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A/CN.4/SR.1802

Summary record of the 1802nd meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1983, vol. I

1802nd MEETING

Wednesday, 13 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*concluded*)* (A/CN.4/364,[2] A/CN.4/365, A/CN.4/368 and Add.1, A/CN.4/369 and Add.1 and 2[3])

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. NI said that the very lucid, concise, yet remarkably comprehensive report submitted by the Special Rapporteur (A/CN.4/364) raised sensitive political issues of concern to all the peoples of the world. The topic was of special significance to third world countries which, because of their political, economic and technological vulnerability, could more easily fall victims to such crimes as aggression and intervention—both armed and unarmed. The atrocities committed during the last two world wars were still in the memory of the older generations and the peoples of the world were therefore virtually unanimous in their resolve to strengthen international public order by providing some mechanism for preventing or deterring international crimes against the peace and security of mankind.

2. The Special Rapporteur had called (*ibid.*, para. 69) for comments on a number of questions, the first of which concerned the scope of the topic; he had sought guidance on the kind of crimes to be covered in the draft code as well as the subjects to be held criminally responsible—individuals, groups, States, or all three together. On the question of the crimes to be included, the 1954 draft code could of course serve as a basis. As was clear from its title, the present topic obviously did not relate to all crimes under international law, including those of lesser importance. The present codification had to be confined to the gravest offences which, because of their magnitude and seriousness, constituted a threat to the peace and security of mankind. That codification should take into account the development of international law since 1954 as reflected in international conventions, declarations and resolutions, including the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,[4] the International Convention on the Elimination of All Forms of Racial Discrimination,[5] the Declaration on the Granting of Independence to Colonial Countries and Peoples,[6] the Convention on the Prevention and Punishment of the Crime of Genocide[7] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[8]

3. The question had also been raised whether there should be a list of offences or whether, on the contrary, a certain number of specific criteria should be laid down and examples of particular types of crime given under each heading, following the Special Rapporteur's recommendation (1755th meeting) to adopt the pattern of article 19 of part 1 of the draft articles on State responsibility.[9] He himself was inclined to favour the second method, because no list of crimes could be exhaustive. It was more practical to set forth precise but fairly broad definitions of crimes, so as to avoid the risk of omissions.

4. In addition, he suggested the inclusion of a residuary provision along the following lines:

> "The provisions of the present code do not prejudice, or in any way affect, any provisions of pre-existing treaties, agreements, conventions, protocols, declarations, resolutions, or similar instruments prescribing certain actions or omissions to be international crimes or, as the case may be, imposing penalties thereon."

A provision of that kind would obviate the necessity of listing all the crimes established by convention or otherwise since 1954 and, at the same time, leave intact and unaffected the provisions of any agreement, declaration, resolution or similar instrument bearing on the question.

5. As to whether legal entities such as States could be held responsible for international crimes, the Judgment of the Nürnberg International Military Tribunal had been frequently cited in support of the view that the crimes to be punished under international law were committed by men and not by abstract entities. Moreover, article 1 of the 1984 draft code specified that: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished." It had been deduced from that provision that only individuals could bear responsibility for crimes under international law. In his view, however, neither the Nürnberg Judgment nor the 1954 draft code excluded the responsibility of States. The rule remained that States were the primary subjects of public international law, although individuals could in certain circumstances be held responsible, and even

* Resumed from the 1761st meeting.

[1] For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

[5] United Nations, *Treaty Series*, vol. 660, p. 212.

[6] General Assembly resolution 1514 (XV) of 14 December 1960.

[7] United Nations, *Treaty Series*, vol. 78, p. 277.

[8] *Ibid.*, vol. 754, p. 73.

[9] *Yearbook . . . 1976*, vol. II (Part Two), pp. 95–96.

punishable, as subjects under international law. The Nürnberg Judgment and the 1954 draft code went no further than that.

6. It was true that the physical actions constituting a crime could only be committed by individuals, who were accordingly liable to punishment, but that fact did not *a priori* relieve the State of its responsibility for any of the crimes defined in the draft code. The responsibility of the State and that of the individuals concerned did not exclude one another. Article 19 of part 1 of the draft articles on State responsibility, which attached responsibility to the State, was clearly based on the premise that a State was capable of incurring responsibility for the commission of international crimes. Of course, legal entities such as States could not be subjected to such types of punishment as imprisonment, but other punitive measures were available, including restitution, indemnification, injunction and declaration of condemnation. That particular question would fall within the purview of the topic of State responsibility. He himself agreed with the Special Rapporteur that the Commission must harmonize its positions by bringing its 1954 draft code into line with article 19 of part 1 of the draft articles on State responsibility (A/CN.4/364, para. 48).

7. With regard to implementation, it had been suggested that penalties should be prescribed for each of the crimes covered by the draft code, and that provision should be made for an international criminal court. It had also been suggested that a provision should be included authorizing the court trying the case to determine the penalty itself; the competent court might be either a national court or an *ad hoc* international court. In that connection, the Special Rapporteur had rightly raised the question concerning "cases where the issue is the criminal responsibility not of individuals, but of the State" (*ibid.*, para. 67). Since States were sovereign and not subject to compulsion, a very pertinent question had been asked at the 1757th meeting, namely: "What States would sign an international instrument which was liable to place them in the dock?" (Para. 13.) Moreover, the suggestion to confer jurisdiction in the matter upon national courts would involve many difficult problems. He therefore agreed with those members, including Mr. Boutros Ghali (1757th meeting), who had urged the Commission to concentrate at the present stage on the elaboration of the substantive part of the draft code and defer consideration of the questions of implementation and procedure until a later stage; the General Assembly might also be asked for its views on the specific steps to be taken in connection with the implementation of the code.

8. Mr. NJENGA congratulated the Special Rapporteur on his first report (A/CN.4/364), which augured well for progress on a difficult topic. The importance which the General Assembly attached to codification of the subject was beyond question, as was apparent from the analytical paper prepared in response to the request made by the Commission at its thirty-fourth session (A/CN.4/365). The Commission's mandate, as laid down in paragraph 1 of General Assembly resolution 36/106, was very clear. In fulfilling that mandate, the Commission's task was not to reopen the question of the need for a draft Code of Offences against the Peace and Security of Mankind but to build on the draft code adopted in 1954 by taking account of developments since that date. The aim, therefore, should be to arrive at a comprehensive legal definition that would command the broadest possible support in the General Assembly and the international community as a whole and thereby to contribute to the maintenance of peace and security.

9. In his report, after giving a very useful account of the historical background to the topic, the Special Rapporteur had raised specific issues as to the scope of the draft, the method to be adopted in examining the topic, and the need for an international criminal jurisdiction to enforce the code. In that connection, he had also described (A/CN.4/364, paras. 24–25) how the victors in the Second World War, ignoring the principle *nullum crimen sine lege, nulla poena sine lege*, had decided to punish the leaders of the vanquished for war crimes under the Agreement of 8 August 1945 and the attached Charter of the International Military Tribunal.[10]

10. The scope of the subject raised questions both *ratione materiae* and *ratione personae*. In that connection, the first Special Rapporteur had provided a useful yardstick for determining whether an international crime was covered by the code when he had explained that the code was intended to refer to acts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility and, further, that the main characteristic of such offences was their highly political nature and that they normally would affect international relations in a way dangerous for the maintenance of peace.[11] Accordingly, such a crime must not only constitute a gross violation of what the present Special Rapporteur had referred to as the sacred principles of civilization (*ibid.*, para. 34), but also threaten the peace and security of mankind; crimes such as piracy, hijacking, counterfeiting of currency and trafficking in drugs would not be covered unless a State was directly implicated.

11. In article 2, paragraphs (4)–(10), of the 1954 draft code, the Commission had listed eight crimes; but that list, though still valid, should be revised in the light of the Definition of Aggression[12] and of contemporary realities as exemplified by State practice. In that connection, the compendium of relevant international instruments (A/CN.4/368 and Add.1), prepared by the Secretariat at the Commission's request, should prove useful. Obviously, colonial domination, slavery, genocide, *apartheid* and any other form of institutionalized racial discrimination, including the possible removal of peoples to so-called bantustans or from occupied territories, must all feature in the code; and, as already recognized in

[10] United Nations, *Treaty Series*, vol. 82, p. 279.

[11] *Yearbook . . . 1950*, vol. II, p. 259, document A/CN.4/25, para. 35.

[12] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

article 19 of part 1 of the draft articles on State responsibility,[13] any acts detrimental to the protection and conservation of the environment should likewise be included. Furthermore, any list of crimes that did not take account of the threat of nuclear annihilation would be unrealistic—a threat currently exacerbated by the unjustified intensification of the nuclear arms race. All uses of nuclear weapons, but in particular their use against non-nuclear powers, should be condemned as crimes along with the use of other weapons of mass destruction, such as chemical and bacteriological weapons.

12. As for the *ratione personae* aspect of the matter, in his view the 1954 draft code was defective in that it was confined to individuals. Many of the crimes envisaged, such as aggression, annexation of territory or *apartheid*, could only be committed by States and, as was clear from article 19 of part 1 of the draft articles on State responsibility, a State could incur criminal responsibility. The Special Rapporteur stated in his report: "The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated." (A/CN.4/364, para. 45.) But a State did not necessarily have to be subjected to the same system of adjudication as an individual. For instance, machinery was available through the Security Council, although it did of course have inherent defects. A State could obviously not be imprisoned; but a whole range of other penalties, involving various forms of sanction, could be imposed upon it. Moreover, the very possibility of being condemned as a criminal State would have a deterrent effect.

13. As for the method to be adopted in examining the topic, there was merit in the suggestion that the Special Rapporteur should use the inductive approach and base his study on State practice as reflected in existing conventions and General Assembly resolutions. It was, however, of vital importance to include in the code certain general principles that would command the widest support and describe in general terms the main constituent elements of the crimes to be covered by the code. Any list of crimes should serve merely by way of example and should not be exhaustive.

14. In regard to the implementation of the code, he agreed that the Commission should prepare a draft statute for an international jurisdiction, but only when the study of the code had been completed. Whether such jurisdiction should be exercised by a national or international tribunal was a matter on which he had an open mind, although there was no reason why the two could not exist side by side. The code could impose an obligation on each State to extradite offenders or to prosecute them, even when they were not citizens of that State and even when the crime in question was not committed in its territory.

The meeting rose at 11 a.m.

[13] See footnote 9 above.

1803rd MEETING

Thursday, 14 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-fifth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter II.

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** (A/CN.4/L.355)

2. Mr. THIAM (Special Rapporteur), introducing chapter II of the draft report, on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.355), first invited members to take note of a number of changes to be made in the text. In paragraph 19 (1) the words "What is the scope of codification" should be replaced by the words "Field of application of the draft code"; paragraph 19 (2) should be amended to read: "Method of preparing the draft"; paragraph 19 (3) should be amended to read: "Question of the statute of an international criminal court." He proposed that paragraph 21, which seemed unnecessary, should be deleted, and that the word "codification" should be replaced by the word "draft" throughout the chapter. In paragraph 29, the words "crimes and delicts" should be amended to read "crimes or delicts". In paragraph 31, the words "They are inclined to think" should be amended to read "They consider", and the words "consequences involving" should be amended to read "consequences which may entail". In the second sentence of the French text of paragraph 36, the words *constituaient un crime* should be amended to read *constituaient des crimes*. In paragraph 40, the maxim *"nullum crimen sine lege"* should be deleted, since it was already implied in the principle of non-retroactivity of criminal law.

3. Like most documents of its kind, the draft chapter contained a historical section prepared by the Secretariat. The summary of the discussion which had taken place on item 4 of the agenda began on page 11. The various questions raised during the discussion were divided into three main groups: scope, method and implementation.

4. With regard to scope, the Commission had recognized that the content of the draft code could be considered *ratione materiae* or *ratione personae*. Since article 19 of part 1 of the draft articles on State responsibility[1] defined international crimes as a whole, it

[1] *Yearbook... 1976*, vol. II (Part Two), pp. 95–96.