



Seventh session

COMMENTS RECEIVED FROM GOVERNMENTS REGARDING  
THE DRAFT CODE OF OFFENCES AGAINST THE PEACE  
AND SECURITY OF MANKIND AND THE  
QUESTION OF DEFINING  
AGGRESSION

## ADDENDUM

Note by the Secretary-General: Further to document A/2162, the Secretary-General has the honour to transmit herewith to the Members of the General Assembly the text of comments by the Government of the United Kingdom of Great Britain and Northern Ireland on the draft Code of Offences against the Peace and Security of Mankind. These comments were transmitted to him under cover of a letter dated 3 September 1952 from the Permanent Delegation of the United Kingdom to the United Nations.

## UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

... The United Kingdom Government offer the following comments of a legal and procedural nature on the draft Code of Offences against the Peace and Security of Mankind as drawn up by the International Law Commission at its third (1951) session. These comments are offered without prejudice to any attitude which Her Majesty's Government may adopt generally towards the Code when it is debated in the General Assembly.

## I

2. There is one preliminary observation of a procedural character to be made. The draft Code figures originally as item 49 on the provisional agenda of the last (sixth) session of the General Assembly, but was deleted on the recommendation of the General Committee. This recommendation was based on the view expressed

by Mr. Bebler (Yugoslavia) to the effect that (see the summary records in document A/BUR./SR.75, of 10 November 1951):

"the draft Code had only recently been communicated to governments and, in accordance with article 16 of the Statute of the International Law Commission, a one-year period of study should be allowed".

It was, however, further recommended that this item be included in the provisional agenda of the seventh session of the Assembly. In so doing, it was apparently overlooked that this same article 16 of the Commission's Statute (A/CN.4/4)<sup>1/</sup> also requires (see its sub-paragraphs (i) and (j)) that when the comments of governments are furnished, they shall be considered by the Commission's Rapporteur on the subject, who is to prepare, in the light of the comments, a final project for consideration and adoption by the Commission. The Commission is then (sub-paragraph (j) of article 16) to submit this final draft to the General Assembly "with its recommendations". It is thus clear (a) that the comments of governments do not themselves go to the Assembly as such; and (b) that what goes to the Assembly is a revised draft drawn up by the Commission after considering the comments of governments, and that the Assembly is entitled to have, with this revised draft, the final recommendations of the Commission.

3. It would therefore, in the opinion of the United Kingdom Government, be premature and indeed irregular for the question of the draft Code to be included in the provisional agenda of the seventh session of the Assembly. According to article 16, the Assembly can only discuss the final draft as elaborated by the Commission after the latter has considered the comments of governments. The present draft of the Code is not such a draft, nor are the ultimate recommendations of the Commission available. Moreover, it is the Commission, not the Assembly, which has the task of studying the comments of governments. It is only after the Commission has carried out this study and done any further necessary work on the draft that the matter can properly come before the Assembly. This could not therefore occur prior to the eighth session.

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<sup>1/</sup> See Statute of the International Law Commission and other resolutions of the General Assembly relating to the International Law Commission.

4. Should this item nevertheless figure in the provisional agenda of the seventh session, the United Kingdom Government must reserve the right to raise the question on the above grounds.
5. The same point was apparently also overlooked in drafting the General Assembly's resolution of 31 January 1952 (resolution 599 (VI)), on the question of defining aggression, where reference was made to the fact that the draft Code would be considered at the seventh session. However, as paragraph 1 of the operative part of that resolution directed that the question of defining aggression be placed on the agenda of the seventh session in any event, as a separate item, this question would not be affected by the postponement of the consideration of the draft Code, nor would such postponement prevent governments from acceding to the request made in paragraph 3 of the resolution, asking them, when commenting on the draft Code, to furnish their views in particular on the question of defining aggression.
6. It appears indeed that there would be some advantage in separating the two matters. If the Assembly adopts a definition of aggression at its next session, it would be desirable and sufficient (if a definition of aggression were considered necessary in the Code) to reproduce this same definition, or refer to it. If on the other hand, the Assembly does not adopt a definition of aggression, it would clearly be inappropriate for one to figure in the Code.

## II

7. On the substance of the draft Code, there is one general observation to be made. Although called draft Code of "Offences" against the Peace and Security of Mankind, the Code is in fact, as its article 1 says, concerned with international "crimes". It deals, therefore, and can only deal, with acts that are not merely illegal or contrary to international law, but which are also criminal, that is to say, have an inherent element of criminality. By no means every illegal act has this character. While it may be that most of those enumerated in sub-paragraphs (1) - (12) of article 2 of the draft Code have or can have it, the matter needs scrutiny, for most of these sub-paragraphs are framed in such wide and general terms that they could be held to cover acts not illegal at all in

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certain circumstances, or which, even if technically illegal, would be wanting in any real element of criminality. The conception of an international crime is of so serious a character as to forbid its use for the purpose of covering any but acts of a manifestly criminal nature.

III

8. The following comments are offered on the individual articles of the draft Code:

Article 1

Purely as a matter of drafting, this article seems to be defective since it merely lays down the general principle that offences against the peace and security of mankind are crimes under international law. This is no doubt true, but it is in a sense self-evident for it constitutes the very basis on which the preparation of the draft Code was called for. A better form of words for article 1 would seem to be something on the following lines:

"The offences specified in article 2 of the present Code shall be regarded as offences against the peace and security of mankind and as crimes under international law".

This would entail a consequential alteration of the opening part of article 2 (see below). As regards the remaining words of article 1 "for which the responsible individuals shall be punishable", while there is no actual objection to this phrase, it is not clear what its exact effect is in the context, or whether it is really necessary. The term "punishable" is ambiguous. An individual may be actually punishable in the sense that there is an existing law in one or more countries to whose jurisdiction he is or might be amenable which makes him liable to punishment in respect of certain offences; or it may mean that he is potentially punishable in the sense that it is open to governments at any time to make provision under their laws for punishing him for certain offences, or by concerted action to make him punishable by an international court. These further steps would all have to be worked out. They are not part of the draft Code itself, and they would depend very largely on what steps were taken or could be taken to give the Code executive force, a matter to which the Commission draws attention in

sub-paragraph (d) of paragraph 58 of its report (A/1858).<sup>2/</sup> It really goes without saying as a matter of general principle, that if a certain act is an offence and a crime, he who commits it must be actually or potentially "punishable", but the statement has little practical significance if not related to the arrangements to be made for enforcing such liability.

### Article 2

If article 1 is amended as above suggested, the preambular phrase of article 2 might read:

"The offences against the peace and security of mankind referred to in article 1 of the present Code are as follows".

#### Sub-paragraph (1)

In the opinion of the United Kingdom Government, this sub-paragraph should simply read: "Any act of aggression", omitting all the words which at present follow the word "aggression". The reasons for this view were fully explained in the statements made on behalf of the United Kingdom in the Sixth Committee during the last session of the General Assembly. Briefly, it has all along been the view of the United Kingdom Government that a satisfactory definition of aggression, covering all those cases that are truly in the nature of aggression but without prejudicing the measures of defence which it may be necessary to take or to prepare in order to resist aggression, is extremely difficult to find, and that some which have been suggested are dangerous. The definition, if such it be, included in the present text of article 2, has the further objection that it is incomplete and singles out for mention only some aspects of aggression. This is indeed expressly recognized by the Commission in the third paragraph of its commentary on this article. There is a further objection to the partial definition contained in sub-paragraph (1), that it employs terms which themselves require definition.

All these considerations suggest that it would be preferable to omit the entire phrase coming after the words "Any act of aggression". In practice it will never be possible to establish aggression except in the light of the particular

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<sup>2/</sup> See Official Records of the General Assembly, Sixth Session, Supplement No. 9.

circumstances in which the act concerned takes place. No municipal system of law attempts to specify or define what particular acts constitute the crime of murder, since one and the same act may be murder, or may be excusable or even justifiable homicide, according to the circumstances in which it is committed. Precisely the same principle applies to aggression. In the opinion of the United Kingdom Government it is sufficient, for the purpose of the draft Code, to specify that aggression is an offence against the peace and security of mankind and an international crime, without attempting to define it.

#### Sub-paragraph (2)

There is no objection of principle to this sub-paragraph, but taken in combination with the existing wording of sub-paragraph (1), it illustrates very well the dangers attendant upon attempts to define aggression, particularly if these are of a partial or incomplete character. Sub-paragraph (2), taken in conjunction with the present wording of sub-paragraph (1), would enable a would-be aggressor State to represent that preparatory measures of a defensive character taken by other States constituted a threat to employ "armed force against another State", consequently a threat of aggression, and consequently an offence under sub-paragraph (2). The answer that the measures were defensive would be met by the rejoinder that they were regarded by the would-be aggressor as constituting a threat, and the would-be aggressor might well be able to represent himself as having a good theoretical case on the basis of the actual language of the draft Code. While the specious character of this argument might be evident, it is nevertheless undesirable that the language of the draft Code should be such as could be used to support such contentions or enable an intending aggressor to employ them for propaganda purposes.

#### Sub-paragraph (3)

These considerations apply with even greater force to this sub-paragraph, and in particular the use of the term "armed force" in the second line is dangerous. This sub-paragraph, as it now reads, would afford an excellent basis on which an intending aggressor State could challenge the defensive measures, preparations or arrangements of another State or group of States, on the ground

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that they were not defensive but were directed against itself. The sub-paragraph refers specifically to preparation, and would tend to hamper in an important degree the necessary preparatory measures of States arming for resistance to aggression.

A further danger of this sub-paragraph is revealed by the Commission's commentary on it. "Planning" is only to be punishable if it results in actual preparatory acts, but at what precise point does planning become preparation? It would be perfectly possible for an ill-disposed State to allege that mere consultations about possible joint defensive measures to be undertaken by a group of States constituted not merely planning but actual preparation.

The sub-paragraph would be much less objectionable if the word "aggression" were substituted for "armed force" in the second line. But in that case the rest of the sub-paragraph would require to be omitted. The sub-paragraph would then read:

"The preparation by the authorities of a State for the employment of aggression"...

or simply

"The preparation of aggression by the authorities of a State"...

Nothing more than this is necessary.

#### Sub-paragraph (4)

Although the commentary on this sub-paragraph makes clear what is intended, the drafting of the paragraph itself is such that if it stood alone (as it would do in the eventual Code) it would be difficult to be sure exactly what it meant, and in particular by whom the offence was being committed. On its language, and in view of the phrase "incursion into the territory of a State", it might almost suggest that the offence was being committed by the State into whose territory the incursion was taking place. It should be made clearer than is at present the case that an offence is committed by the members of any armed bands that effect such incursions. Another weakness of the sub-paragraph is the very fact that it relates directly only to the members of the armed bands themselves, and not to the authorities of the State from which the incursion comes, although, as explained in the commentary, such authorities may be liable under

sub-paragraph (12) of article 2 by reason of their complicity. There is a certain lack of realism in this system, since under modern conditions it is an extremely difficult and unlikely thing for organized incursions of armed bands to take place from the territory of one State into that of another State without the complicity, active or tacit, of the authorities of the State. While to a certain extent the question of State activity can be regarded as covered by sub-paragraphs (5) and (6) of article 2, it would seem preferable to have a provision which would, in terms, state that it is an offence for the authorities of a State to allow their territory to be used as a base of operations or as a point of departure for the incursion of armed bands into the territory of another State.

Such action on the part of the authorities of a State ought also to be brought under the head of aggression, if that term is defined at all (see above).

#### Sub-paragraphs (5) and (6)

These contain further examples of indirect aggression which should certainly be included under aggression, if that term is to be defined.

The phrases "terrorist activities" and "terrorist acts" in sub-paragraph (6) are not defined, and there is a danger that this sub-paragraph, and also sub-paragraph (5) may afford a basis on which States acting in bad faith can attack the actions and policies of neighbouring countries. It would be easy to contend, for instance, that propaganda directed against totalitarian systems of government was an activity "calculated to foment civil strife in another State" within the meaning of sub-paragraph (5). It would be easy to represent that certain activities directed to encouraging the resistance of populations to totalitarian excesses constituted the encouragement of "terrorist" activities in another State.

While no objection of principle is seen to these two paragraphs, and they are indeed a necessary part of any enumeration of offences against the peace and security of mankind, it is desirable that their drafting should be very carefully considered in order that they may not lend themselves to possible abuse.

#### Sub-paragraph (7)

This sub-paragraph is of a very wide and sweeping character. While it may be desirable in practice to impose sanctions against breaches of treaties providing

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for the limitation of armaments and other kindred matters, it would seem that this is rather something which should be done by the treaties themselves, and it is questionable how far it is desirable to try to do it by declaring all such breaches to be automatically offences against peace and security, and to be international crimes. In this connexion the observations made in part II above are relevant. While it may be that deliberate and major breaches of such treaties could properly be regarded as having a criminal character, it is the fact that many breaches of this kind are of a minor, unintentional or technical character. Since it is very difficult to see exactly where the line should be drawn, it might be preferable to omit this provision altogether, and to rely on the terms of any future conventions on the limitation of armaments for the sanctions to be imposed in the event of breaches.

Sub-paragraph (8)

While there is no objection of principle to this provision, there is some doubt from the technical point of view whether it is actually necessary in the context. Illegal annexation of territory results either from direct aggression or from some means of indirect aggression. This is recognized by the commentary which says that "Illegal annexation may also be achieved without overt threat or use of force, or by one or more of the acts defined in the other paragraphs of the present article". It would seem probable that illegal annexation, though it might be effected in various ways, would in fact normally involve one or more of the acts already specified in the previous sub-paragraphs (1) to (6). If this is so, then an offence constituting an international crime will already have been committed by virtue of one of these sub-paragraphs and nothing will be added by specifying the annexation as a separate offence. The annexation would indeed merely be the outcome or result of the previous act which would constitute the offence.

The sub-paragraph is also open to criticism in that the phrase "Acts by the authorities of a State resulting in the annexation, etc.", while it may be necessary in order to cover annexations effected by indirect means, is of a very vague and general character. There may be endless controversy as to whether a given act has or has not actually resulted in annexation, in the sense of being

one of the causes of it. The truth is that where an act clearly has this result, and the annexation is manifestly illegal, the act itself will be an offence under one of the previous sub-paragraphs. If it is not already an offence of itself under one of those sub-paragraphs, it will usually be difficult, if not impossible, to show that the annexation was a resultant of that act. In other words, it will be very difficult to bring the case under sub-paragraph (8) at all. This is an additional factor suggesting that sub-paragraph (8) may add little or nothing to what has gone before.

It is not proposed that the idea contained in sub-paragraph (8) should be entirely omitted from the Code, but merely that its placing and wording may require further consideration.

#### Sub-paragraph (9)

No special comment. This sub-paragraph merely follows the wording of the Genocide Convention.

#### Sub-paragraph (10)

In this sub-paragraph it seems necessary to examine the effect of the final phrase "when such acts are committed in execution of or in connexion with other offences defined in this article". This phrase makes it clear that the limitation to connexion with acts of war contained in the Nürnberg Charter is not to apply; but it has itself a limiting effect and would enable the authorities of a State to behave in the most inhuman way against sections of their own population so long as they could show (which in many cases they probably could) that this behaviour had no direct connexion with any act of the kind specified in the previous sub-paragraphs of article 2. More accurately, it would prevent such behaviour from constituting an offence against peace and humanity or an international crime unless occurring in connexion with one of the specified acts. Possibly it is precisely one of the intentions of this phrase to make it clear that inhuman treatment by a government of its own population, however reprehensible, is a domestic matter and only comes within the class of offences against peace and humanity if occurring in connexion with one of the specified acts. The reasons for this view are not altogether evident. A government's own population may not be "humanity" at large, but it is a section

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of humanity. Nor can it be assumed that peace will not be disturbed merely because the action takes place within a country's own borders. The phrase could almost be read as a licence to a government to behave inhumanly so long as it avoids doing so in connexion with one of the specified acts.

Another effect of the inclusion of this phrase is to render the whole sub-paragraph in a sense superfluous since an offence will already have been committed in any event by reason of the accompanying specified act.

A point of quite a different character is that this sub-paragraph may well prove susceptible of grave abuse for propaganda or political purposes, by encouraging accusations to be made in respect of necessary or justifiable measures taken by the authorities of a State for the enforcement of law and order within their territory or for reasons of security. In no circumstances, of course, is an "inhuman" act justifiable, but there may be room for argument as to what is inhuman, and nothing is easier than to make accusations of inhuman conduct in order to serve an ulterior or political end. From this point of view, the limiting phrase "when such acts are committed in execution of or in connexion with other offences defined in this article" would afford a necessary safeguard.

While therefore the idea underlying this sub-paragraph is therefore unquestionably right, it would seem that its implications have not been fully thought out and require further consideration.

#### Sub-paragraph (11)

No special comment.

#### Sub-paragraph (12)

While this sub-paragraph is right in principle, its application, when it is related to some of the previous sub-paragraphs, may give rise to grave difficulties. It is possible, for instance, to understand a threat of aggression under sub-paragraph (2), but what exactly is an "attempt" to threaten aggression? It is also possible to understand the preparation of aggression or the preparation of the employment of armed force under sub-paragraph (3), but what is an "attempt to prepare"? Examples of this difficulty could be multiplied and they also arise on the other parts of the sub-paragraph. There is, for instance, the ambiguity about the term "complicity", to which attention is drawn in the commentary. It

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would indeed seem that, by reason of the general language of its sub-head (iv), this sub-paragraph includes precisely those cases which the commentary says should not be regarded as involving "complicity". This term therefore requires specific definition or limitation.

There is also much in this sub-paragraph which can lend itself to abuse. The reference to incitement, for instance, could be made the basis of accusations directed against perfectly legitimate comments in the Press of other countries, and of allegations that these comments constitute incitements to commit aggression or to interfere with the internal affairs of another State.

#### Article 3

It will be recollected that the reference to Heads of States in its relation to constitutional monarchies gave rise to considerable difficulties during the drafting of the Genocide Convention. It might be well to give this point further consideration in the light of the discussions which took place at that time, to which no reference is made in the commentary on this article.

#### Article 4

Since everything here turns on the exact meaning of the phrase "provided a moral choice was in fact possible to him", it is for consideration whether the article should not include some of the phraseology at present contained in the commentary, for instance, the very last sentence of the commentary (though that, too, contains terms such as the word "possible", the effect of which in the context is open to a number of different interpretations).

#### Article 5

This article seems quite out of place in the context of the draft Code. In so far as the various offences specified in the Code are, or are made, offences under the municipal laws of different countries, it will be for the laws of those countries to specify the nature of the penalties for any offence, and for the judge in any given case to impose the actual penalty. In so far as the question of punishment, and of the penalties to be imposed, is regulated by an international convention, it will be for that convention to prescribe the penalties and for the parties to the convention to make these penalties applicable under their municipal

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laws, and for competent international courts to apply them in any case to which the convention is applicable. None of this would require to be done by the draft Code, nor does this provision in the draft Code have of itself any direct effect. It would seem, therefore, better to omit it. An additional reason is that its inclusion may actually suggest something which is extremely undesirable, namely, that the same offence may be susceptible of several sorts of punishment of differing degrees of gravity, according to the ideas of the particular tribunal before which it happens to come. This may be inevitable, in so far as offences are in fact tried and punished before municipal courts, but there seems to be no reason for giving some sort of apparent consecration to this position in one of the articles of the Code.

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