

Draft Code of Offences against the Peace and Security of Mankind

1954

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



Draft Code of Offences against the Peace and Security of Mankind (1954)

Article 1

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

Article 2

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

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

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

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

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

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

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

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

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

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

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

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

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

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

(13) Acts which constitute:

- (i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or
- (ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or
- (iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or
- (iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

Article 3

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

Article 4

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

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

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

Chapter III

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

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

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

and directed the Commission to:

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

"(b) Prepare a draft Code of Offences against the Peace and Security of Mankind, indicating clearly the place to be accorded on the principles mentioned in sub-paragraph (a) above."

The Commission's report to the General Assembly at the latter's fifth session in 1950⁴ contained the formulation of the Nürnberg principles. By resolution 488 (V) of 12 December 1950, the General Assembly asked the Governments of Member States to comment on the formulation, and requested the Commission:

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

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

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

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

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

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

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

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

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

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

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

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

Article 1

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

Comment

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

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

Article 2, paragraph 4

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

Comment

The text previously adopted by the Commission read as follows :

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

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

Article 2, paragraph 9

The intervention by the authorities of a State in the internal or external affairs of another State,

by means of coercive measures of an economic or political character, in order to force its will and thereby obtain advantages of any kind.

Comment

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

Article 2, paragraph 11

(previously paragraph 10)

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

Comment

The text previously adopted by the Commission read as follows :

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

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

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

Article 4

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

Comment

The text previously adopted read as follows :

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

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

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

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

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

54. The full text of the draft Code as adopted⁶ by the Commission at its present session is reproduced below :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) Acts which constitute:

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

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

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

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

Article 3

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

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Chapter IV

REGIME OF THE TERRITORIAL SEA

I. Introduction

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

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

57. At the fourth session of the Commission in 1952, the Special Rapporteur submitted a "Report on

the Régime of the Territorial Sea" (A/CN.4/53) which contained a draft regulation consisting of twenty-three articles, with annotations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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