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## DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

### Report of the Secretary-General

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\* A/43/150.

## I. INTRODUCTION

1. On 7 December 1987, the General Assembly adopted resolution 42/151, the operative paragraphs of which read as follows:

"The General Assembly,

"...

"1. Agrees with the recommendation in paragraph 65 of the report of the International Law Commission to amend the title of this topic in English, in order to achieve greater uniformity and equivalence between different language versions;

"2. Invites the Commission to continue its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind including the elaboration of a list of crimes, taking into account the progress made at its thirty-ninth session, as well as the views expressed during the forty-second session of the General Assembly;

"3. Requests the Secretary-General to seek the views of Member States regarding the conclusions contained in paragraph 69 (g) (i) of the Commission's report on the work of its thirty-fifth session;

"4. Further requests the Secretary-General to include the views received from Member States in accordance with paragraph 3 above in a report to be submitted to the General Assembly at its forty-third session;

"5. Decides to include in the provisional agenda of its forty-third session the item entitled 'Draft Code of Crimes against the Peace and Security of Mankind', to be considered in conjunction with the examination of the report of the International Law Commission."

2. On 31 March 1988, the Secretary-General addressed a note to the Governments of Member States requesting the views referred to in paragraph 3 of resolution 42/151.

3. As at 15 August, replies had been received from the Governments of Belgium, Chile, Ecuador, Norway, Oman, Thailand and Yugoslavia. These replies are reproduced in the present report. Further replies will be circulated as addenda to the present document.

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## II. REPLIES RECEIVED FROM GOVERNMENTS

### BELGIUM

[Original: French]

[7 July 1988]

1. It will be possible to implement the draft Code of Crimes against the Peace and Security of Mankind only to the extent that an international judicial organisation is able to impose sanctions for breaches of the norms of that Code. It is with this in mind that the International Convention on the Prevention and Punishment of the Crime of Genocide provides, in article 6, that an international criminal court should have jurisdiction for the trial of persons charged with genocide. While the principle of universal punishment, which is set forth in a number of international conventions, to some extent offsets the lack of an international criminal jurisdiction, it must be recognised that the principle of universal punishment is not the ideal solution in respect of international crime, that is so for the two following reasons.

2. Firstly, there has always been some opposition to universal punishment because it makes national tribunals responsible for judging the conduct of foreign Governments. Secondly, it is logical that a crime which constitutes a breach of international order as such should be referred to a jurisdiction which is itself the expression and guarantor of that international order. Accordingly, it is essential that the mandate of the International Law Commission include the creation of an international criminal jurisdiction.

### CHILE

[Original: Spanish]

[29 June 1988]

1. In the opinion of the Government of Chile, while the establishment of a judicial organ in the area of international criminal law has long been an aspiration of the civilized world, the fact remains that the complexity of adopting an international penal régime today has caused scepticism and discouraged initiatives in this field. That is why States have on the whole been reluctant to embark on the most rigorous aspect of the law, namely, the question of penalties. Then there is the current status of the work on the preparation of the draft Code of Crimes against the Peace and Security of Mankind.

2. In the light of the preceding, the Government of Chile believes that the International Law Commission should continue preparing the aforementioned Code. Only when definitive agreement has been reached on the text of the Code should it seek consensus within the international community regarding a system of competent international criminal jurisdiction for individuals.

ECUADOR

[Original: Spanish]

[18 July 1988]

1. One of the fundamental characteristics of penal law (jus puniendi) is that it categorises certain acts as offences and establishes the corresponding penalties or specific security measures. Accordingly, a code of crimes against the peace and security of mankind that failed to include penalties or any type of practical measures would be a distortion of the very essence of such a code and would be tantamount to a moral declaration without further implications.

2. One of the functions of the International Law Commission is to formulate recommendations aimed at promoting the progressive development of international law and its codification. In other words, the Commission is not called upon to formulate moral declarations, but rather to draft and compile norms of positive international law, including norms relating to penalties. Thus in order for the Commission truly to fulfil its functions and in order for the draft Code of Crimes against the Peace and Security of Mankind to be a genuine code, it is vitally important for the General Assembly to indicate that the task entrusted to the Commission includes the preparation of the statute of a competent international criminal jurisdiction for individuals as well as for Governments.

3. With respect to paragraph 69 (c) (ii), the reference should be to the criminal responsibility of Governments, not of States, for the State includes several elements - the population, the Government, the territory. It is only to the Government that offences may be attributed, because of its nature. This approach would even make it easier to prepare and adopt provisions setting forth practical penalties.

NORWAY

[Original: English]

[18 May 1988]

Norway is of the view that the question of determining the extent of the Commission's mandate in relation to the preparation of a statute of an international criminal jurisdiction for individuals should await further clarification of the underlying substantive issues.

OMAN

[Original: Arabic]

[20 June 1988]

1. As a member of the international Organization, the Sultanate of Oman supports the view that the need to establish an international criminal jurisdiction is an issue separate from that of the need to promulgate the draft Code of Crimes against the Peace and Security of Mankind.

2. It is of the opinion that the need to establish the jurisdiction entails, in practical terms, promulgation of the Code because, once the jurisdiction is established, both codified and uncoded law may be applied, whereas, in the absence of either, neither will be operative. Thus the need to establish the jurisdiction is greater than the need to promulgate the Code because establishment of the international criminal jurisdiction is necessary if the basis of the law, whether codified or uncoded, is to become operative. Otherwise, the legal basis will remain bound by the text of the law as distinct from the actual judicial situation.

THAILAND

[Original: English]

[30 June 1988]

1. According to article 4 of the draft Code of Crimes against the Peace and Security of Mankind, an offence against the peace and security of mankind is a universal offence. None the less, some of the offences listed in the draft Code as falling into this category may not be universally or even generally accepted as such. Thus, there is the possibility that the draft Code may not be generally accepted by the international community - at least not to the extent that it may become customary rules of international law or even conventional rules of general application.

2. In this light, to prepare the statute of a competent international criminal jurisdiction over individuals would be futile at this stage. States would not accept or recognize jurisdiction over the offences the constituents and/or characterization of which are unacceptable to them.

3. Therefore, at this juncture the Commission should concentrate on "recasting" the draft articles so that they may be acceptable to the overwhelming majority of States. After such an accomplishment, the Commission may subsequently proceed to prepare the aforesaid statute. The success of this statute might then predicate a parallel statute which would confer a competent international criminal jurisdiction with respect to States which are offenders.

YUGOSLAVIA

[Original: English]

[21 June 1988]

1. There is little doubt that a broader plan for the elaboration of the draft Code of Crimes against the Peace and Security of Mankind cannot sidestep the question of the sanctions and mechanism of their establishment, i.e., the punishment of perpetrators of crimes against the peace and security of mankind. The question of the establishment of an international criminal jurisdiction for individuals responsible for such crimes constitutes therefore an inseparable part of the Code as a whole and should be considered in due time, along with the question of sanctions. Without parts on the international criminal jurisdiction and sanctions, the future Code would be just a general declaratory act and ineffective as such.

2. On the basis of this opinion it would be necessary to consider and finally establish a plan of work on the draft Code. Yugoslavia maintains that the hitherto experience on the qualification of criminal acts and the laying-down of prosecution rules, particularly the experience from the Second World War, which found its reflection in the Nuremberg principles and international and national tribunals for the prosecution of war criminals, should be finally addressed in the process of the elaboration of the draft Code in accordance with the overall development of international law in the past couple of decades. In doing so, the United Nations and the international community should focus on all achievements and instruments in the field of the protection of human rights (human rights covenants, conventions against apartheid and racial discrimination), as well as those in the field of the implementation of the provisions on the responsibility of States (struggle against aggression and other forms of the use of force). Yugoslavia maintains that solutions should be sought in accordance with the present-day objective needs and the necessity for introducing appropriate improvements in the international legal order to make it reflect the new conditions. And although the question of individual responsibility should be accorded priority for the time being, it is the opinion of Yugoslavia that the responsibility of States will become increasingly important in the future development of international law.

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