Document:-

A/CN.4/SR.1819

Summary record of the 1819th 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:-

1984, vol. I

the political nature of the concept of economic aggression (*ibid.*, para. 80). All the offences listed in the report under consideration were of a political nature and had political repercussions, and the concept of economic aggression had been quite clearly defined by the General Assembly, particularly in the Charter of Economic Rights and Duties of States[6] and in the resolutions it had adopted on the protection of the environment and of non-renewable resources. Economic aggression was a new form of aggression to which the Powers which had hegemonistic and imperialist designs, and which had been deprived by international law of their right to colonial aggression, often resorted in order to bend small States to their political will. Those Powers had even gone so far as to establish international organizations which, on the pretext of aiding the economically weaker countries, were in fact used as means to expert pressure. It was thus obvious that the concept of economic aggression, like that of cultural aggression, was well enough developed to be classified as an offence against the peace and security of mankind, in the same way as aggression proper, particularly since political independence could not exist without economic and technological independence. The Commission would, accordingly, only have to adapt article 2, paragraph (9), of the 1954 draft to the realities of the modern world.

28. In conclusion, he said he was also of the opinion that colonialism had to be included in the future draft Code of Offences against the Peace and Security of Mankind.

The meeting rose at 11.40 a.m.

[6] General Assembly resolution 3281 (XXIX) of 12 December 1974.

1819th MEETING

Monday, 14 May 1984, at 3.05 p.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind [1] (*continued*) (A/CN.4/364, [2] A/CN.4/368 and Add.1, A/CN.4/377, [3] A/CN.4/L.369, sect. B)

[Agenda item 5]

[1] For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

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

[3] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN said that the start of the second week of the Commission's session coincided with a triple anniversary: the 2608th anniversary of the birth of the Indian Prince Siddhartha, the Buddha; the anniversary of his attainment of Nirvana 80 years later; and the anniversary, 35 years after his birth, of his discovery of the four noble truths, namely suffering, the causes of suffering, the elimination of suffering and the key to the elimination of suffering. That fact had a certain relevance to the topic under discussion inasmuch as the first of the five Pancha Sila, or basic principles, was to refrain from taking life.

2. Mr. USHAKOV said that, although he was a free thinker, he respected all religions and, on the occasion of the anniversaries to which the Chairman had just referred, he wished to congratulate the members of the Commission who were of the Buddhist faith.

3. He was very disappointed with the progress of the Commission's work on the draft Code of Offences against the Peace and Security of Mankind. Not only was the work still at the preliminary stage, but the Special Rapporteur had deemed it advisable, for the time being, to limit the topic to less controversial matters until more specific replies had been received from the General Assembly and Governments to the questions which had been raised by the Commission and which were, in his own opinion, fanciful and beside the point.

4. The Commission had, for example, requested the General Assembly's views on the subjects of law to which international criminal responsibility could be attributed or, in other words, on the question whether the international criminal responsibility of States existed. It could be asked whether that question arose only in connection with the draft code under consideration, which was, in his view, a code of offences entailing the individual criminal responsibility of certain persons, or whether it also arose in connection with the topic of the international responsibility of States, on which the Commission might also await the replies to see whether the criminal responsibility of States existed and how it should be dealt with in the context of the corresponding draft. The unknown factor was the "criminal responsibility of States", as opposed to the responsibility of private individuals, which was well established and, in the case of the most serious ordinary crimes, entailed the death penalty or detention.

5. Until hypothetical replies had been given to the Commission's questions, the Special Rapporteur had presented a report (A/CN.4/377) that dealt only with the content of the topic *ratione materiae* and thus contained only a list of offences against the peace and security of mankind. What were those offences? Offences by States or offences by individuals? The question remained unanswered because the content of the topic *ratione materiae* could not be dissociated from the content *ratione personae*. The Special Rapporteur was of the opinion that international crimes had been defined, but that was not at all true. Article 19 of part 1 of the draft articles on

State responsibility,[4] which provided that an international crime resulted from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, defined only international crimes by States. That definition could not be applied to private individuals, in respect of whom it would first have to be determined whether, as such, they had international obligations and, if so, which ones. The definition of an international crime by a private individual was not at all the same as the definition of an international crime by a State.

6. The Special Rapporteur had drawn up a list of offences (*ibid.*, para. 79) which made no distinction between offences by States and offences by individuals. He had proposed, for example, that the future code should include the threat or use of violence against internationally protected persons, on the basis, *inter alia*, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[5] If the crimes covered by that Convention were international crimes, they were international crimes committed by individuals, as clearly indicated in the definition of the "alleged offender" given in article 1. There was, to his own knowledge, no example of any State which had committed any such crime. The same was true of the crime of piracy, which had been defined in article 101 of the United Nations Convention on the Law of the Sea.[6] An act of piracy was an international crime which could be committed only by private individuals. If it was committed by a State, it became "aggression". The same was also true of the crime of taking hostages, which was always committed by private individuals, not by States. Moreover, if a State committed a crime, that crime did not, unfortunately, always entail the responsibility of private individuals, such as statesmen, and an international crime committed by a private individual did not always entail the responsibility of a State.

7. Would the list of crimes *ratione materiae* to be prepared by the Commission be a list of crimes by States or a list of crimes by private individuals? In that connection, he recalled that, within the context of the draft on State responsibility, the Commission had not drawn up a list of international crimes by States. It had merely given examples in article 19, paragraph 3, of part 1 of the draft articles to explain the definition given in paragraph 2. Its approach had been quite different. It had also not considered the possibility of referring, in those draft articles, to the question of the criminal responsibility of private individuals linked with crimes by States. Should it, within the framework of the topic under consideration, deal with State responsibility and establish the legal consequences of crimes by States? In his view, the draft Code of Offences against the Peace and Security of Mankind must relate only to the international criminal responsibility of private individuals. He thus fully agreed with the comments on the draft code made by the German Democratic Republic,[7] which had stated that the concept of individual criminal responsibility should be one of the underlying principles of the code, and that that did not mean annulling or replacing the international responsibility of States. The Commission might include in article 1 of the code a provision stating that individual criminal responsibility did not affect the international responsibility of States. Moreover, the reverse was also true when there was a very close link between a crime by a State and a crime by certain persons, such as statesmen. The German Democratic Republic had further expressed the view that offences against the peace and security of mankind were international crimes the prosecution of which was a universal duty. In his opinion, that should be the basic principle of the future code.

8. In its comments, the German Democratic Republic had also stated that the obligation to prosecute and punish such crimes was part of the international responsibility of States and made it incumbent upon States, within the scope of their national legal systems, to adopt relevant legislative and other measures under which persons guilty of grave international crimes could be prosecuted and punished, without distinction as to their citizenship or the place of commission of the crime and irrespective of the public office they might hold. Where offences against the peace and security of mankind committed by individuals in breach of that obligation had been organized, supported or tolerated by a State, a private individual could be presumed to have acted on behalf of the State. In such a case, the applicable provision would be article 8 of part 1 of the draft articles on State responsibility,[8] which stipulated that there was an internationally wrongful act of that State either by commission or by omission and not necessarily as a result of a crime—an act that would have to be assessed in terms of the criteria laid down in article 19 of those draft articles. As the German Democratic Republic had indicated in its comments, however, such responsibility was separate from the individual criminal responsibility of the perpetrators of the crime, which was assessed in accordance with the international conventions in force or with international custom. Crimes by private individuals did not, merely because they had been organized by a State, become crimes by that State. Referring in that connection to the Special Rapporteur's second report (*ibid.*, para. 11), he noted that the Nürnberg Tribunal had not tried the Nazi German Government for the individual crimes of the major war criminals, but had, rather, tried the perpetrators of those crimes themselves. The same distinction between State responsibility and the responsibility of private individuals must be made in connection with offences against peace, which could therefore not be considered only *ratione materiae*.

[4] See 1816th meeting, footnote 12.

[5] General Assembly resolution 3166 (XXVIII) of 14 December 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 74.

[6] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

[7] A/37/325, paras. 13-14.

[8] See *Yearbook ... 1980*, vol. II (Part Two), p. 31.

9. He agreed with the Special Rapporteur (*ibid.*, para. 13) that the Commission must not limit itself to the excessively general criterion of seriousness and that it must base its study on the practice of States and the relevant international instruments. To that end, the 1954 draft code would serve as a satisfactory basis for the Commission's work. He noted that the Special Rapporteur had divided the offences to be covered by the draft code into three categories (*ibid.*, para. 15): (*a*) offences against the sovereignty and territorial integrity of States; (*b*) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (*c*) crimes against humanity, also called crimes of *lèse-humanité*. With regard to the second category, he was of the opinion that the expression "prohibitions and limitations on armaments" did not reflect the true situation, since there were instruments that prohibited the use of a particular weapon or weapons, but not the use of "armaments". As to the third category, he considered that in the future code the term "humanity" must be taken in the sense of the community of human beings and not in the humanist sense of the Charter of the Nürnberg Tribunal.

10. Referring to the offences classified after 1954, he said he did not understand why the Special Rapporteur had had doubts about the inclusion in the draft code of the use of atomic weapons, describing such weapons as weapons of peace and having practically nothing but praise for them (*ibid.*, para. 52). How could it be said that atomic weapons could serve peace and security? Atomic weapons could destroy civilization on earth, as the General Assembly had stressed in the Declaration on the Prevention of Nuclear Catastrophe. [9] The Commission must draw inspiration from the wording of that Declaration by making the use of atomic weapons one of the offences against the peace and security of mankind to be covered by the draft code.

11. He agreed that the crime of colonialism should be included in the future code, provided that that term, which was still extremely vague, had been defined. He also thought that the crime of *apartheid* should be included in the draft code, which should make it clear that *apartheid* was a State crime, but also a crime which could be committed by a private individual independently of a crime by a State. The same was true of the crime of genocide.

12. In his view, the international instruments referred to by the Special Rapporteur in connection with the protection of the environment (*ibid.*, para. 51) did not relate directly to such protection. Did the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof cause damage to the environment? Did the exploration and use of outer space, including the moon and other celestial bodies, also cause damage to the environment? Those were matters that related more to disarmament. In fact, he did not think that there were any international instruments which related to the protection of the environment and which provided for individual criminal responsibility in the case of damage to the environment.

13. Was the crime of taking hostages an individual or a State crime? In time of war, it could be a State crime, but could it in peacetime? At worst, a State might tolerate the taking of hostages. In his view, the taking of hostages was an individual crime which could be an international crime within the meaning of the International Convention against the Taking of Hostages, [10] but he did not think that it could be an offence against the peace and security of mankind.

14. With regard to acts of violence against internationally protected persons, he pointed out that the Commission had never envisaged the possibility that a State might commit such acts: at worst, it might tolerate such acts. There again, he doubted that such acts could constitute offences against the peace and security of mankind. Nor did he really see how a State could "organize" the breach by an internationally protected person of the obligation to respect the laws and regulations of the receiving or host State, as the Special Rapporteur stated (*ibid.*, para. 57). A diplomatic agent was, in fact, acting on behalf and in the name of the State which had sent him: if he breached that obligation, there was an act of the State; if he was disavowed or removed from his functions, there was no act of the State. It would also have to be made clear how a diplomatic agent could disturb the public order of the receiving or host State.

15. He was convinced that the crime of mercenarism was not a State crime: it was always an individual crime which engaged the individual's criminal responsibility. If a State recruited or trained mercenaries to invade another State, it was quite simply committing an act of aggression. It was therefore open to question whether the crime of mercenarism should be regarded as an offence against the peace and security of mankind.

16. Referring to chapter II, section C, of the report dealing with the maximum content of the draft code and, in particular, to the concept of economic aggression, he said he hoped that States would be able to reach agreement on a definition of that concept on the basis either of the draft submitted by the Soviet Union to the Special Committee on the Question of Defining Aggression in 1953 [11] or of any other proposal. The Commission would have to wait until economic aggression had been defined to decide whether or not it was an offence against the peace and security of mankind.

17. He noted that, in international law, the concept of the non-applicability of the statute of limitations did not exist as far as subjects of international law and, in particular, States were concerned. It existed only in internal law, under which many crimes were, indeed, statute-barred. An agreement would therefore have to be concluded on the non-applicability of the statute of limitations to certain crimes under internal law and, in

[9] General Assembly resolution 36/100 of 9 December 1981.

[10] General Assembly resolution 34/146 of 17 December 1979, annex; see also United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

[11] See *Official Records of the General Assembly, Ninth Session, Supplement No. 11* (A/2638), annex, document A/AC.66/L.2/Rev.1.

particular, war crimes and crimes against humanity within the meaning of the Charter of the Nürnberg Tribunal.

18. In conclusion, he expressed the hope that the Special Rapporteur would be able to submit a report containing draft articles at the Commission's next session.

19. Mr. LACLETA MUÑOZ said that the Special Rapporteur's brief, clear and moderate report had made the topic under consideration look simple, although it was not. The problems to which the topic gave rise warranted some scepticism. The General Assembly had been aware of those problems, as shown by its discussions (see A/CN.4/L.369, sect. B). It had, moreover, not answered the questions the Commission had submitted to it. Until the replies of the General Assembly and Governments had been received, therefore, the Special Rapporteur had been right to consider only the less controversial questions. Even if those replies took some time, the report under consideration (A/CN.4/377) should enable the Commission to make progress in its work. He therefore agreed with the Special Rapporteur's suggestion that, as a first step, the Commission should draw up a list of the offences that were now regarded as offences against the peace and security of mankind. That step nevertheless involved a risk because, once the catalogue of offences had been elaborated, it might not be possible to go much further. In that connection, it would not be at all satisfactory simply to update the 1954 draft code because, in 1954, the situation had been completely different from what it was now. The draft code had been elaborated after the Second World War, at a time when the question of the offences that were attributable to States had been settled. It was because the aggressor States that had already been punished by the victorious Powers that the draft referred to the "authorities" of a State. Its purpose had been to punish offences committed by private individuals on behalf of a State. That difference in circumstances would have to be borne in mind when the Commission elaborated the new draft code.

20. He also had some reservations about other questions. Borrowing the metaphor used by one member of the Commission, he drew attention to the problems involved in erecting the building's walls—if that were possible—and to the need for the building to have a roof, in other words implementation machinery. As a rule, it could be said that, after the Second World War, general and conventional international law had developed more from the point of view of its content than from that of its application and the settlement of disputes arising out of its application. It seemed to him that, if the draft code did not provide for implementation machinery, if only to establish and categorize the acts in question, the building's walls could be used only as weapons in a purely political discussion or unilaterally to justify acts of revenge against a conquered political enemy.

21. The terms used in the report also gave rise to problems. The Spanish version referred indiscriminately to *delitos*, *crímenes* and *actos ilícitos* endangering the peace and security of mankind and a list of which had to be drawn up. According to the title of the topic, *delitos* were what was being discussed. The Special Rapporteur had stressed the fact that what should be taken into account were not just any *delitos*, but rather the most serious ones or, in other words, the *crímenes* referred to in article 19 of part 1 of the draft articles on State responsibility. The term *delitos* appeared to have originated in the terminology used between 1945 and 1954, when it had applied to private individuals who had committed certain criminal acts, whether or not such acts were attributable to a State. The Commission would eventually have to solve that terminology problem.

22. For the time being, it had to choose a criterion and the criterion of seriousness was not adequate. The problem was to determine which offences under international law constituted offences against the peace and security of mankind, but a list of such offences could not be elaborated until the terms "peace" and "security" of mankind had been defined. The second term would be particularly difficult to define.

23. In his second report (*ibid.*, para. 15), the Special Rapporteur had divided the offences covered by the 1954 draft into three categories. The first were offences against the sovereignty and territorial integrity of States. It was quite plain that those offences should be referred to, rather more explicitly in some cases, in the new draft. The wording of article 2, paragraph (3), of the 1954 draft would, in particular, have to be much more specific; that provision, which related to the preparation of the employment of armed force, did not take sufficient account of future developments. The wording of paragraph (9) of the same article was also too vague. It did not specify what measures could be regarded as coercive measures of an economic or political character or what "advantages of any kind" a State could obtain from another State by means of such measures. In economic relations of any kind, it was quite common to exert pressure in order to obtain an advantage, but the problem was to determine at what point such pressure became a coercive measure amounting to economic aggression. As Mr. Ushakov had pointed out, a definition of the concept of economic aggression would be essential.

24. Offences in the second category, namely those violating the prohibitions and limitations on armaments or the laws and customs of war should also be included in the future code. Violations of treaties designed to safeguard international peace and security by means of restrictions or limitations on armaments were, at present, of enormous importance to mankind, which was seeking to bring about general and complete disarmament. It was quite obvious that some provisions of the 1954 draft code, particularly those relating to fortifications, should be updated. It might seem paradoxical that offences against the laws and customs of war also endangered the peace and security of mankind. Indeed, it could be asked what had become of the peace that was to be kept when offences could violate the laws and customs of war. Those offences should nevertheless be referred to in the code, not only because they were serious, but also in order to ensure respect for certain human values, even in time of war. They would, however, have to be referred to in carefully considered terms so that the paradox would not be too striking.

25. Crimes against humanity, which constituted the third category, definitely endangered the security of mankind, even in the absence of any threat to peace. Account would have to be taken of that distinction. With regard to isolated violations of human rights, he agreed with the views expressed by the Special Rapporteur (*ibid.*, para. 34). Although it was true that a violation of human rights characterized as such came under general international law, as Mr. Reuter had pointed out (1817th meeting), an isolated violation could not be regarded as a threat to the peace and security of mankind.

26. It was open to question whether a list of offences against the peace and security of mankind could be elaborated only on the basis of their material content. In some cases, the existence or absence of a threat to the peace and security of mankind depended less on the characteristics of the acts constituting that threat than on those committing those acts. In many areas, particularly that of human rights, a criminal act committed by a single private individual could not be compared with the same act committed by a private individual with the support and tolerance of a State.

27. With regard to the offences to be added to the 1954 draft, it would be essential to refer to the relevant international instruments. The inclusion of colonialism and *apartheid* should not give rise to any problems, although colonialism would have to be defined very precisely. There was no denying the fact that nuclear weapons had a deterrent effect and that their use could not be prohibited. Otherwise, a State would be unable to deter another State by threatening to respond to its attack by means of a prohibited weapon. In fact, the point at issue was not so much the problem of the prohibition of nuclear weapons as that of aggression. It was difficult to outlaw such weapons, since what was illegal was the use of armed force and war. In that connection, he agreed with the conclusion reached by the Special Rapporteur (A/CN.4/377, para. 53), namely that the provisions of the draft code concerning the violation of prohibitions, limitations and restrictions on weapons should cover the hypothesis of a prohibition of atomic weapons, should such a prohibition be laid down at some stage in special conventions.

28. Referring to the obligation of an internationally protected person to respect the laws and regulations of the receiving or host State, he said he could not agree with the Special Rapporteur's conclusion (*ibid.*, para. 57) that any breach of that obligation which might pose a threat to public order in the receiving country was an international offence and that, if the breach were organized by a State, it was likely to be a threat to peace. He did not, however, deny the fact that such a breach might be committed and that it might pose a threat, if not to the peace of mankind as a whole, then at least to the peace of some countries.

29. The recruitment of mercenaries was not in itself an unlawful practice. In his view, States which, like his own, enlisted mercenaries in a regular army were merely following a practice which had been very widespread until the French Revolution and had never been considered reprehensible. In itself, the fact of hiring soldiers for pay was not a crime. It was the purpose for which they were hired that was decisive. In that connection, the use of bands of mercenaries, a frequent practice in Africa, should be prohibited.

30. The list of offences which the Special Rapporteur had presented at the end of his report (*ibid.*, para. 79) gave rise to a few problems. The "organization of armed bands by a State for incursions into the territory of another State", "the undertaking or encouragement by a State of activities calculated to foment civil strife in the territory of another State" and "the annexation of the territory of a State by another State" were all offences committed by or on behalf of a State. It could be said that those offences raised a problem *ratione personae*. The "taking of hostages" and the "taking of hostages organized or encouraged by a State" also gave rise to doubts. It was obvious that the taking of hostages by a private individual could not be regarded as an offence against the peace and security of mankind unless it involved some participation by a State.

31. In conclusion, he said that he endorsed the final comments made by the Special Rapporteur (*ibid.*, paras. 80-81) and that he agreed with the Special Rapporteur's decision not to try, for the time being, to elaborate an introduction to the draft code. Just as the titles of draft articles were always prepared after the texts of those articles themselves had been elaborated, so the general principles should not be formulated until the body of the new code had been drafted.

32. Chief AKINJIDE said the Special Rapporteur, who had presented an outstanding report (A/CN.4/377), must not be discouraged by criticism, from whatever source. Work on the topic had started some 40 years earlier and the end was still not in sight, so it was clear that the Special Rapporteur faced an almost impossible task. The peace and security of mankind were, however, the pith and marrow of the Charter of the United Nations: without them, the objectives of the United Nations would mean nothing. In his own view, the work on which the Commission was engaged was, moreover, possibly the most important assignment the General Assembly had ever given any of its subsidiary bodies and it was infinitely more important than the work that had led to the adoption of the United Nations Convention on the Law of the Sea.

33. Another exercise on a smaller scale was being conducted by the Commonwealth, a grouping of 43 nations, all members of the United Nations. For some years, the Commonwealth Ministers of Justice had been endeavouring to find ways and means of determining what constituted an international crime and of combating such crime. At a meeting of jurists held in Hong Kong in September 1983, he had presented a paper which had served as the basis for discussion and which he hoped to make available to the Commission secretariat.[12] The aim of that meeting had been to carry out an in-depth study of the problem as it concerned the 43 Commonwealth na-

[12] "Facilitating conviction of international criminals", *Papers of the 7th Commonwealth Law Conference, Hong Kong, 18-23 September 1983* (London, Commonwealth Secretariat Publications, 1983).

tions, but, again, no solution was yet in sight. One thing had, however, been crystal clear, namely the enormity of the problem and the untold suffering that international crime and the absence of any sanctions caused throughout the world.

34. While a tribute was due to those who had produced the 1954 draft code, the circumstances under which it had been prepared were very different from present circumstances. After the devastation of the Second World War, people had decided that such wholesale destruction should never be allowed to happen again. Little had they known that, by 1984, the world would be in possibly even greater danger than before.

35. Turning to the list of offences contained in the Special Rapporteur's second report (*ibid.*, para. 79), he said that, while he was in broad agreement with the Special Rapporteur, he also considered that the Drafting Committee should take account of the very constructive comments made by Mr. Ushakov. He had, however, been somewhat surprised at Mr. Ushakov's suggestion that the Special Rapporteur should produce another report, since that would only prolong the Commission's discussions. His own view was that a draft code should be prepared immediately on the basis of the various documents produced by the Secretariat, the Special Rapporteur's two reports and the comments made by the members of the Commission.

36. He had a number of suggestions to make in that connection. First, a list of offences should be compiled on the basis of the list prepared by the Special Rapporteur, together with an indication of what constituted such offences. Secondly, the offences should be grouped into two categories, political and non-political. Thirdly, provision should be made for penalties, since that was too subjective a matter to be left to any court that might be set up. The penalties should match the gravity of the crime and he would strongly urge that they should include reparation, since circumstances might arise in which a custodial sentence passed upon individuals would not suffice. Fourthly, a court should be set up. He for his part saw no reason why a second court could not be established, in addition to the ICJ, to deal with criminal matters. Since the offences listed by the Special Rapporteur could be committed in peacetime as well as in time of war, any such court would certainly have enough to do. Lastly, specific provision should be made for the enforcement of penalties.

37. Although he understood why Mr. Calero Rodrigues (1817th meeting) and Mr. McCaffrey (*ibid.*) were sceptical, he believed that there was a solution to every problem. The Commission should not be deterred by the enormity of the task at hand. In view of the conflicting interests of different nations, however, he also recognized the need to be extremely realistic where certain political offences were concerned.

38. From a realistic point of view, there were three interest groups. The first was the group of small nations, those which were economically, militarily and politically weak and which, of course, comprised the developing countries, including his own. With every passing year, the gap between developed and developing countries widened and the developing countries became economically and militarily weaker. The power they had at their disposal was completely out of proportion with that of the United States of America, the Soviet Union and certain European contries. It was thus quite clear that those that stood to benefit most by the study of the topic under consideration were bound to be the small, weak developing nations. It was in their interest that the Commission should be able to reach a decision that would be acceptable to all concerned.

39. Secondly, account had to be taken of the possibility of a conflict between a great Power and a small nation. The great Powers were the ones that possessed all the technology and know-how and if one of them attacked a small country like his own, that country would be helpless. If, however, provisions of an international nature, such as those now under consideration, were adopted and generally accepted and ratified, smaller nations would be protected.

40. Thirdly, the most important and difficult problem was that of a conflict between two great Powers. There could be no doubt that international security was essentially in the hands of the great Powers. In that connection, the Special Rapporteur had drawn attention to the issue of nuclear weapons. As he himself saw it, the problem related only to two great Powers, although a number of other countries had, to varying degrees, developed nuclear-weapon technology. One thing was certain: the problem of nuclear weapons could not be left out of the present exercise. Indeed, all the Commission's efforts on the topic under consideration would be in vain if the problem of nuclear weapons were ignored. The main threat to world peace at the present time came precisely from such weapons.

41. He could also not accept the theory of deterrence, according to which the threat of the use of nuclear weapons could serve to ward off the danger of war. In his view, the more nuclear weapons there were in the world, the nearer mankind came to another world war. History showed that, once a weapon was developed, it was invariably used to make war. The huge quantities of nuclear weapons, missiles and other weapons of mass destruction that were now being produced would inevitably be used one day. A war lasting only a few hours would not only destroy the great Powers using those weapons, but would also directly or indirectly affect all the countries of the world, developed and developing alike.

42. The greatest importance must therefore be attached to measures to prevent atomic war and the theory of deterrence must be firmly rejected. He fully realized that, if the work on nuclear weapons under the present topic were to succeed, it would be a means of obtaining through the back door what it had not been possible to achieve in the bodies dealing with disarmament. The Commission should, however, not be deterred by that consideration. On the contrary, it should take the view that its discussions were helping to prevent a world war. Despite the comments made by the Special Rapporteur in his report (A/CN.4/377, para. 52) and the analysis he offered (*ibid.*, paras. 26-27), the Commission should therefore make specific provision for nuclear weapons in the draft code so that it would be illegal not only to possess nuclear

weapons, but also to manufacture them. The problem of existing stocks could be discussed in other bodies.

43. As to war crimes, it had been pointed out that much depended on who was the victor and who was the vanquished. If an aggressor won a war, who would try that aggressor? That was a problem to which the Drafting Committee should pay due attention. In any event, the Commission must do everything in its power to help prevent war, so that there would be no winners or losers.

44. The work on the topic under consideration involved a number of assumptions. The first was that a stage had been reached in international relations when nations and, in particular, the great Powers were prepared to subordinate their national interests to their international obligations. Aggression and mercenarism, for example, were instruments of foreign policy. Foreign policy was, however, invariably an extension of domestic policy and it was therefore difficult for the leaders of a great Power to subject national interests to international obligations. If work on the topic under consideration succeeded, it would constitute a move towards a form of world government, since a world court with jurisdiction over very critical issues would be set up and provision would be made for implementation and sanctions. If the results of the Commission's work on the present topic were accepted, they would mean that ideological conflicts had been overcome. One of the causes of disputes in the world and of every case of war by proxy was precisely the existence of an ideological conflict between communism and capitalism.

45. With regard to the problem of mercenarism, he said that there was no intention of outlawing forces such as the French Foreign Legion or the Gurkhas of the British Army. The term "mercenarism" was intended to cover the case of men hired to overthrow Governments and destabilize nations. The situations envisaged were clearly cases of war by proxy, since mercenaries always had a paymaster; wherever mercenaries were used, there was always a foreign power behind them. Mercenarism should therefore be regarded as an international crime, not only for individuals but also for States. In that connection, he said that he could not agree with the subtle distinction proposed by Mr. Ushakov. Mercenarism was a very grave problem for the developing countries because mercenaries were being used against them, both overtly and covertly. If those who hired and paid mercenaries knew that their actions constituted crimes and that, if they were discovered, they would be condemned by world bodies, they might be more careful in their actions.

46. He agreed that there could be no question of any statutory limitation on such grave crimes as offences against the peace and security of mankind. As to the concept of the "peace and security of mankind", he disagreed with Mr. McCaffrey (1817th meeting): "peace" and "security", linked as they were by the conjunction "and", were indissolubly connected and could on no account be separated. There could be no peace without security and no security without peace. In the draft under consideration, the concept of the peace and security of mankind had to remain indivisible.

The meeting rose at 6 p.m.

1820th MEETING

Tuesday, 15 May 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind [1] (*continued*) (A/CN.4/364, [2] A/CN.4/368 and Add.1, A/CN.4/377, [3] A/CN.4/L.369, sect. B)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Sir Ian SINCLAIR noted that there had been a division of opinion in the Commission on the question of whether the Special Rapporteur had been right to devote his second report (A/CN.4/377) to a list of offences for possible inclusion in the draft code or whether he should have begun by elaborating an introduction along the lines indicated by the Commission in paragraph 67 of its report on its thirty-fifth session. In that connection, the mandate given by the General Assembly in paragraph 1 of its resolution 38/132 of 19 December 1983 was not very clear: the Commission had been invited to elaborate an introduction, "as well as a list of offences in conformity with paragraph 69 of that report". That paragraph 69 did not actually suggest that the next step must be to draw up such a list. It simply indicated that the draft code should cover "only the most serious international offences", which would be determined by reference to "a general criterion and also to the relevant conventions and declarations pertaining to the subject".

2. As the Special Rapporteur had pointed out, however (*ibid.*, para. 8), the criterion of "extreme seriousness" was a highly subjective one and would not, in itself, provide much guidance. That point could be illustrated by examples taken from internal law. Under the penal code of certain countries, adultery was a criminal offence; in other countries, it constituted grounds for divorce in civil law but did not come within the scope of criminal law. In pastoral societies, cattle theft was regarded as a particularly grave crime; other societies would treat it as a lesser offence. Moreover, a society changed with time, as did it value judgments. Two centuries earlier, sheep stealing had been regarded as a particularly grave crime in the United Kingdom and had

[1] For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

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

[3] Reproduced in *Yearbook ... 1984*, vol. II (Part One).