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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Report of the Secretary-General

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* A/41/150.

I. INTRODUCTION

1. On 11 December 1985, the General Assembly adopted resolution 40/69, entitled "Draft Code of Offences against the Peace and Security of Mankind". The operative paragraphs of the resolution read as follows:

> "The General Assembly,
>
> "...
>
> "1. Invites the International Law Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-seventh session, 1/ as well as the views expressed during the fortieth session of the General Assembly; 2/
>
> "2. Requests the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the outline of the future Code proposed by the Special Rapporteur and contained in paragraph 43 of the report of the International Law Commission 3/ and the conclusions contained in paragraphs 99, 100 and 101 of the said report;
>
> "3. Further requests the Secretary-General to include the views received from Member States and intergovernmental organizations in accordance with paragraph 2 above in a report to be submitted to the General Assembly at its forty-first session with a view to adopting, at the appropriate time, the necessary decision thereon;
>
> "4. Decides to include in the provisional agenda of its forty-first session the item entitled "Draft Code of Offences against the Peace and Security of Mankind", to be considered in conjunction with the examination of the report of the International Law Commission."

2. The Secretary-General, on 19 February 1986, addressed a note to Governments of Member States and a letter to the relevant intergovernmental organizations inviting them to communicate to him before 15 August 1986 any views they might wish to submit in response to paragraph 2 of resolution 40/69.

1/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10).

2/ See A/C.6/40/SR.23-36, 44 and 50.

3/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10).

3. The present report reproduces the replies that had been received as at 28 August 1986. Replies that might still be forthcoming will be circulated in addenda to the present report.

II. REPLIES RECEIVED FROM GOVERNMENTS

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]

[21 August 1986]

1. Comments submitted previously to the Secretary-General contain a detailed presentation of the views of the Byelorussian SSR on the draft Code of Offences against the Peace and Security of Mankind. Those comments have been published in documents A/35/210, A/37/325, A/39/439/Add.5 and A/40/451/Add.2.

2. In addition it appears wise at this stage to draw attention to a number of further considerations in this regard.

3. Consideration of the various chapters in reports of the International Law Commission that discuss matters associated with the preparation of the aforementioned draft Code cannot but evoke serious concern, because the approach taken by the Commission in drafting specific provisions of the draft Code leads to confusion between matters of individual responsibility and the responsibility of States. Moreover, it leaves an opening for the inclusion, in the draft under preparation, of acts of a general criminal nature that do not belong to the category of offences against the peace and security of mankind. If the draft continues to be formulated in this manner, one cannot rule out the possibility that the very idea of drafting an instrument will be undermined, for the Code is intended to serve in the campaign against the most grievous offences against the peace and security of mankind.

4. It is therefore important for the International Law Commission, in future work on the draft Code, to proceed from a clear understanding of the need to provide in the Code a general definition of offences against the peace and security of mankind. It should be clear from that definition that it relates to individuals. Although an individual cannot directly violate obligations under international law that are binding on States, he can be held responsible for acts that may result in the violation by a State of international responsibilities incumbent upon it.

5. In virtue of the above, the wording of the first alternative of article 3, "a serious breach of an international obligation", cannot be regarded as acceptable. In the view of the Byelorussian SSR, the most appropriate course would be to use the wording of the charter of the Nürnberg Tribunal, which clearly indicates what offences constitute offences against the peace and security of mankind for which an individual may be held criminally responsible. Such offen : must indisputably include the planning, preparation, initiation or waging of a war of aggression; actions directed towards the first use by a State of nuclear weapons; acts of state terrorism; the forceable establishment or maintenance of colonial domination; genocide; apartheid; and violations of the laws or customs of war.

6. Inasmuch as the second alternative of article 3 contains no criteria for offences against the peace and security of mankind, it, too, cannot be regarded as acceptable.

7. The salient criteria for offences against the peace and security of mankind are the internationally unlawful nature of these offences, the damage that they do to the vital interests of the international community and the recognition of such acts as offences by the international community. These criteria could form the basis for article 3.

8. Articles 2 and 4 should be predicated on the concept of individual responsibility for offences against the peace and security of mankind.

9. The articles of the Code must define specific criminal acts where the perpetrators are designated individuals and not "authorities of a State". They may refer to individuals acting on behalf of a State, as a result of which international obligations are violated by the State or its authorities, but not to the State and its authorities.

10. The draft should not establish direct responsibility of the individual under international law. It must proceed on the basis of the general rule that war criminals are punished in accordance with the laws of the country in whose territory they committed the offences.

11. The Code must include provisions designed to secure co-operation among States in preventing offences against the peace and security of mankind, and to ensure the inevitability of punishment for persons guilty of such offences on the basis of international legal practice and the principles of international law.

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[26 August 1986]

1. The present state of the world requires the employment of all possibilities, means and appropriate methods to preserve world peace and to stabilize the security of States. The elaboration of international legal instruments for the prevention and punishment of international crimes constituting a threat to or an attack upon the peace and security of mankind has therefore gained increasing importance. For this reason, the German Democratic Republic considers the drafting of a code of such offences as one of the priority tasks for the United Nations in the codification and progressive development of international law. Work on the draft Code should be continued speedily, with due regard to the problems under discussion and the existing realities, so as to furnish, as soon as possible, the States and peoples fighting for the implementation of their right to self-determination with an effective instrument for punishing international offences against the peace and security of mankind. The activities so far undertaken in the International Law Commission and by its Special Rapporteur constitute a good basis to rely upon.

2. The following comments, referring to resolution 40/69, are meant to confirm and supplement the views of the German Democratic Republic repeatedly set out in written comments and oral statements in the Sixth Committee.

3. The German Democratic Republic regards the proposal relating to the outline of the Code submitted in the third report of the Special Rapporteur as an acceptable concept, since it corresponds to the present state of the discussion and meets the demands of the future Code.

4. With regard to the scope of the draft articles, the German Democratic Republic adheres to the view set out in detail in earlier comments, that the Code should be limited to the criminal responsibility of individuals. This is in line with the lessons of the Nürnberg Tribunal and the draft Code of 1954.

5. In this connection the German Democratic Republic wishes to re-emphasize its point of view that determination of the criminal responsibility of individuals under the Code should not imply the exclusion of the international responsibility of States for international crimes committed by their state authorities. As has been pointed out by a great number of other States, crimes such as aggression, apartheid and genocide are committed by individuals exercising political, administrative or military authority and acting in the capacity of an organ of a State. Thus the State has international responsibility for international crimes committed by such individuals in violation of the pertinent obligations under international law. Such responsibility under international law is being codified under the project of the International Law Commission on state responsibility.

6. The purpose of the Code is to hold criminally responsible individuals having committed offences against the peace and security of mankind. The first requirement in this context is observance of the principle of universality, i.e. that every State would have the right and obligation to prosecute and punish such individuals irrespective of the place where the offence has been committed, the nationality and the official status of the individual concerned. Related to this is, secondly, that such individuals may not invoke immunity to escape criminal prosecution. As proposed in previous comments of the German Democratic Republic (A/37/325), the relationship between international state responsibility and the individual criminal responsibility for international offences could be laid down in the Code in a provision to the effect that the criminal responsibility of individuals should not exclude international state responsibility. By determining the individual criminal responsibility as a concrete legal consequence of international crimes the Code of Offences against the Peace and Security of Mankind would thus significantly complement the project on state responsibility.

7. Following their adoption, both instruments could be used as effective means to prevent and punish international crimes in the context of the implementation of basic purposes and principles of the Charter of the United Nations.

8. Considering that there may be cases where individuals not acting on behalf of a state authority are in a position to commit offences as defined in the Code, the ambit of the latter should not be limited to individuals acting on behalf of state authorities. The German Democratic Republic therefore supports the decision by the

International Law Commission that the first alternative of article 2, 1/ which makes no distinction between individuals acting on behalf of state authorities and individuals not acting on behalf of state authorities, should be referred to the Drafting Committee.

9. Regarding the criteria to be used in defining international offences against the peace and security of mankind, the German Democratic Republic endorses the International Law Commission's view that, beyond the criterion of "seriousness", other criteria will have to be invoked in order to distinguish the category of international offences against the peace and security of mankind from other wrongful international acts. Crucial in this context is the legal object against which an offence has been committed, i.e. that in any case an obligation must have been violated that is of essential importance in maintaining peace and guaranteeing the security of mankind and, therefore, of fundamental concern to the community of States as a whole. Article 19 (para. 2), 2/ of the International Law Commission draft on state responsibility contains pertinent criteria, and the German Democratic Republic welcomes the Special Rapporteur's decision to select them as reference for the definition of international crimes. In view of the difference between the two codification projects, this will guarantee the necessary uniform approach to the question of definition.

10. An international crime that does not conform with the criteria of state responsibility as laid down in article 19, paragraph 2, of the draft articles could hardly be classified as an offence against the peace and security of mankind.

11. Seen in this context, both alternatives of the proposed draft of article 3 (definition of an offence against the peace and security of mankind) do not yet appear satisfactory.

12. The first alternative of article 3 includes the four categories of gravest violations of international law that are covered by article 19, paragraph 3, violations, the commission of which is classified as an international crime. Paragraph 2 of article 19 forms the basis of these categories. However, the criteria specified there, such as violations of an obligation under international law, that is, of essential importance for the protection of fundamental interests of the community of States and their recognition as international crimes by the community of States as a whole, are not included in the first alternative, which would be necessary to distinguish them from other breaches of international law. While the second alternative does contain the criterion of recognition by the community of States as a whole, it lacks the crucial provision, namely, that a violated obligation must be of essential importance for the protection of fundamental interests of the community of States, i.e. of the peace and security of mankind. We would therefore suggest reconsideration as to how the criteria contained in article 19, paragraph 2, should be applied to the Code.

1/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), para. 99.

2/ Ibid., Thirty-first Session, Supplement No. 10 (A/31/10), p. 226.

13. With regard to aggression (article 4, section A), the German Democratic Republic wishes to underline its position, substantiated earlier, that the threat as well as the preparation of an aggression should be included in the Code. The planning and preparation of aggressive wars formed an independent part of the indictment brought at the Nürnberg Tribunal. This made it possible to charge war criminals with criminal responsibility for the political, military and economic preparation, i.e. the planning, of aggressive wars, including war propaganda, although those persons were not directly involved in the implementation of the plans. In the draft Code of 1954, article 2, paragraph 3, did include the preparation of aggression. Leaving it out of a future Code would mean a departure from an international accord established in the Charter of the International Military Tribunal and would be likely to weaken very much the Code's preventive effect.

14. As to whether the Definition of Aggression as contained in General Assembly resolution 3314 (XXIX) (annex), of 14 December 1974, should be incorporated in the Code in its entirety, or whether a mere reference to it as contained in the second alternative from the Special Rapporteur would suffice, the German Democratic Republic would prefer the second alternative.

15. The German Democratic Republic supports the proposal that interference in the internal or foreign affairs of States should be included in the Code (article 4, section C), suggesting that this offence would have to be examined very closely and formulated accordingly, since not each and every kind of interference could be classified as an offence against the peace and security of mankind. At the same time it should be noted that massive forms of interference in the affairs of other States, in particular measures of economic threat and coercion, considerably impair the stability and security of the States concerned and stir up conflicts and tensions in the world, and that therefore such activities in their effects are in the final analysis equivalent to the threat and use of force.

16. As regard international terrorism, the German Democratic Republic condemns any form of it and holds the view that such criminal acts should be consistently prosecuted and punished through effective co-operation between States. By enacting corresponding legislation the German Democratic Republic has already created the necessary prerequisites on its part. In particular such terrorist activities as are carried out or supported by a State and are aimed against the security and stability of any other State should be included as an offence against the peace and security of mankind.

17. The forcible imposition or maintenance of colonial rule, as one of the gravest forms of denial of the right to self-determination, as well as mercenarism should be included in the Code as separate offences against the peace and security of mankind.

18. With respect to further work on the Code, in particular on war crimes, it appears necessary to take into account the ongoing evolution that bears on the classification as offences of specific methods of warfare, in particular the use of atomic, biological and chemical weapons. The German Democratic Republic thinks that the first use of nuclear weapons, the gravest crime against the security of mankind in our time, should be included in the Code as a separate offence.

19. The crimes of apartheid and racism, besides genocide, should be qualified as international offences threatening the peace and security of States and peoples and as crimes against mankind, whose perpetration gives rise to individual criminal responsibility.

20. In view of the eminent political importance States are attaching to this codification project, the German Democratic Republic holds that the elaboration of the Code of Offences against the Peace and Security of Mankind should remain a separate item of the discussions to be held in the Sixth Committee of the General Assembly.

SUDAN

[Original: Arabic]

[13 August 1986]

1. Part I should comprise the following:

(a) The scope of the draft articles;

(b) The definition of an offence against the peace and security of mankind;

(c) The general principles governing the subject.

2. With regard to part I, the Republic of the Sudan considers that, although the International Law Commission has decided that the draft Code should be limited at this stage to the international criminal responsibility of individuals, the draft articles should not be limited solely to individuals but should cover the criminal responsibility of individuals who commit offences against the peace and security of mankind on behalf of their States. Although we accept the legal distinction between state responsibility and individual responsibility, state responsibility in this case must form the basis.

3. With regard to part II, dealing with the definition of an offence against the peace and security of mankind, the opinion that there are offences against the peace of mankind and offences against the security of mankind is incorrect, because it is impossible to define an offence against the peace and security of mankind unless such offence is regarded as a single and unified concept. This is the very concept on the basis of which the Nürnberg Tribunal, which was adopted in London in 1945, referred to such offences as being offences constituting a threat or a danger to, or a breach of, the peace and security of mankind. The great majority of jurists have agreed on the soundness of this concept.

4. The Republic of the Sudan considers that an offence against the peace and security of mankind consists of the violation of obligations whose content is the protection of the highest basic interests of mankind, i.e. those interests that represent man's basic needs and concerns and on which the preservation of the human species depends.

5. In the estimation of the Sudan, the Special Rapporteur was correct in his formulation of the definition, since his definition agrees with the proposal of the third world States, of which the Sudan is one. This definition might include offences against the peace and security of mankind that were not known at the time and were thus not included in the 1954 draft Code (the draft Code prepared by the International Law Commission in 1954), among them the crime of apartheid and the crime of mercenarism. The definition might perhaps also cover numerous different acts, such as aggression, terrorism, genocide, collective deportation and the forcible expulsion of inhabitants from their territory (crimes being committed by Israel against the Palestinians).

6. It is perhaps essential that the draft Code should include the express and specific condemnation as offences against mankind of all acts that are aimed - with or without external assistance - at subjecting a people to a regime that does not endorse the principle of self-determination and at depriving that people of human rights and fundamental freedoms.

7. The Sudan considers that the delimitation of scope and the definition of an offence will be of considerable assistance to the Commission in formulating the general principles. Accordingly, the Commission might defer consideration of these until the questions of scope and definition have been settled.

8. The Sudan also endorses the conclusions contained in the report of the Commission.

VENEZUELA

[Original: Spanish]

[7 August 1986]

1. With regard to the scope ratione personae, Venezuela considers that the Code should not confine itself to delimiting the responsibility of individuals but that it should also cover the criminal responsibility of States.

2. At the same time, it has no objection to the Commission's decision to consider the criminal responsibility of individuals at the present stage and to analyse the criminal responsibility of States at a later date. As to whether the term "individuals" should be understood to mean agents of a State or private individuals, Venezuela favours the view that the Code should outline and cover the reponsibility of all categories of individuals, irrespective of whether or not they have any authority. In its view, crimes against the peace and security of mankind can be committed either by persons acting as officials or public employees or who have been given any authority by the State or by private individuals having no ties whatsoever to the State authority.

3. With respect to the possibility of defining what is meant by offences affecting the peace and security of mankind, Venezuela believes that it is not essential to have such a definition so long as the Code specifies clearly and

unambiguously what conduct or omissions constitute crimes or offences against the peace and security of mankind. Should the Commission decide that it would be beneficial to define the term "offence against the peace and security of mankind", Venezuela considers that there is nothing to prevent the two alternatives proposed by the International Law Commission from being combined into one article comprising, on the one hand, the criterion that an offence against the peace and security of mankind would be constituted by an internationally wrongful act recognized as such by the international community and, on the other, situations resulting from a breach of the obligations contained in the four subparagraphs of the first alternative.

4. Venezuela considers that many of the principles which the Commission had planned to take up at its second session in 1950 could be included in the Code together with others which have arisen as international law has evolved, including the one relating to the non-applicability of the statutory limitations to offences against the peace and security of mankind.

5. With regard to the determination of acts which constitute an offence against the peace and security of mankind, the Commission has done constructive work in attempting to specify and study conduct that is criminal or that represents an attack on the peace and security of mankind and that might be included in the Code. In that connection, Venezuela believes that while the acts so far identified by the Commission could be included in the draft Code that is about to be elaborated, there may be other elements and situations which the Commission should analyse with a view to regulating them in the future Code - in particular apartheid, which deserves to be repudiated and condemned by the international community, and the production, trafficking and trade of narcotic and psychotropic substances.

6. Generally speaking, Venezuela agrees with the outline proposed by the Commission regarding the structure of the future Code; the latter would consist of Part I, which would include the scope of the draft articles, the definition of an offence against the peace and security of mankind and the general principles governing the subject; and Part II which would deal specifically with acts constituting offences against the peace and security of mankind. With regard to the question of structure, it is suggested that the Code should contain other sections, divisions, chapters or parts dealing with the possible régime of sanctions which would be applied to transgressors or offenders within the context of the Code. Unless there is a régime of sanctions and a means of applying such sanctions, the Code would remain a dead letter, used simply for reference purposes by specialists or scholars.

7. The international community has made such progress that it should be possible to study and envisage, in an international instrument, a set of sanctions which would be applied to anyone who committed the offences set forth in the Code, and a competent body - whether national, international or a combination of the two - that would be responsible for bringing them to trial.

8. With regard to the Commission's conclusions, Venezuela has no observations to make concerning article 1 of the draft. 1/

9. The first alternative of article 2, 2/ referring to persons covered by the draft, is very comprehensive and includes persons whose actions are invested with authority by the State and also private individuals. That alternative satisfies Venezuela's views on the matter.

10. The two alternatives of article 3, 3/ concerning the definition of an offence against the peace and security of mankind, are not mutually exclusive; accordingly, they could be combined into a single article which would state that an internationally wrongful act recognized as such by the international community and resulting from a breach of the obligations outlined in the four subparagraphs of the first alternative is an offence against the peace and security of mankind.

11. With respect to section A of article 4, 4/ concerning aggression, it would be best to include in the future Code all available elements which serve to clarify and to delimit precisely the concept of aggression and for that reason there must be a detailed rule defining aggression that is tailored to the characteristics which the Code must have.

12. The list of acts which constitute an offence against the peace and security of mankind must be as comprehensive as possible and must include all acts which in any way threaten or affect the peace and security of mankind. In this connection Venezuela believes that the list of acts so far included in article 4 is relevant but that there are also other types of criminal conduct which the international community must prevent and prosecute because they have become a scourge for mankind as a whole and could lead to a breach of international peace - for instance apartheid and the production, trafficking and trade of narcotic and psychotropic substances.

1/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), footnote 34.

2/ Ibid., footnote 28.

3/ Ibid., footnote 34.

4/ Ibid., footnote 35.