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Observations of Member States received pursuant to General Assembly resolution 41/75

Topic:
**Draft code of crimes against the peace and security of mankind (Part II)- including the
draft statute for an international criminal court**

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Observations of Member States received pursuant to General Assembly resolution 41/75

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[16 April, 9 and 25 June 1987]

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Introduction

1. On 3 December 1986, the General Assembly adopted resolution 41/75 on the 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-eighth session, as well as the views expressed during the forty-first session of the General Assembly;

2. *Requests* the Secretary-General to seek the views of Member States regarding the conclusions contained in paragraph 185 of the report of the International Law Commission on the work of its thirty-eighth session, taking into account the conclusions contained in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session;

3. *Further requests* the Secretary-General to include the views received from Member States in accordance with paragraph 2 above in a report to be submitted to the General Assembly at its forty-second session;

4. *Decides* to include in the provisional agenda of its forty-second 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. On 31 March 1987, the Secretary-General addressed a note to the Governments of Member States inviting them, pursuant to paragraph 2 of resolution 41/75, to communicate their observations to him.

3. The replies received as at 25 June 1987 from the Governments of four Member States¹ are reproduced below.

¹ The replies received after this date from the Governments of six other Member States (Byelorussian Soviet Socialist Republic, Chile, Mexico, Sweden, Ukrainian Soviet Socialist Republic and Union of Soviet Socialist Republics) were circulated to the General Assembly, at its forty-second session, in document A/42/484 and Add.1 and 2.

Brazil

[Original: English]
[14 April 1987]

1. The Brazilian Government is of the opinion that the two questions addressed by the International Law Commission in paragraph 69 (c) (i) and (ii) of its report on its thirty-fifth session² are of great importance to the continuation of its work on the draft Code of Offences against the Peace and Security of Mankind. The necessary guidance on these points should be given to the Commission without further delay in order to avoid adverse effects on the proper consideration of a topic to which the General Assembly attaches great importance.

2. Although there are differing views on the two questions posed by the Commission in 1983, it should be possible to formulate guidelines for the Commission flexible enough to permit the continuation of its work without prejudging the final outcome of its deliberations. With this objective in mind, the Brazilian Government believes that the General Assembly could consider establishing the following "working hypothesis": (a) the Commission would be asked to elaborate a draft code of offences against the peace and security of mankind on the assumption that, at the present stage, the draft would be limited solely to the criminal responsibility of individuals, without prejudice to subsequent consideration of the criminal responsibility of States; (b) the Commission's mandate would extend to the preparation of the statute of a competent international criminal jurisdiction, without prejudice to the exploration of alternative systems for the application of the code; (c) a final decision on these two points would be reserved to a later stage, after the matter has been further studied by the Commission.

² *Yearbook* . . . 1983, vol. II (Part Two), p. 16.

Mongolia

[Original: Russian]
[6 June 1987]

1. The current strained international climate necessitates the use of every opportunity, means and appropriate method to preserve international peace and strengthen the security of States. The elaboration of international legal instruments to prevent and punish international offences that threaten the peace and security of mankind is therefore of ever greater importance. Offences against the peace and security of mankind jeopardize not only the very existence of human civilization, but also man's sacred right to peace and to life. For this reason, the Mongolian People's Republic considers the drafting of a code of offences against the peace and security of mankind to be one of the priority tasks of the United Nations in the sphere of the progressive development and codification of international law.

2. The work done by the Special Rapporteur and the International Law Commission on the preparation of a draft code is considerable. However, Mongolia has objections both to the method behind the preparation of the draft and to a number of the concrete decisions taken on the basis of that method.

In Mongolia's view, the Commission's approach to the elaboration of the various provisions of the draft code entails confusion of the issues of individual responsibility and State responsibility. That opens up, *inter alia*, the possibility of the inclusion in the draft of offences of a general criminal nature that do not belong to the category of offences against the peace and security of mankind. For that reason, it is important that the draft should contain a general definition of offences against the peace and security of mankind, making it clear that it relates to individuals.

3. Mongolia wishes to stress what is, for it, a matter of principle: the code must provide that individuals will incur criminal responsibility for international offences against the peace and security of mankind and it must not touch upon the international responsibility of States. The criminal responsibility of States simply does not exist as a legal category. The concept of the criminal responsibility of States is not merely politically inimical, but also juridically baseless. Criminal law sanctions individuals, by methods peculiar to itself. It is impossible to apply criminal sanctions against a State. Consequently, any attempt to examine these two categories of responsibility within the framework of the same topic will doom the code to failure.

4. The question of the list of offences to be included in the code is, in Mongolia's opinion, one of the main issues relating to the elaboration of this instrument. It is very important for that list to reflect the realities and the needs of the modern age. The main emphasis in the code should be on the most serious international offences, and not on minor breaches of the law. The list should include aggression; genocide; *apartheid*; State or nuclear terrorism; the establishment or maintenance by force of colonial domination; actions aimed at the first use of nuclear weapons by a State; the planning, preparation, launching or conduct of a war of aggression; the recruit-

ment, training, financing or use of mercenaries; slavery; violation of the laws and customs of war, etc.

In this connection, Mongolia considers it extremely important for the list of offences to include the first use of nuclear weapons by a State, since the use of such weapons is, in terms of its consequences, the most horrible of the offences against the peace and security of mankind. The resolution of this issue in the code would be one of the main indicators of how far the code was up to date and reflected the realities of our day.

5. In order for the code to be more effective, it should include, in addition to the other provisions, an obligation upon States to incorporate in their legislation rules establishing severe penalties for persons guilty of the offences to which the code refers. That would promote the creation of national legal guarantees for the prevention of such offences and for eliminating the possibility of committing them.

6. Mongolia is convinced that, until the work on the code is complete, its elaboration must remain one of the main topics for the Commission and one of the major items on the agenda of the Sixth Committee of the General Assembly.

Qatar

[Original: English]
[7 April 1987]

1. Of the various options considered by the International Law Commission regarding the application of criminal law in space in connection with the implementation of the code, the Government of the State of Qatar is of the view that international criminal jurisdiction is the option most suited to the particular nature of offences against the peace and security of mankind.

2. Since effective international jurisdiction requires a competent international judicial body, the Government of Qatar favours extending the Commission's mandate to the preparation of the statute for such a tribunal, which would have jurisdiction over individuals accused of offences against the peace and security of mankind.

Venezuela

[Original: Spanish]
[22 June 1987]

1. Venezuela has upheld as a general principle the need to establish in the code a régime of sanctions and the means of applying them, and also to provide for a competent court that would try alleged offenders.

2. In the opinion of the Venezuelan Government, the following considerations should be borne in mind in applying this principle:

- (a) The principle of the territoriality of Venezuelan criminal law must not be disregarded. It is set out in article 3 of the Penal Code in the following terms:
- “Anyone who commits an offence or misdemeanour in the territory of the Republic shall be

punished in accordance with Venezuelan criminal law.”

- (b) It should be determined whether the person who is alleged to have committed an offence against the peace and security of mankind, and who is consequently to be tried, is a private person or a person vested with authority, since Venezuela accepts, both in internal public law (criminal law and administrative law) and in external law (public international law), the principle that the State is responsible for the conduct of its public officials or agents. Consequently, if, in their capacity as representatives of the State, they were to commit one of the offences against the peace and security of mankind

referred to in the code, the State itself could not escape responsibility when it was attributed.

3. The Government of Venezuela nevertheless accepts that there is one exception to the application of this principle, namely that set out in article III of the “Law approving the accession of Venezuela to the International Convention on the Suppression and Punishment of the Crime of *Apartheid*”. In accordance with that instrument, the responsibility of representatives of the State for the criminal acts identified in the Convention is recognized, exceptionally, without responsibility for those acts being incurred by the State of which they are agents.