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Draft Code of Offenses Against the Peace and Security of Mankind
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One problem with the developing of an enforceable Code of Offenses Against the Peace and Security of Mankind is that no U.N. body has ever been vested with complete responsibility for producing a draft. Instead, three bodies have shared that responsibility. First the International Law Commission (ILC) started working on the Draft Code itself. Second, another “Special Committee” of the General Assembly was given responsibility for drafting a statute for an international criminal court. Third, there was the Special Committee on Defining Aggression, which in 1974 finally produced a document. To have different bodies dealing with the same subject is this clearly unproductive. It would have made more sense for the same body to deal with all questions relating to the same subject since enforcement must be tailored to the comes intended to be enforced.

The consequences of proceeding along three parallel tracks are self-evident. The “Special Committee” charged with drafting a statute for the court completed its work in 1953 but the project was tabled because there could be no court without first having a code. Then the code project was tabled in 1954 because it could not be approved until aggression was defined. The three parallel tracks never met.

Aggression was finally defined in 1974 and the ILC resumed its work on the draft code, producing three reports from 1982-85. But the Commission is stilling pursuing its work along separate tracks, repeating the mistake made 30 years earlier. One Working Group is preparing the Draft Articles on State Responsibility, which establishes in article 1G the criminal responsibility of states. At the same time, the Rapporteur on the draft code is trying to introduced into the code new crimes such as mercenarism, colonialism and environmental violations which so far have no foundation in international law. The inconsistency in approach and the lack of technical soundness of that work is regrettable because it is another lost opportunity for the codification of international criminal law.

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One reason for the Commission's slow progress is that it does not have enough technical expertise in international criminal law, as is evident in the reports of the Special Rapporteur. Since 1982 precious years have been wasted on very meager results which certainly do not advance the codification process.

There are now 22 different categories of international crimes supported by 312 international instruments that have been elaborated between 1815 and 1984. The need for codifying international criminal law is more compelling today than it ever was before because of the number of international instruments involved. There are 47 instruments on aggression and 54 instruments on the regulation of armed conflicts, but they are very poorly reflected in the proposed articles of the draft code. There are also 23 conventions dealing with slavery and slave-related practices and 12 conventions in the narcotics control area with a 13th in the process of elaboration, which are not reflected at all in the draft code.

The ILC's debated as to what the code should include (*ratione materiae*) are baffling. Consider for example the application of loose criteria which lead to the inclusion of "mercenarism" and "environmental violations" as international crimes (however one may wish to define them since they are not recognized as international crimes) while overlooking certain recognized ones such as "war crimes," "slavery," and others. Furthermore, none of the weaknesses of the Nuremberg and Tokyo Trials has been cured by the work of the Special Rapporteur. The crimes are vaguely defined, ambiguous in their meaning, and the elements of each offence are far from being discernible. In short, they violate the principles of legality required in criminal codification. This is either a deliberate way to prevent the development of a technically sound code, or it is the product of a very high degree of technical nonchalance.

A comprehensive codification is certainly possible. In 1980 I submitted a Draft International Criminal Code to the Sixth U.N. Congress on Crime Prevention, which I am presently revising. Certainly if I can produce a code by myself, the distinguished Commission, with all of its resources, can do even better.

Also, the issue of a code is severable from the issue of enforcement. We have to decide first what the substantive crimes are. At present, we have what is known as an indirect enforcement system. That is, international criminal law conventions place a duty on states who

are parties to the conventions to incorporate the international crime into their domestic laws and to enforce it through the national criminal justice system. This has been done in different states with a variety of crimes such as hijacking, kidnapping, hostage-taking, international drug trafficking, and war crimes. Thus, the importance of a codification is that it harmonizes international criminal law and provides a model for states to adopt and incorporate these international obligations into their domestic laws.

The issues of whether there should be a court, how it should work, and who should be subject to it is related but technically separate. It is difficult, however, to consider enforcement without at least knowing first what the crimes are. The Special Rapporteur's 1982 list of international crimes hardly contains all the relevant international instruments. If the United Nations and the ILC cannot even start with the appropriate compendium of international instruments, how is it possible to assume that a codification will accurately reflect what international criminal law is, let alone how to enforce it?

Finally, I also disagree with the Special Rapporteur's apparent belief that he can, by some "inductive" process, determine which acts and practices should be considered international crimes and which should not. That is not in conformity with the original mandate of the General Assembly to codify existing international law. One is hard pressed, for example, to say that "mercenarism" should be an international crime when there is not even a single international convention on the subject. Similarly, I do not know of any international convention that makes "colonialism" an international crime. Thus I do not see how these forms of conduct, which are certainly reprehensible, can be included in the list of international crimes while at the same time excluding other international crimes that are supported by numerous conventions. Basic methodology and technical know-how are very much at fault here, and I hope, Professor McCaffrey, that through your influence and that of other concerned members of the Commission these problems will soon be resolved.

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In preparing for this meeting, I went back to some of the old writings of scholars who, starting in the 1920s, established various projects on this subject with the International Law Association, the International Association of Penal Law, and the Interparliamentary Union. I looked at some

of the work that went into the preparation of the 1937 Terrorism Convention and at the work of the first two Special Rapporteurs for the draft code project in 1947 and 1950. One can clearly see a thread of continuity that lasted almost 30 years which now seems broken. Scholarship, idealism, dedication and commitment to the attainment of those higher values that the law should embody seem to have been eroded by ideological and political concerns.

It is ironic that that flame of idealism and scholarship, which existed for more than 60 years spanning two world wars, is gradually dying out during the longest period of peace in our history.

I hope, Professor McCaffrey, that you will continue to work on the Commission to advance those old ideals.