol. IX, p. 1439.

[37] *Ibid.*, pp. 1445-1446.

[38] *Entscheidungen des Reichsgerichts in Strafsachen*, vol. 61 (1928), p. 242, at p. 254.

[39] E. Mezger, *Strafrecht* (Lehrbuch), 3rd ed. (Berlin, 1949), p. 241; cited in Meyrowitz, *op. cit.*, p. 330.

[40] *O.G.H. br. Z.* (see footnote 23 above), vol. 3, p. 129.

[41] *Ibid.*, vol. 1, p. 225.

[42] *Entscheidungen des Bundesgerichtshofes in Strafsachen*, vol. 3 (1953), pp. 365-366; *Juristenzeitung* (Tübingen), vol. 8 (1953), pp. 377-378; cited in Meyrowitz, *op. cit.*, p. 298.

(d) *Superior order*

(19) It might be asked whether an exception based on compliance with a superior order constitutes a separate concept. Compliance is justified by *coercion* and by an *error* as to the lawfulness of the order. If the individual complies owing to coercion, coercion will be invoked as an exception; if the individual complies owing to an error as to the lawfulness or unlawfulness of the order, the error will be invoked.

(20) The Commission will therefore have to pronounce on the need to retain a separate provision on superior order.

(21) In the decisions of the United States military tribunals, the exception based on superior order was invoked in the *Hostage* case, concerning the responsibility of Field Marshal List:

> An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature.[43]

In the *High Command* case referred to above, the tribunal stated that:

> . . . in determining the criminal responsibility of the defendants in this case, it becomes necessary to determine not only the criminality of an order in itself, but also . . . whether or not such an order was criminal on its face.[44]

(22) These elements show that compliance in error with a wrongful order may constitute an admissible exception. However, here, as in the case of an order carried out due to coercion, emphasis must be placed not on the order, but on the *error*. The error must have the characteristics set forth in the paragraphs on that concept. However, once it has been established that the error has such characteristics, it can exonerate the individual who carried out the order.

Article 10. Responsibility of the superior
[former article 9]

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

Commentary

(1) Here it is a question of the application to a specific case of the theory of complicity. Complicity does not arise only in the case of equal, independent partners, with the one aiding and abetting the other or providing him with the necessary means. It can also be the consequence of an order given by an individual who has the authority to give commands, or of a deliberate omission on the part of such an individual in an instance where he had the power to prevent the offence. It can also result from negligence, since in principle all military leaders must keep themselves informed of the situation of the units under their command and of the acts committed or planned by them. There have been judicial decisions in this area, including the *Yamashita* case and the *Hostage* case.

(2) In the *Yamashita* case, the United States Supreme Court posed the question whether the laws of war impose on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts that are violations of the laws of war by an uncontrolled soldiery, and whether he may be held personally responsible for his failure to take such measures. The Court's answer was affirmative.[45]

(3) In the *Hostage* case, the United States military tribunal stated that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about".[46]

(4) The difficulty that arises in connection with draft article 10 is not a substantive problem, but rather a methodological one. The question is whether a specific article should be devoted to these judicial decisions or whether the general theory of complicity should be allowed to cover cases falling within this category.

(5) It must be remembered that Additional Protocol I to the Geneva Conventions[47] devoted two articles to the duties of military leaders, namely article 86, which deals with omissions, and article 87, which deals with specific obligations. Draft article 10 simply reproduces paragraph 2 of article 86.

(6) It would perhaps be preferable to devote a provision to the precise cases in question, because, on the one hand, there are consistent judicial decisions and treaty provisions on the subject and, on the other hand, the offences under consideration are committed in the context of a hierarchy in which the authority to give commands is almost invariably involved and in respect of which it might be desirable to provide the responsibility in question with a separate basis, instead of referring to the general theory of complicity.

Article 11. Official position of the perpetrator
[former article 8, subparagraph (*a*)]

The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility.

Commentary

(1) Article 7 of the Charter of the Nürnberg Tribunal[48] ruled out the exception based on the official position of the perpetrator, stating:

> 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.

[43] American Military Tribunals, case No. 7, vol. XI, p. 1271.

[44] *Ibid.*, case No. 12, vol. XI, p. 512.

[45] *United States Reports* (Washington, D.C.), vol. 327 (1947), pp. 14-15.

[46] American Military Tribunals, case No. 7, vol. XI, p. 1303.

[47] See footnote 19 above.

[48] See footnote 12 above.

(2) The Charter of the Tokyo Tribunal[49] ruled out only the exception to the principle of responsibility, while admitting extenuating circumstances. Article 6 reads:

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his Government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

(3) It will be noted that article 6 of the Tokyo Charter, which also deals with compliance with orders from a superior, makes provision for the possibility of extenuating circumstances in both situations.

(4) In the Nürnberg Principles,[50] the Commission separated the two problems. Principle III, on the responsibility of heads of State or Government, rules out any exceptions to their responsibility. Principle IV, which deals with compliance with an order from a superior, makes provision for responsibility only if a moral choice was in fact possible to the perpetrator.

(5) In the context of draft article 11, it is obviously only a question of the responsibility of heads of State or Government. The issue of an order from a superior has already been dealt with in the context of exceptions to the principle of responsibility (art. 9 (*d*)).

(6) With regard to the question whether such responsibility leaves any room for extenuating circumstances, it would seem more appropriate to regard the official position of the perpetrator as an aggravating circumstance, since one of the basic concerns of the code is to suppress abuses of power. However, the issue of extenuating or aggravating circumstances has not yet been considered and would in any event be out of place in a part dealing solely with exceptions to the principle of responsibility.

[49] See footnote 13 above.

[50] See footnote 5 above.