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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Report of the Secretary-General

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I. INTRODUCTION

1. On 4 December 1980, the General Assembly adopted resolution 35/49, paragraphs 1, 2 and 3 of which read as follows:

> "The General Assembly,
>
> "...
>
> "1. Requests the Secretary-General to reiterate his invitation to Member States and relevant international intergovernmental organizations to submit or update, not later than 30 June 1981, their comments and observations on the draft Code of Offences against the Peace and Security of Mankind and, in particular, to inform him of their views on the procedure to be followed in the future consideration of that item, including the suggestion of having the item referred to the International Law Commission;
>
> "2. Requests the Secretary-General, on the basis of the replies submitted by Member States and relevant international intergovernmental organizations and the statements made during the debate on this item, to prepare an analytical paper in order to facilitate the further consideration of the item;
>
> "3. Further requests the Secretary-General, to submit a report to the General Assembly at its thirty-sixth session;"

2. On 2 January 1981, the Secretary-General addressed a note to the Governments of Member States and a letter to the relevant international intergovernmental organizations, requesting their comments and observations on the subject.

3. As of 15 September 1981, replies had been received from the Governments of Chile, the German Democratic Republic, Germany, Federal Republic of, Mexico, the Philippines, Poland, Qatar, Romania and Tunisia and from the Council of Europe.

4. It may be recalled that the comments and observations received from the Governments of Member States and relevant intergovernmental organizations pursuant to General Assembly resolution 33/97, adopted on 16 December 1978, were circulated in documents A/35/210 and Add.1 and 2 and Add.2/Corr.1.

5. Similarly, the comments and observations received under General Assembly resolution 35/49 are reproduced in the present report. Further comments and observations will be reproduced in addenda to this report.

6. The analytical paper referred to in paragraph 2 of resolution 35/49 will be issued as a separate document.

II. REPLIES RECEIVED FROM GOVERNMENTS

CHILE

[Original: Spanish]

[17 April 1981]

1. In this connexion, the Permanent Mission of Chile could inform the Secretary-General that, at the thirty-fifth session of the General Assembly, the Chilean delegation to the Sixth Committee stated Chile's position on the item, emphasizing especially that the instrument eventually adopted should be unanimously accepted, that the procedures prescribed in it should be such that they could be effectively applied to those at whom they were aimed and that they should be so conceived that their underlying principles were not influenced by political interests at the expense of law and justice.

2. It therefore becomes of overriding importance to elaborate objective or procedural rules for setting in operation the substantive provisions contained in the draft to be reviewed by the International Law Commission.

3. Chile therefore favours a set of international rules clearly specifying the judicial organ which will be competent to consider and rule on cases involving offences against the peace and security of mankind, as described in the Code, since otherwise the preparation of a list of responsible acts would be nothing more than an expression of lofty moral sentiments by the international community with little or no practical effects on the conduct of those commiting them.

4. There is no doubt that the creation of an international judicial organ possessing penal competence has for long been an aspiration of the civilized world; but the complications involved in adopting a system of international criminal liability in this day and age, when the subjects of such a system have shown more than a little scepticism about it, have discouraged sustained initiatives, since States generally prove reluctant to subject themselves to the most rigorous aspect of the law, namely, the punitive aspect.

5. It will therefore be a delicate task to consider, in conjunction with the Code of Offences against the Peace and Security of Mankind, the question which body, similarly international in scope and endowed with penal jurisdiction, shall try, evaluate and rule on accusations and defences that fall within its sphere of competence in accordance with the procedure to be established, taking into account as the standard for action the adoption of just, impartial and effective solutions. To that end, the autonomous, independent and creative function of whatever tribunal is decided on should be underscored, so that considerations extraneous to its strictly judicial task may not impinge on its actions.

6. Consequently, as Chile has agreed in its statements on the item, there must be a unanimous commitment on this point, reflected in jurisdiction that is compulsory, ipso facto, not based on special agreements depending entirely on the will of the self-obligated, because the only path to respect for the international penal order is one circumscribed by obligations which cannot be evaded, so that a legal duty will be the basis for the peaceful settlement of disputes arising from the application of the proposed Code.

7. At the same time, Chile favours the establishment of general and equitable procedural rules to provide full and consistent process of law, spelt out in advance in specific and generally accepted legal norms. This process of access to the judge should be focused on a technical appraisal of the act complained of, unaffected by the political motivations of the parties to the case or of third parties, or by pressures of any kind.

8. If the task of establishing a competent tribunal to deal with infractions of the Code, and of determining the procedural rules that will make such a body an indispensable organ, is a complex one requiring a decision by the international community to submit its acts to review by an impartial third party, it will be a still more complicated task to arrive at normative solutions for instituting international penal jurisdiction compulsory for States and for individuals.

9. In view of the foregoing, Chile is convinced that the draft Code of Offences against the Peace and Security of Mankind should be referred to the International Law Commission for thorough reconsideration, with a view to the Commission's submitting in the near future a detailed report in keeping with the requirements of contemporary law. To that end, Chile stands ready to collaborate in whatever way the international community deems appropriate.

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[19 June 1981]

1. The German Democratic Republic reaffirms its great interest in the resumption of work on a draft Code of Offences against the Peace and Security of Mankind.

2. The German Democratic Republic set forth its view of such a draft code in greater detail in its written comments of 25 July 1980 (A/35/210/Add.1) and in the statements made by its representative before the Sixth Committee on 5 December 1978 (A/C.6/33/SR.63) and on 3 October 1980 (A/C.6/35/SR.10).

3. In the struggle for a radical improvement of the international situation and for the strengthening of international peace and security, the German Democratic Republic believes the earliest possible completion of a Code of Offences against the Peace and Security of Mankind assumes heightened importance.

4. In principle, the German Democratic Republic can accept any procedure for the further consideration of the draft Code which would guarantee its priority

treatment and speedy completion. But it would doubt whether the International Law Commission, concerned at present with a larger number of codification projects, will be able to comply with this requirement.

5. Therefore, the German Democratic Republic gives preference to the further consideration of the draft Code by the Sixth Committee of the United Nations General Assembly. One of the reasons for this suggestion is that the Sixth Committee has on several occasions successfully elaborated international treaties on the prevention and combating of offences which are particularly dangerous to peaceful co-operation among States.

GERMANY, FEDERAL REPUBLIC OF

[Original: English]

[30 June 1981]

1. If further consideration of the draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission in 1954, is indeed deemed appropriate and expedient at the present time - which the Federal Government continues to doubt - the first step should be to request the International Law Commission to revise the draft Code in the light of the development of international law during the past 25 years and taking into account the present comments. The deadline to be given the International Law Commission should make allowances for the other important items on the Commission's agenda.

2. As to substance, the Federal Government would like to recall the misgivings voiced by its representative on 7 October 1980 in the Sixth Committee (see A/C.6/35/SR.12).

3. For reasons of judicial safeguards, numerous provisions of the draft Code would require much more definite formulation before they could serve as a basis for prosecution against individuals. As it stands now, the text is too vague in defining the offences, the perpetrators and the scope of punishment.

4. The second shortcoming of the draft lies in the lack of an appropriate international body for implementing possible future penal provisions. Only an independent international criminal court with a balanced membership would be capable of applying punitive norms according to the principle of equality.

MEXICO

[Original: Spanish]

[10 March 1981]

1. As stated by the delegation of Mexico during the debate on the item at the thirty-fifth session of the General Assembly, the Government of Mexico favours the elaboration and adoption of a Code of Offences against the Peace and Security of Mankind.

2. However, before undertaking such a task, Member States need to know the views of other countries on the possible content of the Code, in order to evaluate its future usefulness.

3. The elaboration of the Code will be meaningful only if it becomes the legal basis for the establishment of an international criminal court with compulsory and not merely optional jurisdiction.

4. Finally, if the General Assembly decided to elaborate a Code of Offences against the Peace and Security of Mankind, either by updating the International Law Commission's 1954 draft or by preparing a new text, the Government of Mexico is of the view that the task should be entrusted to an intergovernmental committee with a small membership, constituted in accordance with the principle of equitable geographical representation, which, in order to avoid extra expense, could meet during regular sessions of the General Assembly. It would not appear desirable to refer the matter back to the International Law Commission, in view of the political nature of the instrument to be elaborated and taking into account the heavy agenda which the Commission should dispose of before taking up a new topic.

PHILIPPINES

[Original: English]

[24 March 1981]

1. The Philippine Government fully supports the initiatives of the International Law Commission and the Sixth Committee of the General Assembly concerning the formulation and codification of an international Code of Offences against the Peace and Security of Mankind. The envisaged Code should serve to reaffirm the principles embodied in the Charter of the Nuremberg Tribunal and in that Tribunal's judgements. Likewise, the Code shall serve to strengthen the basis for international co-operation and understanding among States in accordance with the Charter of the United Nations.

2. In particular, the proposed Code should give greater emphasis to the vital concerns of humanity for greater equality, development and world peace. The principles embodied in the various United Nations resolutions could be included in the draft Code, that is, resolution 2734 (XXV) of 16 December 1970 on the Declaration on the Strengthening of International Security, resolution 2625 (XXV) of 24 October 1970 relating to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, resolution 3314 (XXIX) of 14 December 1974, providing for a most comprehensive definition of aggression, and resolution 3074 (XXVIII) of 3 December 1973 relating to the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

3. The Philippines considers that the draft Code, as formulated in 1954 by the Commission, should not be confined to a mere listing of political or related offences. Rather, it should also provide for a wider or more relevant listing of non-political offences or to include offences recognized in the national

legislation of States. In this regard, the draft Code should provide for a better definition of such concepts as State responsibility or the criminal responsibility of States in relation to the concepts of individual responsibility, extradition and complicity.

4. The Philippines would suggest the inclusion in the draft Code of a wider listing of national or international crimes which are economic in nature such as the following: large-scale fraud, the absconding of public funds by individuals or nationals, counterfeiting and forgery offences and other similar offences that would tend to financially or economically destabilize the economic viability and security of States, particularly those of the developing States.

5. The Philippine Government hopes that the proposed Code be strengthened with binding provisions, such that acceding or signatory States should automatically extradite or punish offenders and co-operate with each other in implementing the Code on a bilateral or multilateral basis.

POLAND

[Original: English]

[30 June 1981]

1. Poland, a country which went through an ordeal during the Second World War and the Nazi occupation, feels duty bound to support all actions taken with a view to developing human rights and consolidating the precepts of human morality, respecting law in international relations and outlawing war.

2. Poland has always been a consistent advocate of responsibility for crimes against peace, war crimes and crimes of genocide, the responsibility regulated by such international legal acts as the Potsdam Agreement of 2 August 1945, the Agreement on the Suppression and Punishment of the Crime of Genocide and the Charter of the Nürenberg Tribunal of 8 September 1945, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and the United Nations Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968.

3. Poland was among the first countries to adopt a special penal law concerning the responsibility for crimes of the Third German Reich, namely the 1944 Decree on Penalty for Nazi Criminals. The Law of 22 April 1964 on the Non-Applicability of Statutory Limitations to Nazi Crimes which is in force in Poland corresponds to international legal acts as well as United Nations conventions and resolutions concerning the prosecution of war criminals and crimes against mankind.

4. For the above-mentioned reasons, the Government of the Polish People's Republic favours the continuation of work on the draft Code of Offences against the Peace and Security of Mankind.

5. The advisability of such a Code is corroborated by the fact that 35 years since the end of the Second World War, the threat of a new war has not been eliminated. There are still hotbeds of tension, the arms race continues and armed

conflicts still break out. In the face of the development of weapons of mass destruction, these phenomena acquire a new dimension. Until now, no satisfactory settlement of accounts for Nazi crimes has been made. A large number of war criminals guilty of the gravest crimes have not been apprehended, others have not been meted out appropriate punishment. The legislation of some States has failed to settle satisfactorily the question of the non-applicability of statutory limitations. At the same time, mankind finds itself facing new threats, unrelated to war, stemming from the nuclear, chemical and bacteriological pollution of its environment.

6. The draft Code of Offences against the Peace and Security of Mankind will constitute a proper complement to the Convention on the Responsibility of States currently being drafted by the International Law Commission, which regulates the responsibility of States for international crimes in draft article 19. However, when a "State" means an anonymous collective and, under contemporary international law, the scope of its responsibility is limited to compensation and satisfaction, then the awareness of the direct and penal responsibility of an individual guilty of such offences might to a greater extent be conducive to their prevention.

7. The Code of Offences drafted by the International Law Commission between the years 1951 and 1954 may constitute a useful basis for further discussions. However, the Government of the Polish People's Republic is of the opinion that the enumeration of offences in article II of the draft Code is no longer adequate either in the light of the present state of technology or the development of law. It has to be borne in mind that over the past 25 years, i.e. since the adoption of the draft of four articles concerning offences against the peace and security of mankind, a number of international acts have been promulgated whose violation is considered an international offence. Such acts, which have the status of international agreements, are the 1977 Additional Protocols to the Geneva Conventions, the conventions against racial discrimination as well as the General Assembly resolutions reflecting universal legal opinion on this subject, for instance, resolution 3314 (XXIX) on the Definition of Aggression. In the view of the Polish Government, alternative solutions should be taken into consideration in discussions on the future Code: either an exhaustive list of offences covered by the draft Code, as is the case with the Geneva Protocols should be provided or the relevant spheres should be spelt out as examples: crimes against humanity, war crimes, genocide, apartheid, heavy pollution of man's natural environment with a reference to the relevant resolutions of the positive law. The advantage of the first solution is the firmness of the law and the impossibility of pleading ignorance of committing an international crime. On the other hand, the disadvantage of this solution is its unwieldy nature, incompatible with the accelerated pace of technological and sociological changes which breed new crimes or contribute to such intensification of others as to threaten the security of mankind (terrorism and hijacking). The advantage of the second solution is its flexibility, which allows for the possibility of embodying new legal acts, while lacking the legal firmness of the former.

8. The principle specified in draft article 3 that the function of the head of State or any other government function shall not be free from liablity is correct. However, the Code should also include a principle - similar to the one expressed in draft article 4 of the Convention on the Responsibility of States - that the

characterization of an act as an offence against the peace and security of mankind cannot be affected by the characterization of the same act as lawful under internal law.

9. In the view of the Polish Government, it is imperative for the Code to include a provision on the non-applicability of statutory limitations to war crimes and crimes against humanity as well as an obligation binding on all signatories to introduce relevant laws in their internal legislation. The principle of non-applicability of statutory limitations with respect to the gravest crimes should be accorded the status of a principle of international law.

10. Poland, which lost over 6 million citizens not only as a result of aggression and hostilities but mainly as a result of criminal Nazi extermination policy, follows closely the process of prosecution and punishment of war criminals. The fact that the number of punished Nazi war criminals is insignificant in comparison with the number of those guilty of such crimes is attributed to political and legal conditions of jurisdiction in the Federal Republic of Germany.

11. Despite the fact that 35 years have elapsed since the end of the Second World War, some areas of Nazi criminal activity and various groups of Nazi criminals have escaped prosecution in the Federal Republic of Germany. Investigations and trials in that country involved primarily the lower officials of the occupational apparatus of Nazi Germany. The functionaries of the Third Reich central authorities, even if they were investigated, managed to escape prosecution. A glaring example of these practices is the investigation concerning the responsibility of the officials of the Central Security Office of the Reich. Prosecution failed to cover the crimes committed by Nazi criminals from these Wehrmacht and Waffen SS units which took part in genocidal actions against civilians and prisoners of war or the crimes committed by the employees of the civilian administration or the members of the Third Reich's judiciary. Neither prosecutors nor Nazi judges who sat in special penal courts passing capital punishment against all the elementary principles of universally binding law have faced the court. No one out of the 537 Nazi officials suspected of complicity in the mass extermination of the Polish intelligentsia and the perpetration of crimes against children, women and handicapped persons has so far stood trial.

12. The problem of responsibility requires thorough consideration. The idea of an international penal court is not a new one: it found its implementation in the Nürenberg Tribunal. However, both the high costs of maintaining a permanent court and the well-understandable difficulties in its staffing argue in favour of other solutions, such as ad hoc courts or the introduction of a provision in the Code, binding on all signatory States, to recognize and introduce in their internal criminal law the legal norms included in the Code, guaranteeing a due process of law and punishment of persons liable for criminal offences.

13. As regards the further procedure with a view to drafting the Code, the Government of the Polish People's Republic is of the opinion that at present, until agreement is reached on the basic provisions of the Code, the debate should be continued in the Sixth Committee of the General Assembly. However, at a stage of elaborating concrete provisions, the work should be continued in the International Law Commission.

QATAR

[Original: Arabic]

[18 June 1981]

1. The above-mentioned draft Code does not contain any indication as to the judicial authority that is competent to apply its provisions and whether it is the national courts or an international court. In view of the fact that the specification of the competent court is a matter of extreme importance, as without it the Code becomes merely a piece of wishful thinking, I suggest that the judicial competence be clearly indicated in the draft Code.

2. With regard to the contents of article 2, (9) of the draft Code, which proscribes "The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind", we suggest that it be explicitly stated that this provision does not apply to the right of some States to resort to an embargo on the exportation of certain of their products as a means of obtaining their legitimate, internationally recognized rights or as a means of self-defence.

ROMANIA

[Original: French]

[28 June 1981]

1. In the light of the principles and basic thrust of the foreign policy of the Socialist Republic of Romania, designed to contribute to the strengthening of peace and friendly co-operation among peoples and to the building of a better and more just world on the basis of respect for the principles and norms of international law, the Romanian Government is in favour of the finalization and adoption of a code of offences against the peace and security of mankind.

2. The adoption of such a Code would meet the increased demand on the part of the international community for any means, including the legal means, to prevent and combat international offences. This is all the more imperative at this time, when the peace and security of peoples are subject to frequent and ever more serious threats posed by the emergence of new hotbeds of conflict, moves to redivide the world into spheres of influence, interference in the internal affairs of other States, the increasingly adverse effects of the arms race and, finally, a new wave of terrorism, revanchism, chauvinism and neo-nazism.

3. The adoption of a Code of Offences against the Peace and Security of Mankind would, at the same time, meet the imperative demands of the contemporary world for the progressive development and codification of international law, and would thus contribute significantly to increased State responsibility and a stronger will on the part of States to promote peace and co-operation among peoples.

4. We believe that the draft Code of Offences against the Peace and Security of Mankind elaborated in 1954 by the International Law Commission could serve as a working paper of undeniable value in future codification work in this field.

5. Any in-depth examination of the question should, first of all, take into account the evolution of the socio-political situation in the contemporary world and the role to be played by the future legal instrument against that background. Specifically, it would have to be borne in mind that during the 27 years since the elaboration of the draft Code, there have been significant developments in international penal law, with the adoption and, where applicable, the entry into force of international conventions, international agreements and resolutions of the United Nations General Assembly that define as offences a number of acts which pose major threats to the peace and security of mankind. Those instruments worth mentioning are: the International Convention on the Elimination of All Forms of Racial Discrimination (resolution 2106 A (XX)), the International Convention on the Suppression and Punishment of the Crime of Apartheid (resolution 3068 (XXVIII)), the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973, the 1970 and 1971 conventions for the suppression of unlawful acts against the safety of international civilization, the 1977 Protocols Additional to the Geneva Conventions of 12 August 1949 for the protection of war victims; the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons (resolution 1653 (XVI) of 24 December 1961) and the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX).

6. The very serious acts against the peace and security of mankind which are defined as offences in legal instruments such as the above-mentioned must be cited in the future Code, so that their inclusion with the acts already cited in the draft Code would ensure that international offences are covered by the most comprehensive set of regulations possible.

7. In the opinion of the Romanian Government, the future Code should also define as offences against the peace and security of mankind such acts as the taking of hostages, pro-war propaganda, incitement, instigation and defamation likely to jeopardize international peace and security.

8. In the opinion of the Romanian Government, the future Code must stipulate what constitutes an offence against the peace and security of mankind. A tight definition and comprehensive listing of such offences are also necessary inasmuch as the basic principle universally recognized in penal matters is the principle of legality of accusation, i.e., nullum crimen sine lege.

9. At the same time, by virtue of the principle of legality of punishment - nulla poena sine lege - the Code must also lay down rules governing penalties for acts defined as offences. With a view to providing an effective regulative system and making it possible to bring offenders to book, consideration might be given to including in the draft Code a provision under which all States would incorporate relevant clauses in their internal legislation.

10. The Code should also include provisions regarding the responsibility of States, as entities subject to international law, for offences against the peace and security of mankind committed by persons and/or authorities acting on their behalf. In this connexion, consideration might be given to the other forms of responsibility and, in any event, material liability for damage caused by the unlawful activities of States.

11. In view of the extreme gravity of the offences in question, which the entire international community is anxious to punish, we believe that the Code could usefully include an explicit provision concerning the principle of non-applicability of statutory limitations, both with regard to the prosecution of perpetrators of offences against the peace and security of mankind, and with regard to the enforcement of penalties for the perpetration of such offences.

12. We believe that the draft Code of Offences against the Peace and Security of Mankind must not omit provisions such as those relating to the authorities competent to hear cases and the modalities and procedure for the implementation of the Code.

13. Such provisions would probably enhance the effectiveness of this international legal instrument.

14. Consideration of the draft Code of Offences against the Peace and Security of Mankind should resume without delay with a view to the finalization of the Code. To that end, it would be advisable to entrust the matter to the International Law Commission.

TUNISIA

[Original: French]

[July 1981]

1. Although the draft Code is not in any way at variance with Tunisian legislation and hence gives rise to no objections in principle, it should be updated, since it has undergone no improvement since it was drawn up in 1954.

2. What is needed in order to bring the draft Code into line with developments in international law over the past 25 years and to express with greater precision some terms and concepts in it which are lacking in clarity is:

(a) To take into account the principles set forth in relevant resolutions of the General Assembly, in particular the resolutions entitled

(i) "Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV));

(ii) "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (resolution 2625 (XXV));

(iii) "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity" (resolution 3074 (XXVIII));

(b) To make the draft Code applicable to the offences defined in the Geneva Convention of 12 August 1949 relative to the protection of victims of war and the additional Protocols of 8 June 1977;

(c) To have the crime of apartheid, as defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, covered by the draft Code;

(d) To have the draft Code also cover the most serious offences envisaged in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973;

(e) To take into account the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modifcation Techniques of 10 December 1976;

(f) Given the seriousness of the offences dealt with in the draft Code to make the principle of the non-applicability of statutory limitations set forth in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1969 applicable to them.

3. The value and legal significance of such a Code will depend wholly on its scope of application. However, the existing draft Code in its present form contains no provisions on that matter.

4. In addition to providing an exhaustive list of punishable offences, the Code should specify:

(a) The procedure for punishing such offences;

(b) The penalty attaching to each offence;

(c) The competent jurisdiction (and hence the courts having jurisdiction in such matters).

5. The draft Code provides, in article 1, only for the responsibility of individuals whereas it should also be possible for them to invoke the responsibility of States. The conviction of an individual should not automatically absolve a State of reponsibility for injury caused by its authorities.

6. Moreover, an effort to clarify and make more explicit certain terms and concepts would make the draft Code clearer and hence prevent conflicting interpretations of its substance. The terms used in connexion with criminal offences should therefore be as clear as possible and should not be open to dispute. Accordingly, the concepts of "terrorist acts" and "terrorist activities" (art. 2, para. 6) should be strictly defined.

7. Inhuman acts committed by individuals not acting at the instigation or with the consent of the authorities are referred to in article 2, paragraph 10, as offences against the peace and security of mankind, but paragraph 11 makes no mention of that article.

8. Lastly, given the magnitude of the issues that remain to be resolved, the International Law Commission - which has from the start been responsible for the preparation of the draft Code - would still seem to be the appropriate body for that purpose.

III. REPLIES RECEIVED FROM INTERGOVERNMENTAL ORGANIZATIONS

COUNCIL OF EUROPE

[Original: French]

[2 June 1981]

1. The Council of Europe welcomes the ideals and principles underlying the provisions of the draft Code of Offences against the Peace and Security of Mankind. However, the present text, which dates from 1954, calls for certain observations.

General comments

2. First of all, two general comments appear to be in order. The first of these is prompted by the age of the draft and relates to the developments with respect to public international law which have taken place in the interim and which could not, of course, be reflected in the draft. A number of instruments have since been formulated under the auspices of those United Nations organs which deal with questions closely related to the peace and security of peoples. It therefore seems desirable to ensure that this draft Code is compatible with such texts as 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 Definition of Aggression and the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Declarations by the Committee of Ministers of the Council of Europe on human rights, terrorism and intolerance may also be relevant.

3. The second comment relates to the content and scope of the draft Code. The draft contains a list of offences which as they appear to us to be defined, entail the criminal responsibility either of persons considered individually or of States. This is so, for example, in the case of an act of aggression against another State or preparation for war.

4. Criminal responsibility of States and means of effectively penalizing such responsibility at the international level are currently being studied by the International Law Commission in connexion with its work on State responsibility. Effective machinery for enforcing the Code is one of the more striking omissions from the draft.

5. It would therefore seem that if the draft is to have any positive effect, those aspects - criminal responsibility of the State and effective means of enforcement - will have to be dealt with.

6. For the above reasons, it might be preferable to await the outcome of the International Law Commission's work and to refer the draft Code to it for consideration of those aspects.

Observations on the text of the draft articles

7. In view of the above observations, we do not propose to comment in detail on each of the provisions of the draft Code. Nevertheless, attention may usefully be drawn to certain points. These are:

(a) The need for better definition of some of the offences defined and terms used in the draft Code. The term "aggression" as used in article 2, paragraphs 1 and 2, should be reviewed in the light of the definition given by the General Assembly in its resolution 3314 (XXIX). Similarly, expressions such as "armed bands", "activities calculated to foment civil strife" and "terrorist activities" should be defined or at least a list of examples should be given (see art. 2, paras. 3, 4 and 5).

In the case of "terrorism" and "terrorist acts", in particular, a number of international conventions have so far been adopted, notably the Council of Europe's 1977 Convention on the Suppression of Terrorism, which should perhaps be taken into account.

(b) The possibility of adding to the list of offences given in article 2, such offences as the crime of genocide, apartheid and the taking of hostages, which have been the subject of specific conventions defining them as offences under international law.

It may be that "forced disappearance" of persons express mention in such a list, particularly in article 2, paragraph 11.

(c) The possibility of providing for an effective system of enforcement. Under the draft Code, enforcement of the Code is left to national courts. The question now arises whether, in view of the developments which have occurred and the current work of the International Law Commission, it might not be possible to go further and make provision for enforcement of the Code at the international level through the establishment of an international criminal court. It may be noted in this connexion that the question of an international criminal jurisdiction is on the Commission's programme of work among the topics which might be taken up in the near future.

(d) The need to expand the scope of the Code to include the systematic violation of human rights. It may be recalled that the steadfast defence of human rights is a matter of prime importance to the Council of Europe and is also embodied in the Charter of the United Nations. The

international protection of human rights is closely limited to the maintenance of peace, and repeated and systematic violations at least should be considered an offence against mankind.

(e) We shall conclude by simply mentioning two other aspects which might merit closer consideration:

Firstly, there was a proposal by the Netherlands 1/ to amend article 4 of the draft Code, as originally adopted by the International Law Commission in 1951, to make it clear that the fact that a person had acted on the orders of his Government or of a superior did not relieve him of responsibility "si elle pouvait avoir connaissance du caractère criminel de l'acte". The amended text of article 4, as adopted and as it now appears in the draft Code ("if in the circumstances at the time, it was possible for him not to comply with that order"), does not adequately reflect the aspect emphasized by the Netherlands, namely knowledge of the illegality of the act.

The second point is whether there should be added to the draft Code a provision whereby the States parties undertake to incorporate in their national penal laws provisions prohibiting the acts referred to in the Code.

1/ Yearbook of the International Law Commission, 1954, vol. II, p. .