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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Report of the Secretary-General

Addendum

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* A/35/150.

REPLIES RECEIVED FROM GOVERNMENTS

GERMAN DEMOCRATIC REPUBLIC

[Original: English]
[25 July 1980]

1. In concert with the other socialist States and all other peace-loving States and peoples the German Democratic Republic has, since its founding, pursued a policy of peace, disarmament and international détente. In so doing it has been aware of the responsibility for securing peace which it bears as the socialist German State on the dividing line between the social systems of socialism and capitalism.

2. Therefore the German Democratic Republic, like the great majority of delegates on the Sixth Committee during the thirty-second and thirty-third sessions of the General Assembly, definitely welcomes the resumption of the discussion on the drafting of a code of offences against the peace and security of mankind. Precisely at the present time when the international situation has become more complicated, the drafting of such a code is of special importance. The German Democratic Republic believes that the code can constitute a weighty contribution to securing peace and observing generally accepted principles and norms of international law as well as to curbing, through penal legislation, activities by individuals, groups or organizations against peace and international law.

3. Guided by these objectives, the General Assembly, in its resolutions 95 (I) and 177 (II) adopted over 30 years ago, entrusted to the International Law Commission the formulation of a draft code of offences against the peace and security of mankind, in which it was to rely on the Nürnberg principles. In the view of the German Democratic Republic, the principles underlying the Charter of the International Military Tribunal, Nürnberg, 1/ and the judgement of the Tribunal are the point of departure and the core of all efforts to achieve a comprehensive codification in international law of the legal norms relating to the prosecution and punishment of international crimes directed against peace and harmony among nations. They embody the principle that the sovereignty of any State cannot extend to the protection of individuals who, mostly in an official capacity, have committed crimes, like war crimes or crimes against humanity, on behalf of that State or in the name of others. On the contrary, such persons shall not escape universal prosecution and punishment to which no statutory limitation shall apply.

4. The revised draft code of the text submitted by the International Law Commission in 1954 is an acceptable basis for further consideration of this topic. In the view of the German Democratic Republic, however, the Nürnberg principles are still inadequately reflected in it. The draft should, for example, take account of the principle that domestic law on prescription must not apply to the

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1/ United Nations, Treaty Series, vol. 82, p. 284.

above-mentioned international crimes, which is reaffirmed, inter alia, in General Assembly resolutions and in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968. In addition, the code should include the generally recognized principle under which the only options open to a State getting hold of persons guilty of such crimes must be either to extradite them to a State requesting their extradition, or to punish them itself with all due severity.

5. The generally valid principles applicable to the prosecution and punishment of the gravest international crimes, which are embodied in the Nürnberg principles, have been and are consistently applied in the German Democratic Republic. The Constitution of the German Democratic Republic of 7 October 1974 says in article 91: "The generally accepted norms of international law relating to the punishment of crimes against peace and humanity and of war crimes are directly valid law. Crimes of this kind do not fall under the statute of limitations." In the territory of the German Democratic Republic a total of 12,861 persons found guilty of war crimes and crimes against humanity received final sentences from 1945 to 31 December 1978.

6. Apart from the need to eliminate from the present draft of the International Law Commission the inadequacies mentioned with respect to non-limitation and extradition it is also necessary to take account of the results reached over the past 25 years in the codification of crimes against the peace and security of mankind. On article 2 of the 1954 draft the German Democratic Republic would like to comment as follows.

7. Proceeding from the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the constituent facts of the crime of genocide are, on the whole, adequately reflected in the draft.

8. The provisions relating to the crime of aggression should be updated and defined more precisely in the light of the definition of aggression adopted by General Assembly resolution 3314 (XXIX) on 29 November 1974.

9. What is lacking or virtually lacking in the draft are provisions on the crimes of racism and colonialism and their most blatant manifestation - the crime of apartheid. The elements which constitute such crimes should therefore be included in the draft on the basis of relevant instruments like United Nations resolutions, the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

10. In defining more precisely the constituent elements of war crimes and crimes against humanity, account should be taken of the relevant provisions of the Geneva Conventions of 12 August 1949 and the first protocol amending them of 8 June 1977.

11. There should be even more specific provisions on the prosecution of the crimes of annexation and intervention, dealt with in paragraphs 8 and 9 of article 2 of the draft code, taking into account all current forms of their commission and

relevant United Nations documents. Criminal liability should also apply in the context of the practices of intervention by transnational corporations.

12. A major task remains to combat the crime of terrorism dealt with in paragraph 6, especially in cases where it is organized by a State.

13. The code should also contain applicable provisions from the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973.

14. This enumeration of categories of grave international crimes which, the German Democratic Republic feels, should be included in the code, is not complete. However, the German Democratic Republic shares the view expressed in the discussion in the Sixth Committee during the thirty-second and thirty-third sessions of the General Assembly, that consideration should focus on the gravest international crimes which pose the greatest threat to international peace and security.

15. The German Democratic Republic sees the code's fundamental purpose in its reaffirming, concretizing and enforcing existing contractual and common law obligations of States for the prosecution and punishment of grave international crimes. This is all the more necessary as a number of States have not lived up to their responsibilities or have not acceded to significant conventions in this field.

16. The German Democratic Republic considers that work on the drafting of the code must no longer be delayed, but should proceed speedily and with the intensity and thoroughness commensurate with the high significance of the subject. This need for a thorough approach also applies to the code's final legal form which must be such as to ensure its universal effectiveness.

MONGOLIA

[Original: Russian]
[2 June 1980]

1. In accordance with the fundamental principles of its peace-loving foreign policy, which seeks to ensure international peace and security and the development of mutually advantageous co-operation among States, the Mongolian People's Republic fully supports the proposal calling for the preparation and adoption by all States of a Code of Offences against the Peace and Security of Mankind; for it regards the adoption of such a code as a major contribution to the attainment of the lofty purposes and principles set forth in the Charter of the United Nations, first among them being the noble aim of maintaining and strengthening international peace and security.

2. Furthermore, the detailed formulation and subsequent adoption of such a code would promote the progressive development and codification of contemporary

international law, particularly the principle that natural and legal persons bear individual criminal responsibility for offences against the peace and security of mankind, as reflected in the Charter, and the judgement of the Nürnberg International Military Tribunal which was later endorsed in General Assembly resolution 177 (II) of 21 November 1947, and other major international instruments on this question.

3. The draft Code of Offences against the Peace and Security of Mankind submitted to the General Assembly in 1954 by the International Law Commission could, in principle, serve as the basis for formulating such a code. In addition to the international legal instruments referred to above, account must be taken of the Definition of Aggression, approved by the General Assembly in 1974 in resolution 3314 (XXIX), the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly in 1973, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the 1977 Additional Protocols to the 1949 Geneva Conventions for the Protection of War Victims, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly in 1968, General Assembly resolution 3074 (XXVIII) on the same question and other international legal instruments designed to discourage offences against the peace and security of mankind.

4. The Mongolian People's Republic considers that all commitments solemnly entered into by States in the sphere of disarmament and the strengthening of international security constitute a political and material safeguard against offences against the peace and security of mankind.

5. Particular attention must be devoted to ensuring that the provisions of the code do not impair or hamper the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960, the right of peoples to struggle for liberation from colonialist and neo-colonialist oppression and combat racism and apartheid, hegemony and other forms of foreign domination and subjugation or the legitimate right of peoples and States to individual and collective self-defence in accordance with Article 51 of the Charter of the United Nations.

6. Bearing in mind political, legal and financial considerations, the Mongolian People's Republic considers that the most productive course would be to entrust the further elaboration of the draft Code to the Sixth (Legal) Committee of the General Assembly.

NORWAY

/Original: English/
/8 July 1980/

1. In accordance with General Assembly resolution 33/97, the Norwegian Government has been requested to transmit its viewpoint on the draft Code of Offences against the Peace and Security of Mankind. Since the United Nations, after 25 years have elapsed, is now planning to resume work on this question, this matter must be seen in the light of developments which have taken place during this intervening period of time. In this respect, the Definition of Aggression which was adopted by the General Assembly at its twenty-ninth session in 1974 in resolution 3314 (XXIX) is of particular importance.

2. The Norwegian Government is therefore of the opinion that it will be necessary to undertake an extensive revision of the draft Code submitted by the International Law Commission following the Commission's sixth session. It would appear that the most appropriate procedure would be to undertake a renewed and thorough study of the question in the International Law Commission followed by a report to the General Assembly.

3. The Norwegian Government has the following comments to make on individual articles in the draft.

A. Article 1

4. This provision seems somewhat obscure. Considering the fact that it has the character of a general introduction to the Code, the question is whether it is desirable to make it more specific.

B. Article 2

5. If the draft is to be embodied in a Code under which the contracting parties would be required to introduce the definitions in their own penal legislation, the definitions should be formulated as precisely as possible both with regard to the description of the offence itself and to the question of whom the provisions are directed against. It is for example not clear who is covered by the term "authorities of a State".

6. The definitions should also be adjusted in the light of the General Assembly's Definition of Aggression. This particularly applies to article 2, paragraphs (1) to (5).

7. The Norwegian Government has the following comments to make on the individual paragraphs:

Paragraph 1

8. This provision should be adjusted and adapted to the Definition of Aggression, in particular to article 1 and article 3 (a) of the Definition. A practical solution would seem to be to refer to the Definition, that is to say the General Assembly's resolution 3314 (XXIX).

Paragraph 2

9. The contents of this provision might possibly be incorporated into paragraph 1.

Paragraph 3

10. This provision seems to give rise to a number of practical problems, in particular with regard to a precise understanding of the word "preparation". It must be clear for example that the drawing up of ordinary emergency preparedness plans in case an armed conflict should arise is not covered by this term.

11. This provision too ought probably to be tied to the Definition of Aggression and might possibly be included in paragraph 1 in the same manner as with the preceding paragraph. Paragraph 1 might for example be given the following wording:

> "1. Any act of aggression, as defined by the Definition of Aggression adopted by the General Assembly of the United Nations, as well as preparation of such an act of aggression or any other threat to resort to such an act, committed by authorities of a State."

12. An alternative solution might be to deal with this in three paragraphs as in the draft, but all the time ensuring that this is tied to the Definition of Aggression. In this case it might be appropriate to draw up a special article containing a definition of the term aggression (with reference to the General Assembly resolution). In such an article consideration might also be given to including definitions of other expressions used in the draft, in particular the expression "authorities of a State" (see above).

Paragraph 4

13. Reference is made to article 3 (g) of the Definition of Aggression. The draft is here substantially wider in scope, so that if it is desired to go further than article 3 (g) of the Definition of Aggression, it will be necessary to retain paragraph 4.

Paragraph 5

14. The offence mentioned here is not directly covered by the Definition of Aggression, although attention is drawn to article 3 (f) of the Definition.

15. As now worded, the provision immediately raises the question of the degree which the authorities' guilt or involvement must assume before they become liable to punishment under the provision or, in relation to the expression "toleration", the degree of activity required to avoid punishment. This provision ought to be given a more precise formulation in order to avoid doubts as to interpretation.

Paragraph 6

16. This provision should be seen in context with paragraph 5 and by and large it gives rise to the same problems. It will be necessary to arrive at a definition of what types of acts the paragraph covers.

17. As regards terrorism it is worth noting that the persons who are directly responsible for the act of terrorism will often be punishable under penal provisions in other international conventions, while the provision here is only directed against the authorities' giving support to, or failing to combat, acts of terrorism.

Paragraph 7

18. The scope of this provision should be restricted to cover grave violations, even if it might obviously create problems in each individual case to decide whether or not a violation shall be considered grave. It seems unreasonable that the Code should make every minor infraction in this field a punishable offence. The provision should be restricted to cover clear violations of substantive provisions.

Paragraph 8

19. One may wonder if this provision has any significance of its own, since annexation undoubtedly comes under the term "aggression" and will in addition be unlawful in many cases under the laws and customs of war (see paras. 25-28 below as well as art. 6 of the Fourth Geneva Convention 2/ and art. 3 of Additional Protocol I (A/32/144)).

Paragraph 9

20. This paragraph seems to fall outside the natural scope of these provisions. In addition, since the wording of the provision is imprecise, and therefore makes it difficult to enforce, it is proposed that the provision be deleted.

2/ United Nations, Treaty Series, vol. 75, p. 287.

Paragraph 10

21. This provision is almost identical with article II of the Convention of 9 December 1948 concerning the Prevention and Punishment of the Crime of Genocide. 3/ Such differences as there are seem by and large necessary on editorial grounds. The Norwegian Government is, however, in some doubt as to the justification of the word "including" in the introductory part of the paragraph. This gives the impression that the listing that follows is not exhaustive. If this is the case, the text clearly differs from article II of the Genocide Convention.

Paragraph 11

22. This provision seems to give rise to a number of problems. It is based on the definition of "crimes against humanity" contained in the Nürenberg Charter, 4/ but with certain alterations. While crimes against humanity according to the Nürenberg Charter could only be adjudged if they were committed in connexion with other offences described in the Charter (offences against peace and war crimes), the draft is so formulated that the acts in question may be adjudged separately. However, it contains certain ambiguities in the manner it is worded.

23. According to the wording it appears that the offence must be directed against "any civilian population". This formulation creates a number of problems. In the first place the question may be asked whether, under the provision, it is possible to be punished for violations against own nationals. In the second place the wording seems to imply a minimum scale, so that violations against individual persons are not directly covered. The question of where the limit is to be drawn appears on the other hand somewhat uncertain.

24. The provision also raises problems with regard to who may be liable to punishment. The expression "private individuals acting at the instigation or with the toleration of such authorities" may possibly lead to unfortunate results. It seems somewhat unreasonable to argue that the degree of punishability in respect of individual persons should be greater if they have acted with the open or tacit consent of the authorities than if they act exclusively on their own initiative. There is no corresponding limitation in paragraph 10.

Paragraph 12

25. This provision raises a number of problems which should be clarified.

26. As mentioned above, the Geneva Conventions have special provisions concerning prosecution of violations of the Conventions' rules. In this connexion certain acts have been identified and described as "grave breaches" and the contracting

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3/ United Nations, Treaty Series, vol. 76, p. 277.

4/ United Nations, Treaty Series, vol. 82, p. 288.

parties have undertaken to introduce provisions in their domestic penal legislation prohibiting such acts. Furthermore, the States have the obligation to institute proceedings against persons suspected of having committed such grave breaches themselves, or extraditing them to another State willing to institute such penal proceedings.

27. If the paragraph is concerned with "grave violations" only, such a provision is unnecessary in the Code, since the Geneva Conventions and the Additional Protocols must already be considered to cover this in a satisfactory manner. However, breaches of the laws of war may imply violations of rules other than those of the Geneva Conventions and for that reason there may be good grounds for keeping the provision. On the other hand, the provision such as it is worded at present implies that any violation either of the Geneva Conventions or of other treaties relating to war as well as rules of customary law shall be regarded as criminal violations against the peace and security of mankind. There seems to be good reasons for arguing that this is to go rather too far, since the treaty provisions embodied in rules of international law on the laws of war are in a large measure very detailed and there seems to be little reason to allow minor infractions to come under the term "offences against the peace and security of mankind".

28. Another problem is whether paragraph 12 should cover both international and domestic conflicts. It seems reasonable to suppose that in 1954 the provision was formulated exclusively with international conflicts in mind. However in 1977 a special Additional Protocol to the Geneva Conventions was adopted, including rules exclusively covering domestic conflicts and it therefore seems natural that gross violations at any rate of these provisions shall fall under paragraph 12.

C. Article 3

29. The Norwegian Government would suggest that the expression "Head of State" should be replaced by "constitutionally responsible rulers"; reference is made to the corresponding expression in article IV of the Genocide Convention.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

/Original: English/
/29 July 1980/

1. As regards the draft Code itself, in the light of experience over the past 25 years since work on the draft Code was discontinued the United Kingdom remains sceptical about the opportuneness of reverting to this question now.

2. The United Kingdom has noted the comments of the International Law Commission (contained in para. 111 of its report for 1977). The United Kingdom has also carefully studied the records of the debates in the Sixth Committee at the Thirty-third Session leading up to the adoption of resolution 33/97, including the remarks of those delegates who suggested that the draft Code of Offences should be revised so as to take account of developments in international relations since

1954. In this connexion, the United Kingdom suggests that the question also arises (and is indeed anterior) whether the need for a Code of Offences against the Peace and Security of Mankind of the nature proposed has been obviated by other instruments already adopted. Reference is made, inter alia, to the Convention on the Prevention and Punishment of the Crime of Genocide and the two Additional Protocols which revise and supplement the 1949 Geneva Conventions for the Protection of War Victims.

3. Should any question ultimately arise of revising the draft Code so as to take into account developments since 1954, the United Kingdom may have its own proposals to make for the addition of offences which have proved, in the intervening period, to constitute serious threats to the peace and security of mankind as well as, in many cases, harsh and unwarranted interference with the rights of innocent persons: in particular, hijacking, the taking of hostages, crimes against diplomatic and consular agents and other forms of international terrorism, and also the harbouring of perpetrators of such acts. The United Kingdom regards it as an essential preliminary, if further work is to be undertaken on the elaboration of a draft Code, that greater clarity should first be attained on a basis of general agreement, over the very concept of 'offences against the peace and security of mankind' - that is to say, the criteria determining the acts which should fall within this concept and the questions of jurisdiction involved. The United Kingdom would consider it appropriate that at least this preliminary process, if it is to be undertaken, should take place in the Sixth Committee.

4. As these are prior issues of such importance, which affect not only the substance of the matter, but also the future procedure to be followed, the United Kingdom finds it difficult at this stage to offer comments of a more definite character. Similarly, the United Kingdom does not find it necessary now to comment further on the 1954 draft, or to reiterate its detailed comments made on the 1951 draft, which are to be found in General Assembly document A/2162/Add.1 of 16 September 1952, and which were reflected only to a very limited extent in the 1954 draft.

UNITED STATES OF AMERICA

[Original: English]
[25 July 1980]

1. The United States continues to doubt that useful progress can be made at this time on a code of offences against the peace and security of mankind and its inextricably linked mechanism of an international criminal jurisdiction.

2. In light of the role the United States was privileged to play in the elaboration of the London and Tokyo Charters and in the conduct of the Nüremberg and Tokyo Tribunals, and subsequent and continuing prosecution based on the principles thereby established, we are, of course, not opposed to the principle of individual responsibility. Our doubts are rather a function of our concern that at present agreement on a code of offences seems highly unlikely and disagreement will not be

only a distraction from other issues of greater priority on which progress is possible but risks weakening the impact of the existing precedents.

3. An examination of the efforts of the United Nations to elaborate such a code in the period between 1947 and 1957 is revealing of the many technical and legal problems that have prevented agreement on a code. At the twelfth session, the Assembly decided in resolution 1186 (XII) to defer consideration of the code and international criminal jurisdiction until such time as the General Assembly "takes up again the question of defining aggression ...". At the same time the Assembly adopted resolution 1186 (XII), it adopted a carefully paralleled resolution (resolution 1187 (XII)) which deferred consideration of an international criminal jurisdiction until such time as the General Assembly took up again the question of defining aggression and the question of a draft code of offences.

4. The Definition of Aggression on which the Assembly was able to reach agreement does not seek to define a crime but is rather couched in terms of recommendations to the Security Council in analysing matters that come before it. It is couched in terms of generality appropriate in a recommendation to a body whose discretion must be preserved and whose function with regard to the maintenance of peace and security is political rather than judicial. The Definition of Aggression we have, however useful, is not the product contemplated in General Assembly resolution 1186 (XII). The intended function and effect of a code of offences must be borne in mind. It seeks to establish individual criminal responsibility. It amounts to nothing less than a duty in international law for individuals to disobey their own national authorities. This is clearly an entirely different area of legal concern from that involved in providing guidance to the States members of the Security Council in analysing in a political context Article 39 situations. We have not consequently removed the barrier of the absence of a definition suitable to the purposes of a code of an essentially criminal character.

5. Since the rationale for the earlier deferral still stands, it remains to be seen whether there are other grounds for urging the reconsideration of the matter at this time.

6. Much of the International Law Commission's draft deals with such issues of State conduct as organizing armed bands, intervention, annexation of territory, encouraging terrorist acts, acts in violation of the laws or customs of war, genocide. At the time the Commission elaborated many of these provisions, there were no other instruments which adequately covered the material. While these aspects of the Commission's draft were primarily incidental by-products of the central purpose of the Code they were among the reasons progress on the Code was of particular importance in the 1950's. Guidelines concerning the limits of State conduct in these areas, however, now clearly exist. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, the 1949 Geneva Conventions and Additional Protocols I and II are but a few relevant examples. Other material contained in the Commission's draft is now present in such instruments as the Genocide Convention. Much therefore of the earlier draft's potential contribution has already been made by these other instruments.

7. The question of the possible criminal responsibility of States is currently before the International Law Commission. An article on the matter is contained in Part I of the Commission's draft on State responsibility. As the Commission and the Special Rapporteur for Part I of the draft have made clear, it is impossible to comment definitively on the Commission's draft on this point until the provisions on judicial or other impartial settlement machinery are elaborated in subsequent parts of the Commission's work on the topic. Suffice it to note that the Commission's suggestions concerning the very notion of a criminal responsibility for States have proven controversial.

8. It would certainly appear prudent to await further work by the Commission on the intimately related issue of potential criminal responsibility of States before contemplating reconsidering the questions of a possible Code of Offences Against the Peace and Security of Mankind.

9. It is, of course, impossible to discuss in any conclusive manner the question of a Code of Offences Against the Peace and Security of Mankind without also discussing the mechanism of an international criminal jurisdiction. These matters have been discussed together in the past and the background material on international criminal jurisdiction will doubtless be circulated by the Secretary-General pursuant to resolution 33/97.
