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**Eleventh report on the draft Code of crimes against the peace and security of mankind, by
Mr. Doudou Thiam, Special Rapporteur**

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draft statute for an international criminal court**

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**Eleventh report on the draft Code of Crimes against the Peace and Security of
Mankind, by Mr. Doudou Thiam, Special Rapporteur**

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

[Original: French]
[25 March 1993]

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Multilateral instruments cited in the present report

Source

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, pp. 31 et seq.
and Additional Protocols I and II (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, pp. 3 et seq.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
American Convention on Human Rights (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, p. 123.

Introduction

1. The question of the possible establishment of an international criminal jurisdiction was already studied in the three previous reports.¹ At that stage the aim was not to submit a draft statute for an international criminal court, but rather to initiate a thorough discussion in the Commission on very important aspects of the establishment of such a court, so that the debate could provide the necessary guidelines for drafting a statute.

2. This report, however, offers the Commission a draft statute for an international criminal court. It is submitted further to paragraphs 4 to 6 of General Assembly resolution 47/33 of 25 November 1992, dealing with the report of the Commission on the work of its forty-fourth session,² which read as follows:

The General Assembly,

...

4. *Takes note with appreciation* of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction;

5. *Invites* States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction;³

6. *Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from

its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

3. It is against this background that this report is presented. First, it should be noted that the present draft is based on the option that the court will be an organ of the United Nations. It is difficult to imagine the United Nations requesting the Commission, by resolution, to draft the statute of a court that would not be an organ of the United Nations. That is why the draft does not propose any other option.

4. Moreover, it is not the intention in this report to offer definitive solutions to a problem of great complexity. Instead, the report consists of a work plan presenting the various subjects to be covered in the statute of a court. At most, an attempt has been made to respect the spirit and approach of the Commission in its desire for an organ with structures that are adaptable, not permanent and of a modest cost.

5. It will be noted that, for this purpose, the draft has been abridged by not covering all the organs usually found in criminal jurisdictions. Hence, there is no investigatory body functioning separately from the trial body. All investigation chambers are permanent in character. That is why this draft has introduced a system in which the investigation is conducted by the court itself, that is to say, by the trial body, more often than not in the course of the hearing itself.

¹ *Yearbook . . . 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1, *Yearbook . . . 1991*, vol. II (Part One), p. 37, document A/CN.4/435 and Add.1 and *Yearbook . . . 1992*, vol. II (Part One), p. 51, document A/CN.4/442.

² *Yearbook . . . 1992*, vol. II (Part Two).

³ *Ibid.*, annex.

6. Similarly, so far as prosecution is concerned, this draft does not propose to establish a department headed by a public prosecutor, assisted by the whole army of officials that the functioning of such an organ implies. The more flexible solution of leaving the prosecution in the hands of the complainant State has been preferred.

7. There is nothing absurd about this solution; as indicated in the comments to draft article 25 (Prosecution) below, it has been adopted in some criminal court drafts, where the complainant State appoints an officer, also called a "Procurator". However, a more traditional option is also proposed in article 25, alternative B.

8. As for the trial body, it does not have a permanent membership. It is not always the same judges who sit in a chamber. They differ according to the cases, the President of the court having a pre-eminent role to play in this connection. He is the person who chooses from a panel of judges appointed by States. The only permanent feature is the number of judges required to sit on a given case.

9. The fact that the organs of the court do not function on a full-time basis has certain implications, especially as regards the allowances paid to the judges and the compatibility or incompatibility of a judge's functions with other functions.

10. As for the jurisdiction of the court, the proposed draft article does not aspire—far from it—to solve all the problems to which this issue gives rise. It will be borne in mind that the jurisdiction of the court is not exclusive, but concurrent, each State being empowered either to try the case itself or to refer the accused to the court. This option seems to have won the support of the majority in the Commission. Moreover, this jurisdiction depends on the consent of two States: the complainant State and the State on whose territory the crime has been committed.

11. The question of jurisdiction *ratione materiae* is even more difficult. High hopes are being placed on the contribution members of the Commission may make to solving this difficult and delicate issue which has long been debated without any solution emerging. No agreement has been reached on a list of crimes to form the subject of this jurisdiction.

12. For this reason, pending the coming into being of a code of crimes, one solution would be for the jurisdiction

ratione materiae of the court to be established by special agreements between States parties, or by individual acceptance, these instruments being subject to implementation at any time.

13. Another problem is that of applicable penalties. Generally speaking, in national law, the criminal code and the criminal jurisdiction are the subject of separate instruments. As regards the matter under consideration, however, the authors of previous drafts did not consider it useful or timely to draft two separate instruments. It is in the draft statute of the court that provision was made for the penalties and, in general, the court was left to apply whatever penalties it deemed appropriate, without reference to any code. The present draft refers to the criminal law of one of the States concerned. This solution is admittedly imperfect but at least it refers to the law of a State.

14. Another completely different problem is how to ensure that the defendant will appear before the court. This is an important question. According to the present draft, which is in line with the general opinion of the Commission, proceedings by default are not admissible in the court. If the defendant does not appear voluntarily, there must be ways of making him appear. Between States parties provision is made for a simplified rule of handing over the defendant to the court merely upon request, with reservations, however, as concerns respect for certain principles. Between States not parties to the statute, or between States parties and States not parties, only extradition proceedings can guarantee the appearance of the defendant if he fails to appear voluntarily.

15. As the court cannot conclude extradition agreements unless it is recognized to have such authority, it would be for the State party intending to submit the case to the court to obtain extradition of the defendant to its territory and to hand him over to the court.

16. Moreover, it will be appropriate to complete the draft with some ancillary provisions related to cooperation between the court and States parties or States not parties to the statute.

17. The Special Rapporteur provides below a brief presentation of the draft which, it is reiterated, does not claim to solve all the delicate issues to which the establishment of an international criminal jurisdiction gives rise. At most, it constitutes a work plan for the Commission.

Draft statute for an international criminal court

PART I

ESTABLISHMENT

DRAFT ARTICLE 1. ESTABLISHMENT OF THE COURT

(a) *Proposed text*

18. The proposed text of draft article 1 reads as follows:

Article 1. Establishment of the Court

There is established an International Criminal Court whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

(b) *Comments*

19. In this draft article, the adjective "criminal" is used purposely in preference to the adjective "penal", in order to make it very clear that the court is concerned with crimes and not with ordinary offences. The court shall

take cognizance only of such ordinary offences as are linked to a crime which has been referred to the court.

DRAFT ARTICLE 2. THE COURT, JUDICIAL ORGAN OF THE UNITED NATIONS

(a) *Proposed text*

20. The proposed text of draft article 2 reads as follows:

Article 2. The Court, judicial organ of the United Nations

The Court shall be a judicial organ of the United Nations.

(b) *Comments*

21. It is of the utmost importance for the criminal court to be an organ of the United Nations. The coexistence of ICJ and an international criminal court as organs of the United Nations would not be contrary to the Charter. Article 1 of the Statute of ICJ actually provides that "The International Court of Justice ... shall be the principal judicial organ of the United Nations", which leaves room for another judicial organ having jurisdiction in criminal matters. This view seems to be confirmed by the recent Security Council resolution establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.⁴

DRAFT ARTICLE 3. SEAT OF THE COURT

(a) *Proposed text*

22. The proposed text of draft article 3 reads as follows:

Article 3. Seat of the Court

The seat of the Court shall be established at [...]

(b) *Comments*

23. Establishing the seat of the court is essentially a political problem. It is for the Sixth Committee of the General Assembly to discuss the matter and to submit proposals to the General Assembly. Nevertheless, the Commission too may discuss the problem, if it so desires, and submit its own proposals to the General Assembly.

DRAFT ARTICLE 4. APPLICABLE LAW

(a) *Proposed text*

24. The proposed text of draft article 4 reads as follows:

Article 4. Applicable law

The Court shall apply international conventions and agreements relevant to the crimes within its juris-

isdiction [as well as general principles of law and custom].

(b) *Comments*

25. The debates in the Commission have revealed that, of the sources of law that may be applied, only international conventions and agreements did not give rise to controversy.

26. By contrast, the controversy that arose about the general principles of law and custom explains why these two sources have been placed in square brackets.

27. This restrictive approach is perhaps dictated by a sense of caution. It should be noted, however, that no previous draft had gone so far in restricting the law that could be applied by an international criminal court.

28. The draft Statute of the International Penal Court prepared in 1926 by ILA⁵ listed as sources of law to be applied: international treaties, conventions and declarations; international custom; general principles of law; and judicial decisions as subsidiary means for the determination of rules of law (art. 23).

29. According to article 2 of the revised draft statute of the 1953 United Nations Committee on International Criminal Jurisdiction,⁶ "The Court shall apply international law, including international criminal law and, where appropriate, national law".

30. A more recent draft prepared by Chérif Bassiouni⁷ includes the sources listed in Article 38 of the Statute of ICJ.

31. To remain faithful to the views of the Working Group on the question of an international criminal jurisdiction, the present draft article strictly speaking includes only conventions and agreements.

DRAFT ARTICLE 5. JURISDICTION OF THE COURT

(a) *Proposed text*

32. The proposed text of draft article 5 reads as follows:

Article 5. Jurisdiction of the Court

1. The jurisdiction of the Court shall not be presumed.

2. The Court shall have jurisdiction over every individual, provided that the State of which he is a national, and the State in whose territory the crime is presumed to have been committed, have accepted its jurisdiction.

3. Pending the adoption of a criminal code relevant to its jurisdiction, offences within the jurisdiction of the Court shall be defined in special treaties

⁵ ILA, *Report of the Thirty-fourth Conference, Vienna, 5-11 August 1926* (London, 1927), pp. 113-125. See also United Nations, *Historical survey...*, memorandum by the Secretary-General (Sales No.1949.V.8), p. 61, appendix 4.

⁶ See *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953, Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*, annex.

⁷ Association internationale de droit pénal, *Nouvelles études pénales* (Erès, Syracuse, Italy, 1992).

⁴ Security Council resolution 808 (1993) of 22 February 1993.

between States parties, or in a unilateral instrument of a State.

4. Such treaties or unilateral instruments shall determine and indicate exactly the offences over which the Court is recognized to have jurisdiction.

5. The Court shall not try defendants other than those within its jurisdiction, or try defendants for acts other than those for which they were prosecuted.

(b) *Comments*

33. Draft article 5 deals with jurisdiction *ratione personae* and *ratione materiae*.

34. The jurisdiction of the court to try an individual, or its *ratione personae* jurisdiction, is subject to the agreement of the two States concerned: the State of which that individual is a national and the State in whose territory the crime was presumably committed.

35. In national criminal law, there are two main rules of jurisdiction: territorial jurisdiction and personal jurisdiction. Territorial jurisdiction is, of course, the rule more generally applied. It is not, however, the only one. It encompasses major exceptions in national legislation. In particular, where the honour or the basic interests of a State are at issue that State often gives preference to the personal jurisdiction rule.

36. This draft, if it is not to be totally lacking in realism, cannot exclude either of the two rules in favour of the other. For this reason, jurisdiction should be conferred both by the State in whose territory the crime was committed and by the State of which the perpetrator is a national.

37. The question of the jurisdiction *ratione materiae* of the court is also very complex. A code of international crimes does not yet exist.

38. The discussions in the Commission have not made it possible to define offences within the jurisdiction *ratione materiae* of the court, with the exception of genocide and possibly apartheid. At this stage, the draft should not be too ambitious. The jurisdiction *ratione materiae* of the court should be limited to a few offences about which the international community is in broad agreement. It will thus be incumbent on the Commission to indicate, if it can, in this spirit, the offences which would fall within the jurisdiction of the court.

39. It is proposed here that, until such time as States parties adopt an international criminal code, offences within the jurisdiction of the court should be defined by agreements between States parties. Any State may also, at the time of its accession to the statute of the court or at any other time, define the crimes for which it recognizes the jurisdiction of the court.

40. Such a method, which seems more flexible, was proposed in the draft Statute for the Creation of a Penal Chamber of ICJ.⁸

⁸ Prepared by V. V. Pella and adopted by the International Association for Penal Law, Paris, 16 January 1928, revised in 1946 (United Nations, *Historical survey* . . . , p. 75, appendix 7).

DRAFT ARTICLE 6. JURISDICTIONAL DISPUTES

(a) *Proposed text*

41. The proposed text of draft article 6 reads as follows:

Article 6. Jurisdictional disputes

The Court shall rule on questions relating to its own jurisdiction in a case submitted to it.

(b) *Comments*

42. It is a rule in international law that the judge hearing a dispute shall also be the judge of the court's own jurisdiction. This draft article, therefore, merely applies a rule which has been in force for a long time.

DRAFT ARTICLE 7. JUDICIAL GUARANTEES

(a) *Proposed text*

43. The proposed text of draft article 7 reads as follows:

Article 7. Judicial guarantees

1. Everyone charged with a criminal offence shall be presumed innocent until proved guilty.

2. Everyone shall be entitled:

(a) **To a fair and public hearing;**

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

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

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

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

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

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

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

(b) *Comments*

44. Draft article 7 deals with the judicial guarantees which any individual prosecuted before the court enjoys.

45. These guarantees are found in many international instruments, such as statutes of international military tribunals, especially the Charter of the Nürnberg Tribunal⁹

⁹ 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).

(art. 16) and the Charter of the International Military Tribunal for the Far East (the Tokyo Tribunal)¹⁰ (art. 9). They are also found in the following instruments: the International Covenant on Civil and Political Rights (art. 14); the Convention for the Protection of Human Rights and Fundamental Freedoms (arts. 5-6); the American Convention on Human Rights (arts. 5, 7 and 8); the African Charter on Human and Peoples' Rights¹¹ (art. 7); the Geneva Conventions of 12 August 1949 (art. 3 common to the four Conventions) and Additional Protocols I (art. 75) and II (arts. 4-6) thereto.

46. As the draft Code of Crimes against the Peace and Security of Mankind has not yet been adopted, it was deemed useful to devote a specific provision of the statute of the court to judicial guarantees.

PART 2

ORGANIZATION AND FUNCTIONING

DRAFT ARTICLE 8. PERMANENCE OF THE JURISDICTION OF THE COURT

(a) *Proposed text*

47. The proposed text of draft article 8 reads as follows:

Article 8. Permanence of the Court

Although the jurisdiction of the Court is permanent it [shall not function on a full-time basis and] shall be convened only to consider a case submitted to it.

(b) *Comments*

48. This draft establishes two things, namely that: (a) the jurisdiction of the court shall be permanent in nature; and (b) not all of its organs shall function on a permanent basis.

49. If the jurisdiction of the court is permanent, it is easier to convene the court if the need arises.

50. Had the court already been established, it would have been possible to avoid all the delays that the international community is presently facing in setting up a court to judge the war crimes committed in the former Yugoslavia. Such a court would have existed prior to commission of the crimes.

51. The permanence of such a jurisdiction would not be incompatible with the intermittent functioning of its organs.

52. The present draft attempts to combine these two aspects, while responding to the Commission's concern to establish a body that is modest and inexpensive.

DRAFT ARTICLE 9. RESIDENCE OF THE PRESIDENT AND THE REGISTRAR

(a) *Proposed text*

53. The proposed text of draft article 9 reads as follows:

Article 9. Residence of the President and the Registrar

ALTERNATIVE A

[Only] the President and the Registrar shall reside at the seat of the Court and shall exercise their functions on a full-time basis.

ALTERNATIVE B

[Only] the Registrar shall reside at the seat of the Court and shall exercise his functions on a full-time basis.

(b) *Comments*

54. This draft article, which provides that only the President and the Registrar (alternative A), or only the Registrar (alternative B), shall reside at the seat of the court, is also based on a concern for economy.

DRAFT ARTICLE 10. RULES OF PROCEDURE

(a) *Proposed text*

55. The proposed text of draft article 10 reads as follows:

Article 10. Rules of procedure

Rules of procedure elaborated by the Court shall determine the method of functioning of its various organs and their relationship.

(b) *Comments*

56. Since the members of the court will not reside at the place where it has its seat and will be convened only intermittently to consider a case, it will be necessary for the rules of procedure to go into detail as to how communication among the members of the court will be established, especially with regard to the transmittal of evidence and documents, to ensure the closest possible administrative relationships among the members.

DRAFT ARTICLE 11. QUALIFICATIONS REQUIRED

Proposed text

57. The proposed text of draft article 11 reads as follows:

Article 11. Qualifications required

The members of the Court must be jurists of high moral character and recognized competence in international law and, more specifically, in international criminal law.

¹⁰ Signed at Tokyo on 19 January 1946 (*Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 et seq).

¹¹ Adopted in Nairobi on 26 June 1981 (see OAU, document CAB/LEG/67/3/Rev. 5).

DRAFT ARTICLE 12. APPOINTMENT OF JUDGES

(a) Proposed text

58. The proposed text of draft article 12 reads as follows:

Article 12. Appointment of judges

The members of the Court shall be appointed as follows:

(a) Each State party to the Statute of the Court shall appoint a judge who possesses the qualifications provided for in article 11 of this Statute;

(b) The Secretary-General of the United Nations shall prepare a list in alphabetical order of the judges appointed by the States.

(b) Comments

59. The appointment procedure proposed in this draft article avoids the need to appoint full-time judges. The list referred to in paragraph (b) above shall constitute a panel from which judges shall be chosen to sit on a case, in accordance with article 14 below.

60. A different procedure, which would consist of the judges being elected by the General Assembly, could also be considered. Such a procedure, however, would be more appropriate if the judges were to exercise their functions on a full-time basis.

DRAFT ARTICLE 13. ELECTION OF THE PRESIDENT AND VICE-PRESIDENT(S)

(a) Proposed text

61. The proposed text of draft article 13 reads as follows:

Article 13. Election of the President and Vice-President(s)

1. The President and Vice-President(s) shall be elected by the General Assembly of Judges by an absolute majority. They shall constitute the Bureau of the Court.

2. The Bureau shall take all decisions concerning the administrative and financial functioning of the Court.

(b) Comments

62. A larger committee could also be established whose members would be elected by representatives of the States parties. This committee would then elect the President or Vice-President(s). It would be authorized to oversee the administrative and financial management of the court and, in particular, to agree upon the draft budget of the court for submission to the General Assembly. However, a structure of this kind would be too cumbersome and better suited to an inter-State court.

DRAFT ARTICLE 14. APPOINTMENT OF THE REGISTRAR

Proposed text

63. The proposed text of draft article 14 reads as follows:

Article 14. Appointment of the Registrar

On the proposal of the President, the Bureau of the Court shall appoint the Registrar in accordance with the procedure which it has itself established.

DRAFT ARTICLE 15. COMPOSITION OF A CHAMBER OF THE COURT

(a) Proposed text

64. The proposed text of draft article 15 reads as follows:

Article 15. Composition of a chamber of the Court

1. Each chamber of the Court shall consist of nine judges.

2. If the accumulation of cases so requires, the Court may establish several chambers.

3. The President or, in his place, the Vice-President, shall select the judges to sit in the chambers of the Court from the list referred to in article 12.

4. No judge from the complainant State or from the State of which the accused is a national shall be a member of a chamber which is hearing a case involving such States.

(b) Comments

65. The number of judges constituting the court or a chamber of the court has varied according to the different draft statutes. The draft statute for an international criminal court prepared in 1926 by ILA¹² provided that the court could sit in one or more sections of five judges (art. 14, *in fine*).

66. The draft Statute for the Creation of a Penal Chamber of ICJ adopted by the International Association for Penal Law¹³ provided for 15 titular and 8 supplementary members (art. 3).

67. The Convention for the Creation of an International Criminal Court of 16 November 1937,¹⁴ adopted by the International Conference on the Repression of Terrorism, made provision for five regular judges and five deputy judges (art. 6).

68. The 1943 draft Convention for the Creation of an International Criminal Court, prepared by the London International Assembly¹⁵ provided that the court should consist of 35 judges and that the number could be increased if the need arose (art. 9).

¹² ILA, *Report of the Thirty-fourth Conference* . . . (see footnote 5 above).

¹³ See footnote 8 above.

¹⁴ United Nations, *Historical survey* . . . p. 88, appendix 8.

¹⁵ *Ibid.*, p. 97, appendix 9 B.

69. Annex I to the draft Convention on the Crime of Genocide,¹⁶ prepared by the Secretary-General of the United Nations, concerning the establishment of a permanent international criminal court for the punishment of acts of genocide, provided for seven regular judges and seven deputy judges (art. 6). Annex II of the same draft Convention, concerning the establishment of an ad hoc court, provided for seven regular judges but no deputy judges (art. 11).

70. The Charter of the Nürnberg Tribunal¹⁷ provided for four judges representing the signatories to the London Agreement of 8 August 1945, each to be assisted by an alternate (art. 2).

71. Apart from the question of how many judges should have cognizance of a particular case, there is also the question whether the court might be divided into several chambers, if its caseload so warranted. That possibility, for which provision is made in paragraph 2, should not be entirely ruled out.

DRAFT ARTICLE 16. COMPATIBILITY WITH OTHER FUNCTIONS

(a) *Proposed text*

72. The proposed text of draft article 16 reads as follows:

Article 16. Compatibility with other functions

1. **Members of the Court may continue to exercise the functions which they performed before their election. However, they shall not participate in any case in which they have previously been involved in any capacity whatsoever.**

2. **If a judge considers that he should not sit for a particular case, he shall so inform the President.**

(b) *Comments*

73. As judges only receive a daily allowance, they cannot be required to abandon the functions which they previously exercised.

DRAFT ARTICLE 17. DEPRIVATION OF OFFICE

Proposed text

74. The proposed text of draft article 17 reads as follows:

Article 17. Deprivation of office

Members of the Court shall not be deprived of their office unless, in the unanimous opinion of the other members, they have ceased to meet the required conditions.

DRAFT ARTICLE 18. DIPLOMATIC IMMUNITY

Proposed text

75. The proposed text of draft article 18 reads as follows:

Article 18. Diplomatic immunity

Members of the Court, when travelling to or from its seat on Court business, shall be entitled to diplomatic passports and, while engaged in the performance of their duties, shall enjoy diplomatic privileges and immunities.

DRAFT ARTICLE 19. VACANCY OF A SEAT

Proposed text

76. The proposed text of draft article 19 reads as follows:

Article 19. Vacancy of a seat

In the event of a seat being vacated on the death or resignation of a judge or for any other cause, the State having appointed that judge shall simply provide for his replacement by way of a letter addressed to the President of the Court.

DRAFT ARTICLE 20. SOLEMN DECLARATION

(a) *Proposed text*

77. The proposed text of draft article 20 reads as follows:

Article 20. Solemn declaration

Every member shall, in open court, make a solemn declaration that he will exercise his functions impartially and conscientiously.

(b) *Comments*

78. Instead of administering the oath to a judge when he takes office at the time of a case, the oath may be administered once during a plenary session to all judges whose names appear on the list.

DRAFT ARTICLE 21. ALLOWANCES, EMOLUMENTS AND SALARIES

(a) *Proposed text*

79. The proposed text of draft article 21 reads as follows:

Article 21. Allowances, emoluments and salaries

1. **The President of the Court shall receive a special annual allowance.**

2. **The Vice-President [s] shall receive a special allowance for each day that he [they] exercise[s] the functions of President.**

3. **The judges shall receive a daily allowance during the period in which they exercise their functions. They shall also receive free transport to and from the Court according to a scale set by the General Assembly.**

4. **The Registrar shall receive a salary.**

¹⁶ Ibid., p. 120, appendix 12.

¹⁷ See footnote 9 above.

5. The salaries, allowances and emoluments and the running costs of the Court shall be set by the General Assembly.

(b) *Comments*

80. In some draft statutes, it is the States of origin which pay the travel costs and emoluments for the judges, on a scale set by the States parties. Such a system, however, would be more acceptable if the court were merely an inter-State body, rather than a United Nations body.

DRAFT ARTICLE 22. BUDGET OF THE COURT

Proposed text

81. The proposed text of draft article 22 reads as follows:

Article 22. Budget of the Court

The budget of the Court shall be met by the United Nations as decided by the General Assembly.

PART 3

PROCEDURE

DRAFT ARTICLE 23. SUBMISSION OF A CASE TO THE COURT

(a) *Proposed text*

82. The proposed text of draft article 23 reads as follows:

Article 23. Submission of a case to the Court

1. A case shall be submitted to the Court on the complaint of a State.

2. (a) Any State, whether or not it be a party to the Statute of the Court, may, instead of having an accused person tried under its own jurisdiction, refer him to the Court.

(b) Submission by a non-State party of a complaint to the Court shall imply accession to the Statute of the Court and to recognition of its jurisdiction in respect of the offence in question.

(c) The complaint, addressed to the President through the Registrar, shall indicate the name and domicile of the agent who follows the procedure, takes part in the investigation and, where necessary, conducts the prosecution before the Court.

(d) All procedural documents shall be served at the domicile of the agent or at any address which he indicates.

3. On receiving the complaint, the President of the Court shall, provided the States are not complainants, inform the State on whose territory the offence was committed and the State of which the accused is a national.

4. The complaint shall include an exact statement of the charges and the elements on which the complaint is founded.

(b) *Comments*

83. Paragraph 1 restricts the right of complaint to States. Accordingly, individuals and international organizations are excluded from this right. The right of international organizations to complain was a subject of dispute in the Commission and failed to win general approval.

84. Paragraph 2 (a) establishes the optional and concurrent character of the court in that any State also has the right to have an accused person tried by its own courts. It also permits access to the court by non-States parties. In return for the right of a non-party State to submit a case to the court, paragraph 2 (b) creates obligations on the part of that State.

DRAFT ARTICLE 24. INTERVENTION

(a) *Proposed text*

85. The proposed text of draft article 24 reads as follows:

Article 24. Intervention

Any concerned State may intervene in the criminal procedure, submit a memorandum and take part in the proceedings.

(b) *Comments*

86. The "State concerned" must be understood to mean the State of which the offender is a national. It may also mean, provided they are not complainants, other States which are aggrieved or whose nationals are aggrieved, or it could even mean the State or States on whose territory the crime was committed.

DRAFT ARTICLE 25. PROSECUTION

(a) *Proposed text*

87. The proposed text of draft article 25 reads as follows:

Article 25. Prosecution

ALTERNATIVE A

The State which brings a complaint before the Court shall assume responsibility for conducting the prosecution.

ALTERNATIVE B

The prosecuting authority before the Court shall be the Prosecutor-General. He shall act on behalf of all the States parties. He shall be elected by the Court [the States parties] from among the judges on the list provided for in article 12. He shall hold office for three years.

(b) *Comments*

ALTERNATIVE A

88. This option makes the complainant State responsible for conducting the prosecution before the court. It

would seem to respond to the general concern to establish a modest, inexpensive body.

89. This was the option adopted in the 1937 Convention for the Creation of an International Criminal Court,¹⁸ (art. 25, para. 3). It was also one of the solutions identified in the 1928 draft Statute for the Creation of a Criminal Chamber of ICJ¹⁹ whereby the Security Council which, according to the draft, is responsible for undertaking international criminal proceedings, may, if it deems it appropriate, “leave [the presentation of the accusation] to the State concerned” (art. 25). Furthermore, the 1926 ILA draft²⁰ provides that the complainant State shall appoint a “procurator or agent” to conduct the proceedings (art. 27). Alternative A seems to correspond more closely to the spirit of the present draft articles.

ALTERNATIVE B

90. Alternative B, however, offers another option which is the more classic procedure. This solution is to establish a prosecutorial organ, headed by a prosecutor-general. It has the drawback, though, of appointing a permanent official, to head a permanent office with deputies (general lawyers, general substitutes and many junior officials). The Commission has no wish to embark upon this course.

DRAFT ARTICLE 26. INVESTIGATION

(a) *Proposed text*

91. The proposed text of draft article 26 reads as follows:

Article 26. Investigation

1. **The Court, if it deems the complaint admissible, shall summon the defendant to appear before it.**

2. **After examining the defendant and considering the evidence, the Court shall decide whether or not to initiate an investigation.**

3. **To that end, the Court may, at any time, either on its own initiative, or at the request of the parties:**

(a) **Order the disclosure and production of any document or exhibit connected with the proceedings, the production of which appears necessary in order to establish the truth;**

(b) **Under the same conditions, order witnesses to attend and be examined before the Court or one or more of its members, or order that their examination be conducted through letters of request in the manner provided by territorial law and allow their deposition as evidence before the Court;**

(c) **All testimony shall be in written form;**

(d) **When a question arising in a case involves prolonged investigation which cannot be conducted before the Court, the Court may appoint a special**

committee consisting of one or more of its members in order to carry out the inquiry. The Court may act upon the report of this committee as it sees fit;

(e) **The Court, under the same conditions, may summon any person with expert knowledge, particularly in military, naval, aerial or scientific matters, in order to give evidence in any case in which the Court deems his knowledge is required for the determination of the case;**

(f) **No examination of experts and no hearing or confrontation of the defence may take place other than in the presence of the counsel for the defence or the complainant or those duly convened.**

4. **The parties undertake to provide the Court with all necessary assistance, especially in respect of the attendance of witnesses, which shall be secured, where necessary, by means of coercion, in accordance with the rules of the requested State.**

(b) *Comments*

92. This investigation procedure, carried out at the hearing by the court itself, replaces the procedure of entrusting the investigation to a permanent body, in practice the examining magistrate. However, paragraph 3 (d) provides that, if the case requires lengthy investigation, the court may appoint one or more of its members to carry out the investigation. This special committee is dissolved as soon as the investigation is completed however, and is therefore not permanent in nature.

DRAFT ARTICLE 27. JUDGEMENT BY DEFAULT

(a) *Proposed text*

93. The proposed text of draft article 27 reads as follows:

Article 27. Judgement by default

[No defendant may be judged by default.]

(b) *Comments*

94. This provision is placed in square brackets. Indeed, the predominant view was that proceedings by default should not be permitted. However, such a solution would be liable to paralyse the work of the court. It would suffice for the court to be unable to secure the appearance of the defendant.

95. Proceedings by default exist in some of the draft statutes. For example, the 1926 ILA draft statute on an international criminal court²¹ provided for default of appearance (art. 33). In such a case, the court would issue a *mandat d'amener* or a *mandat d'arrêt* and continue the proceedings, after proof of due service of the charge. The court need only to satisfy itself that it has jurisdiction to hear the case.

96. The deterrent effect of an international *mandat d'arrêt* (arrest warrant) should not be underestimated;

¹⁸ See footnote 14 above.

¹⁹ See footnote 8 above.

²⁰ ILA, *Report of the Thirty-fourth Conference . . .* (see footnote 5 above).

²¹ *Ibid.*

such a warrant would greatly limit the defendant's freedom of movement and action.

DRAFT ARTICLE 28. HANDING OVER AN ACCUSED PERSON TO THE COURT

(a) *Proposed text*

97. The proposed text of draft article 28 reads as follows:

Article 28. Handing over an accused person to the Court

1. A State party shall hand over to the Court, at the request of the Court, any person against whom the Court has instituted proceedings for crimes that fall within its jurisdiction.

2. The State required so to do shall, however, ensure that:

(a) The proceedings have not been instituted on political, racial, social, cultural, or religious grounds;

(b) The accused does not enjoy immunity from prosecution;

(c) The handing over would not be contrary to the legal principle of *res judicata*.

(b) *Comments*

98. Among the States parties, it would appear desirable to facilitate the conditions under which an accused person is handed over to the court. However, the present draft article takes account of the concerns expressed within the Commission about the need to safeguard the rights of the accused. That is why the principle stated in paragraph 1 is tempered by the provisions of paragraphs 2 (a) and 2 (b).

99. It should be recalled that this simplified procedure contains no new elements (Art. 5). The 1943 draft Convention on an international criminal court prepared by the London International Assembly²² contained the following provision:

The handing over of an accused person to the prosecuting authority of the ICC is not an extradition. The ICC is deemed for the purpose of this Convention a Criminal Court common to all nations, and justice administered by this Court shall not be considered as foreign.

100. Between non-States parties or between a non-State party and a State party, recourse shall be had to the extradition procedure.

101. The problem would be to determine whether the court would be competent to conclude extradition agreements. It appears that it would not have such competence.

102. Where the accused refuses to appear, one solution would be to require any State which exercises the right to institute proceedings against a person residing in a third State, to obtain the extradition of the accused to its territory, in order to hand him over, as necessary, to the court.

DRAFT ARTICLE 29. DISCONTINUANCE OF PROCEEDINGS

(a) *Proposed text*

103. The proposed text of draft article 29 reads as follows:

Article 29. Discontinuance of proceedings

The Court shall discontinue its proceedings and shall order release of the accused where the charge has been withdrawn and has not been immediately reinstated by a State which is competent to apply for institution of the proceedings.

(b) *Comments*

104. In the national law of certain countries, withdrawal of an accusation does not automatically lead to the discontinuance of the proceedings. It is still necessary for the public prosecutor, the defender of law and order, to agree to discontinuing the proceedings.

105. In the case referred to in article 29, however, the fact that there is no public prosecutor responsible for defending international law and order justifies discontinuance of the criminal proceedings where the accusation is withdrawn.

DRAFT ARTICLE 30. DETENTION UNDER REMAND

Proposed text

106. The proposed text of draft article 30 reads as follows:

Article 30. Detention under remand

1. The Court shall decide whether a person who is brought before it shall be placed or held under arrest. It shall determine, where necessary, the conditions under which he may be released on bail.

2. In making an arrest, the State on whose territory the seat of the Court is established shall make available to the Court an appropriate place of detention and, where necessary, the requisite guards.

DRAFT ARTICLE 31. HEARINGS

Proposed text

107. The proposed text of draft article 31 reads as follows:

Article 31. Hearings

Hearings shall be public unless, because of the nature of the charge or the evidence, the Court decides otherwise.

DRAFT ARTICLE 32. MINUTES OF HEARINGS

Proposed text

108. The proposed text of draft article 32 reads as follows:

²² United Nations, *Historical survey...* (see footnotes 5 and 15 above).

Article 32. Minutes of hearings

1. The minutes of hearings shall be signed by the President or, in his absence, by the Vice-President or by the judge who presided over the hearings.

2. The minutes shall include a succinct statement of the principal elements of the hearings and shall constitute the only evidence that the formalities provided for have been observed.

DRAFT ARTICLE 33. JUDGEMENT

(a) Proposed text

109. The proposed text of draft article 33 reads as follows:

Article 33. Judgement

1. When the prosecution and defence have presented their arguments and concluded their pleas, the President shall declare the proceedings closed.

2. The Court may render its judgement immediately, retire to hold deliberations, or set another date for delivery of its judgement.

3. The deliberations of the Court shall be confidential and the judges shall maintain the confidentiality of their deliberations.

4. The decisions of the Court shall be taken by a majority of the judges present and shall be deemed to represent the opinion of the Court as a whole.

5. All judgements of the Court shall be well-founded and read out at the public hearing by the President. Only the grounds which led to the decision of the majority shall be included in the judgement. No dissenting or individual opinion shall be published or divulged in any form whatsoever.

(b) Comments

110. Paragraph 5 deserves some explanation. Given the weight and authority attached to judgements in criminal cases, individual or dissenting opinions do not seem desirable. They weaken the authority attached to such judgements, whereas the judgements may have grave consequences insofar as they may seriously affect the personal freedom of those convicted.

DRAFT ARTICLE 34. PENALTIES

(a) Proposed text

111. The proposed text of draft article 34 reads as follows:

Article 34. Penalties

Until a code specifying the applicable penalties is adopted, the Court shall apply the penalties provided for by the criminal law of either:

(a) The State of which the perpetrator of the crime is a national; or

(b) The State which lodged the complaint; or

(c) The State on whose territory the crime was committed.

[However, the death penalty shall not be applicable.]

(b) Comments

112. The principle of *nulla poene sine lege* requires that the penalties imposed upon a guilty person must have been laid down before the incriminating acts were committed. In the present circumstances, the absence of an international criminal code makes it necessary to refer either to the law of the State of the perpetrator of the crime, or to the law of the State which lodged the complaint, or else to the law of the State in whose territory the crime was committed.

113. It will be for the Commission to choose from among these three options. The inclination is to opt for the law of the State of the perpetrator as the law with which he is presumed to be familiar. However, the principle of territoriality is the ordinary law principle in criminal matters.

DRAFT ARTICLE 35. REMEDIES

(a) Proposed text

114. The proposed text of draft article 35 reads as follows:

Article 35. Remedies

ALTERNATIVE A

1. Revision shall be the only remedy against judgements pronounced by the Court. Revision may take place should a fact of a decisive nature be discovered which was unknown to the Court and of which the applicant could not have been aware before the judgement was rendered.

2. Revisions shall be examined by the chamber of the Court which rendered the judgement.

ALTERNATE B

1. The remedies shall be appeal and revision.

2. Revision shall be the only remedy against judgements pronounced by the Court. Revision may take place should a fact of a decisive nature be discovered which was unknown to the Court and of which the applicant could not have been aware before the judgement was rendered.

3. Appeals shall be examined by a special chamber of the Court, composed of judges who did not take part in the judgement contested.

4. Revisions shall be examined by the chamber which rendered the judgement.

(b) Comments

115. Of the two remedies provided for in the present draft article, only revision meets with the broad agreement of the members of the Commission.

116. The opinion of the Commission on the subject of appeal is divided. Some believe that judgements rendered by the highest criminal court should not be subject to appeal. Others believe, to the contrary, that respect for human rights demands that an appeal should be authorized against any criminal law decision. For this reason, alternatives A and B are presented.

117. In the case of revision, it must be noted that this procedure has not always been allowed. Thus, according to article 26 of the Charter of the Nürnberg Tribunal, the

“judgment of the Tribunal as to the guilt or the innocence of any defendant . . . shall be final and not subject to review”.²³

118. Such a provision can be explained only in relation to the circumstances, since it is quite exceptional. This wording means that the death penalty would not be subject to revision should a judicial error be discovered. To prevent such an outcome, the revision procedure should be accepted in the draft.

DRAFT ARTICLE 36. EXECUTION OF SENTENCES

(a) *Proposed text*

119. The proposed text of draft article 36 reads as follows:

Article 36. Execution of sentences

ALTERNATIVE A

Sentences of imprisonment shall be executed in the territory of the State of the seat of the Court, which shall provide an appropriate place of detention and the necessary staff and guards.

ALTERNATIVE B

Sentences of imprisonment shall be executed in the territory of the State party designated by the Court

upon approval of the former. The plaintiff State may not refuse to give its approval. However, the plaintiff State shall execute the sentence if it so desires.

ALTERNATIVE C

Sentences of imprisonment shall be executed in the territory of the State designated by the Court upon approval of the former. However, the State of which the accused is a national may not be designated.

(b) *Comments*

120. It is necessary to determine the place of detention for those sentenced. If no provision is made on this matter, every sentence would be a judgement devoid of practical application.

121. Alternative A, which opts for the place of the seat of the court, seems the most appropriate. It affords equal treatment to all prisoners. Nonetheless, the other options have also been proposed in some draft statutes.

DRAFT ARTICLE 37. RIGHT OF PARDON AND CONDITIONAL RELEASE

(a) *Proposed text*

122. The proposed text of draft article 37 reads as follows:

Article 37. Right of pardon and conditional release

The right of pardon and conditional release shall be exercised by the State in charge of executing the sentence, after consultation with the other States concerned.

(b) *Comments*

123. The term “States concerned” must be understood to mean the State on whose territory the crime was committed, the victim State or the State whose nationals have been the victims.

²³ See footnote 9 above.