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Summary record of the 1883rd meeting

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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desirable that members of the Commission should confine their comments to the offences referred to in the report under consideration.

The meeting rose at 12.45 p.m.

1883rd MEETING

Friday, 17 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Welcome to Mr. Huang

1. The CHAIRMAN extended a warm welcome to Mr. Huang and congratulated him on his election to fill the vacancy in the Commission caused by the election of Mr. Ni to the ICJ.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

2. Mr. RIPHAGEN said that his own experience as Special Rapporteur for the topic of State responsibility had perhaps made him over-sensitive about too absolute a distinction—or even a separation—between primary rules, secondary rules, tertiary rules (implementation or *mise en œuvre*) and what he himself, in one of his reports on State responsibility, had called "pre-primary" rules, which related *inter alia* to the "sources" of the other rules and involved a temporal element, in other words the emergence, the transformation and the extinction of primary rules.

3. It was of course easy to express moral indignation about acts of aggression, intervention or colonial domination, but it was less easy to describe in abstract legal terms the primary rules and all the legal consequences of their violation, as well as the temporal elements involved, including retroactive effect and "non-prescriptibility".

4. In his view, it would be quite difficult, if not impossible, to draw up a code of offences against the peace and security of mankind—which would obviously embody primary rules—without having a clear idea of the other rules (secondary rules, etc.) connected therewith. He therefore agreed with the members of the Commission who could not accept the recommendation made by the Special Rapporteur in his third report (A/CN.4/387, para. 9) "to defer until a later stage the formulation of the general principles governing the subject", particularly since those general principles dealt with matters such as "universal competence for the punishment of the offences in question" and "the obligation of every State to prosecute and punish the offenders unless they are extradited". That rule of *aut dedere aut punire* of course raised the question of the attribution of the burden of prosecuting and punishing offenders. Unfortunately, the history of the hijacking of civilian aircraft showed that, all too often, the State most directly affected was not particularly anxious to demand the hijackers' extradition, since prosecution and punishment might make it the target of "counter-action"; for the same reasons, some Governments refused to allow hijacked aircraft to land in their territory. Those were facts that could not be ignored.

5. One general principle, which was, moreover, a secondary rule, had in fact been taken into account by the Special Rapporteur, who had established it as a framework for the drafting of the code when he had stated that his intention was to deal with offences for which the responsible individuals should be punished, such offences being characterized as "crimes under international law". In that connection, it was possible to adopt either of the following two approaches.

6. The first approach had been the basis of the early efforts that had been made. It was an operation that could be compared with that of giving "direct effect", within the sphere of internal law, to certain primary rules of public international law which had initially been meant to govern legal relationships between States. In view of the scope and seriousness of the internationally wrongful acts committed as between States before and during the Second World War, it had been considered insufficient to draw legal consequences only in respect of inter-State relations. There had been an awareness that, even in inter-State relations, almost anything that happened was the result of action by individuals who took decisions and executed them; the idea had accordingly emerged of holding such individuals responsible and liable to criminal punishment (criminal responsibility). That approach clearly underlay the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which had been formulated by the Commission in

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

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

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

1950.[6] It should be noted that, in Principle VI, (*c*), "crimes against humanity" were recognized as such only when committed "in execution of or in connection with any crime against peace or any war crime".

7. The second approach would be to recognize the existence of common values or values "shared" by all States. That approach was a very old one and consisted of treating certain individuals who were not vested with any governmental authority as enemies of mankind (*hostes generis humani*), piracy *jure gentium* being the prime example.

8. Actually, a third or intermediate approach was also possible. It would take account of the actual existence of organized groups of private individuals which in a way were an imitation of a "State", or at least of a "Government"; they exercised power in the immediate sense of being able, through the possession of arms and the application of violence, to influence the conduct of other persons and even of representatives of the State (State authorities). Such groups of individuals effectively challenged the normal, presupposed monopoly of power of the State authorities in order to use force within the territory of that State.

9. It was known to all that such *Potentaten* (to use a German term) existed and that they existed separately from Governments and States, which were the normal subjects of public international law. The question thus arose of how to deal with those "unofficial sovereigns" in international law and, in order to answer that question, it was necessary to fall back on one of the two approaches he had indicated earlier. In that connection, he had reservations with regard to some of the statements made by the Special Rapporteur in paragraph 15 of his third report and, in particular, in paragraph 141, where it was stated: "Terror is a means, not an end. The purpose of terrorism, depending upon its form, is either political, ideological or villainous." Power invariably corrupted and it was well known that many a "villainous" act had been committed on the pretext of "political" or "ideological" purposes. All the crimes committed during the Nazi era, for example, had been "politically" and "ideologically" motivated.

10. With regard to unofficial *Potentaten*, moral indignation about their offences and, in particular, about their disregard for the distinction between combatants and non-combatants, namely innocent bystanders who were the victims of their acts, would in principle be the same as in the case of similar offences committed by persons having governmental authority. "Villains" exercising actual power and "State authorities" committing "villainous" acts were morally in the same position. In that case, the approach adopted was in fact the second approach, namely that of identifying acts committed by "enemies of mankind". Legally, however, the mere fact that non-State authorities were involved meant that the States concerned had to take the necessary repressive measures and to provide jointly, in special agreements, for mutual support where the offences were of a "transnational" nature, as in the case of the hijacking of civilian aircraft.

11. Turning to the draft articles submitted by the Special Rapporteur, he said that his comments would be subject to the remarks he had just made on the general principles, which would, to some extent, have a bearing on the scope and formulation of the primary rules of the code.

12. His first comment was that the Commission could not escape engaging in the inverse operation to what it had had to deal with in connection with the topic of State responsibility. In the latter case, it had had to determine which acts—necessarily acts by individuals—were attributable to the State. In the present case, the problem was that of the attribution of acts by State authorities to an individual, bearing in mind the fact that the offences in question were offences under international law. As in the case of State responsibility, the issue of "complicity" (possibly as a result of "toleration") between State authorities and non-governmental groups would also have to be examined. Incidentally, he very much doubted whether any of the offences being dealt with in the context of the topic under consideration had been committed as a result of a decision that was genuinely democratic, either in form or in substance. The foregoing comments would make it clear that he preferred the first alternative proposed for draft article 2.

13. As to draft article 3, he could not accept the proposition that there was no link at all between "international crimes" within the meaning of article 19 of part 1 of the draft articles on State responsibility[7] and the topic under consideration. All the same, he had some doubts as to the wisdom of linking them as closely as had been done in the first alternative. Actually, a similar connection had been established in draft article 4 with regard to the Definition of Aggression adopted by the General Assembly.[8] Although, in relations between States, some measure of vagueness might be acceptable for primary rules, when dealing with criminal consequences for individuals much greater precision was necessary. In that connection, he recalled that the Definition of Aggression was accompanied by a reference to some parts of the report of the competent Committee and he urged that that point should be taken into account.

14. The second alternative of draft article 3, to his mind, was not really an alternative because it referred to a "pre-primary" rule. It dealt with the way in which acts were to be recognized as giving rise to individual criminal responsibility. He agreed with its wording, not as an alternative to the first version of article 3, but as a separate "pre-primary" rule indicating how acts by individuals could give rise internationally to individual criminal responsibility. In point of fact, such recognition was also a basic element of article 19. However, he could not agree with the Special Rapporteur's treatment (*ibid.*, para.

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[6] See 1879th meeting, footnote 6.

[7] *Ibid.*, footnote 9.

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

51) of the recognition of such acts as a "subjective element"' on the same level as the "intention to commit an offence". The elements of "subjectivity" at issue in the present case were quite different.

15. It would be clear from the comments he had made that he could not accept the proposition that part IV (General principles) of the draft should be left "pending".

16. Referring to part V, containing the list of offences, and in particular to draft article 4, he said that it was impossible for him to agree that the criminal responsibility of any individual should be dependent upon the veto power of the permanent members of the Security Council. More generally, he found that article 4 did not take account of the distinction between rules governing relations between States and rules relating to the criminal responsibility of individuals. In that connection, the reference to the Definition of Aggression or its incorporation in the draft code created the same confusion as the reference, in the first alternative of section A, subparagraph (*e*) (ii), 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.

17. With regard to the first alternative of section A of article 4 and, more specifically, to the rule of interpretation contained in subparagaph (*f*), it was difficult to see how such a rule, which would be quite understandable in a document concerning relations between States, could be included in what was, after all, a penal code.

18. As to sections B and C of article 4, he shared the doubts expressed by previous speakers. While some measure of vagueness was acceptable in rules governing relations between States, there was no way of holding an individual criminally responsible under rules whose interpretation depended on nice distinctions. More particularly, and in connection with the criminal responsibility of individuals, it was quite clear to him that subparagraphs (*a*) and (*b*) of section C referred to entirely different types of acts.

19. In the light of what was known about the international weapons trade, he was inclined to doubt the realism of the provisions of section D, (*b*) (iv), in so far as they related to the manufacture and supply of arms. He was in favour of the idea contained in subparagraph (*b*) (iv) but he was not at all convinced that the act in question had the "recognition of the international community as a whole".

20. With regard to intervention, he could not help thinking that it was often like bribery, in which both parties were at fault: the party offering the bribe and the party accepting it.

21. In conclusion, he urged that a contradiction between part III and part V should be avoided. As it now stood, part V singled out for attention "colonial domination", but that was only one example of the violation of the principle of the right of self-determination of peoples referred to in part III.

22. Mr. SUCHARITKUL congratulated the Special Rapporteur on his excellent report (A/CN.4/387) and noted that Mr. Jagota, the Chairman of the Commission at the current session, was the author of a study on the topic based on extensive research on the Tokyo trial, at which Judge Pal from India had played a key role in the progressive development of international law.

23. The title of the topic made it clear that the draft code to be prepared by the Commission would deal with offences against "the peace and security of mankind", a concept that formed an indivisible whole. In the Preamble to the Charter of the United Nations, the peoples of the United Nations had declared their determination to unite their strength to maintain "international peace and security", a term that was particularly precise in the French version of the Charter because the word "international" applied both to peace and to security. The main characteristic of the topic under consideration was that all mankind was included in its scope. That was an element that would contribute to the progressive development of international law and that involved human rights, humanitarian law, the law of war and of armed conflicts, and the law of the common heritage of mankind, as well as the law of offences against the peace and security of mankind. The concept of mankind also came into play with regard to the crime of piracy, a crime under international law that was recognized as such. The fact that the draft code related to the peace and security of mankind, and not only to international peace and security, made it broader in scope and meant that it must transcend borders and nationalities and was intended for all States, whether or not they were Members of the United Nations.

24. With regard to the scope of the draft articles, the Special Rapporteur proposed an article 1 that merely indicated that the draft articles applied to offences against the peace and security of mankind. Such offences were defined in article 3, for which two alternatives were proposed. Although the Commission usually drafted definitions only after it had completed a set of articles, the meaning of certain terms had to be defined at the outset. The second alternative, which contained a general definition of an offence against the peace and security of mankind, was quite acceptable, but the first alternative was relevant as well because it placed emphasis on an element which the Commission had already found essential, namely the seriousness of the nature of the act in question and of its consequences. Four categories of serious breaches of an international obligation of essential importance were listed in the first alternative; they were based on article 19 of part 1 of the draft articles on State responsibility.[9]

25. As several members of the Commission had pointed out, a distinction had to be drawn between the international responsibility of the State and the criminal responsibility of the individual, both as far as their nature and as far as their consequences were concerned. Although the Commission had prepared its 1954 draft code without taking account of the criminal responsibility of the State, and although it

[9] See 1879th meeting, footnote 9.

should be able to do so now, even despite the existence of article 19, it could not entirely overlook that provision. Article 19, which could be described as a problem child—whose paternity, however, was not in dispute—gave only a glimpse of the direction which the Commission's future work would take. He personally would have no objection if the Commission dealt only, for the time being, with individual responsibility, since the international responsibility of the State came under a topic that was being studied by another special rapporteur. It should, however, be noted that the content of the concept of individual responsibility was very broad and that it could include not only the responsibility of individuals, but also that of authorities as agents of the State. One member of the Commission had even suggested that that concept might include the responsibility of legal persons other than States, such as commercial enterprises, which under the internal law of some countries had legal personality and could incur criminal responsibility. Because of the lack of consensus and although that opinion seemed to have been shared by the majority of the members of the Commission, it had been decided not to take account for the time being of the question of the international responsibility of the State.

26. The distinction between a professional offence and a personal offence, which was made in the administrative law of a number of countries and to which one member of the Commission had drawn attention, did not exist in the administrative law of his own country. In Thailand, an individual who had been the victim of an injurious act by an authority could not bring suit against the Government or the State, which did not have legal personality, but he could bring a civil suit against the authority concerned, which might, for example, be a ministry or a ministerial department. According to Thai administrative law, if the authority was convicted, it was the official at fault who would have to pay compensation, since responsibility was attributable only to natural persons, not to the authorities. He also drew attention to intent, an essential element to be taken into account in addition to the act itself. In that connection, he referred to the common-law maxim *actus non facit reum, nisi mens sit rea.*

27. Like other members, he was of the opinion that the Commission should study the general principles that governed offences against the peace and security of mankind. In addition to the seriousness of the nature of a wrongful act and of its consequences, it should consider the principle of the non-application of statutory limitations and the question of the application of the principle *nullum crimen, nulla poena sine lege*, a principle of internal law which would not necessarily automatically have to be applied to international crimes and, in particular, to offences against the peace and security of mankind. The Nürnberg and Tokyo judgments had, moreover, been criticized for having been rendered in the absence of a code of offences against the peace and security of mankind, and it was in response to such criticism that the Commission had been requested to prepare a code. Some of the other general questions that the Commission should study included attempts, conspiracy, penalties and the possibility of establishing an international criminal court.

28. As the Special Rapporteur had explained, the list of crimes contained in chapter II of the report under consideration was not exhaustive, since it was confined to crimes against peace. It would be completed by war crimes and crimes against humanity, which related, for example, to the dignity of man, the treatment of prisoners of war, forced labour, slavery and servitude. It was to be noted that war crimes had already been dealt with in the 1949 Geneva Conventions.[10] On the whole, he was in favour of the list drawn up by the Special Rapporteur, on the understanding that economic aggression should for the time being be left aside because it might be covered by the concept of aggression.

29. Referring to the Definition of Aggression, he recalled that, during the discussions in the General Assembly which had led to its adoption, the representative of Argentina, Mr. Ruda, had pointed out that such a definition would be quite useful in a number of areas.[11] With regard to the maintenance of international peace and security, for example, Article 39 of the Charter of the United Nations provided that the Security Council could decide what measures should be taken in the event of any threat to the peace, breach of the peace or act of aggression. The Security Council's competence to decide that an act was an act of aggression was one element of the definition that did not come into play in the topic under consideration, in which aggression was merely regarded as a crime. The threat of aggression and the preparation of aggression must also be regarded as crimes. The preparation of aggression was a completed act that had to be distinguished from preparatory measures and attempted aggression. Even if the preparation of aggression did not lead to an offence against the peace and security of mankind, it was in itself tantamount to such an offence, although it gave rise to many problems as far as the production of evidence was concerned.

30. Interference in the internal or external affairs of States was another crime that had to be included in the draft code. With regard to terrorism, it would be interesting to know what findings had been reached by the *Ad Hoc* Committee dealing with the question. The question of violations of the obligations assumed under certain treaties was a very broad field of study. Colonial domination, like colonization and annexation, also had to be regarded as offences against the peace and security of mankind and, in his view, they were denials of the right of peoples to self-determination. While he would prefer the term "colonial domination", he would have no objection if it were replaced by wording that was considered more acceptable. He pointed out that mercenarism was not necessarily an offence against the peace and security of mankind and that it was the use of mercenarism

[10] Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

[11] *Official Records of the General Assembly, Twenty-second Session, Plenary Meetings*, 1618th meeting, paras. 220-229.

that should be condemned as such. Perhaps mercenarism might be included in the concept of aggression.

31. Mr. FRANCIS congratulated the Special Rapporteur on his third report (A/CN.4/387), which was excellent. Expressing full agreement with the outline for the draft code (*ibid.*, para. 4), he said that, in his view, the single most important issue facing the Commission concerned the place that the introduction to the draft code, including the general principles, should occupy in the context of the general order of priority of its work. As was apparent from the report of the Commission on its thirty-sixth session,[12] two different approaches to the question had been advocated. The first was that the Commission should initially prepare a provisional list of offences and then deal with the introduction and, more particularly, the general principles. The second was that the principles should be taken up as a matter of priority and discussed together with the list of offences. He for his part considered it essential to arrive at a provisional statement of principles at the current session, particularly having regard to the priority the General Assembly expected the Commission to accord to the topic.

32. As soon as the Commission had been established, it had been asked to formulate the principles of international law embodied in the Charter and the Judgment of the Nürnberg Tribunal and to embark on the drafting of a code, as it had rapidly done in the early 1950s. The Special Rapporteur had already recommended that the draft code should include the offences covered by the 1954 draft, as well as a number of other offences, such as colonialism, *apartheid*, the taking of hostages and mercenarism (A/CN.4/377, para. 79). The Commission thus had an impressive list of offences which should enable it to arrive at its own list fairly quickly; that list would necessarily be provisional since other offences would in due course be added to it. Furthermore, by its resolution 38/132 of 19 December 1983, the General Assembly had invited the Commission to continue its work on the elaboration of the draft code by "elaborating, as a first step, an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report"; and, at its thirty-ninth session, the General Assembly had renewed that invitation.[13] There could therefore be no doubt that the Commission was required at its current session to prepare an introduction and to enunciate principles, at least on a provisional basis, for submission to the General Assembly.

33. It had been suggested that the Special Rapporteur might formulate some general principles which the Commission would consider at its thirty-eighth session, in 1986. In his own view, however, the issues had been discussed fully enough for the Commission to be able now to go on to the drafting stage, and it was in the introduction to the draft code that the whole question of general principles should be approached. Without seeking to make a formal proposal, he would suggest that the Commission should invite the Drafting Committee to appoint a subcommittee from among its membership to take a quick look at a provisional list of general principles or, alternatively, if the Drafting Committee's work-load was too heavy, to request the Chairman of the Commission and some members of the Drafting Committee to enunciate a few principles for consideration later in the session. Failing that, the quinquennium would end in 1986 without further progress having been made on the question of principles; and the ensuing quinquennium might well end without the topic having been concluded.

34. He could not agree with the statement in the Commission's report on its thirty-sixth session that: "It is not, indeed, impossible that on re-reading the relevant instruments certain expressions, such as the 'laws or customs of war', may appear outdated, since war is now outlawed."[14] One of the offences against the peace and security of mankind listed in the 1954 draft code was "acts in violation of the laws or customs of war" (article 2, paragraph (12)), and the 1949 Geneva Conventions[15] and its Additional Protocols[16] provided a prime example of the way in which the international community had outlawed war. No matter how regrettable it was, war had not been eradicated from the face of the earth and the laws of war should therefore be accepted for what they were worth, not dismissed as inappropriate in certain circumstances.

35. In his view, article 19 of part 1 of the draft articles on State responsibility[17] bore a very real relationship to the draft code. Its relevance, however, was not to be assessed so much in the context of the draft article 3 submitted by the Special Rapporteur as in the light of the answer to the difficult question whether a State or an individual incurred responsibility in a given situation. If, for instance, in a parliamentary democracy such as that of his own country, the cabinet decided to go to war, and if that decision had the full backing not only of individuals but also of the instrumentalities of power, namely the armed forces, and of the nation as a whole, could it be claimed that the State incurred no responsibility within the meaning of the code, although the individuals concerned did? Under article 19, of course, a State incurred criminal responsibility. The issue, therefore, was whether the code should remain silent on that point, with the result that only the members of the cabinet who had given the order to go to war would be held responsible. Those members of the Commission who came from the third world would undoubtedly take the view that, in such circumstances, criminal responsibility would be attributable to the State. In that connection, a reference to a "wrongful act of the State", as suggested by Mr.

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[12] *Yearbook ... 1984*, vol. II (Part Two), pp. 11-12, paras. 33-40.

[13] General Assembly resolution 39/80 of 13 December 1984, para. 1.

[14] *Yearbook ... 1984*, vol. II (Part Two), p. 12, para. 40.

[15] See footnote 10 above.

[16] Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

[17] See 1879th meeting, footnote 9.

Mahiou (1882nd meeting), would afford a degree of flexibility, and it warranted consideration pending a decision by the General Assembly on whether the draft code should apply to States as well.

36. The Special Rapporteur rightly pointed out that an individual could be acting as such or as an agent of the State (A/CN.4/387, para. 17). It was essential to have such a nexus, as was apparent from the use of the expression "by the authorities of a State" in many of the offences listed in article 2 of the 1954 draft code. He considered that something was lacking in the first alternative of draft article 2 submitted by the Special Rapporteur, and that the second alternative was out of place in the context. He therefore suggested that the two alternatives should be combined to embody the idea that individuals who committed an offence against the peace and security of mankind might act as individuals or as agents of the State.

37. As to draft article 3, the first alternative was not appropriate and the second alternative was not clear. He had, however, been attracted by the wording suggested by Mr. Ushakov (1881st meeting), although he would like to see it in writing.

38. Lastly, with regard to acts that might constitute an offence under the draft code, Mr. Reuter (1879th meeting) had spoken of the extent to which drug trafficking was destabilizing small countries. Such countries were in fact not only being destabilized by trafficking in dangerous substances: their relations with other countries were also being seriously disturbed by the power cliques involved. The Commission might wish to give some thought to that problem.

39. Mr. FLITAN congratulated the Special Rapporteur on the clarity, concision and preciseness of his third report (A/CN.4/387), which was an important step forward in the study of a very difficult topic. He noted that, in that report, the Special Rapporteur had defined the content *ratione personae* and the minimum content of the draft code, had taken the 1954 draft code as a starting-point and had presented an outline. He agreed that the Commission should confine itself to the minimum content and take the 1954 draft as a basis for its work and, in principle, he endorsed the proposed outline (*ibid.*, para. 4), subject to further review when the outline had been filled in.

40. The question of the limitation of content *ratione personae* called for several comments. In its report on its thirty-sixth session,[18] the Commission had stated: "With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments." The question of State responsibility was thus still open to discussion, notwithstanding the probably much too positive statement of the Special Rapporteur, in paragraph 2 of his report, that: "The general view which emerged from the debate in the Sixth Committee of the General Assembly was that, in the current circumstances, the draft should be limited to offences committed by individuals." As clearly indicated in the topical summary of the debate in the Sixth Committee (A/CN.4/L.382, para. 26), some representatives had "made the point that restricting the scope of the draft code of offences to the criminal responsibility of individuals would diminish the value of the code as an instrument of prevention and deterrence, and would disregard the progressive development of the law on that subject over the past 30 years", and others had noted that: "The implications of the concept of the criminal responsibility of a State were not ... unrealistic and failure to achieve progress in that area would be tantamount to codifying, by omission, the current impossibility of ensuring strict observance of the principles of the Charter of the United Nations and of international law." It was in that spirit that the General Assembly had adopted resolution 39/80, the fourth preambular paragraph and paragraph 1 of which were particularly relevant in that regard. He therefore did not see why the Commission should not consider the question of State responsibility for offences against the peace and security of mankind, since it was, after all, States, not individuals, that were the principal perpetrators of such offences. Moreover, if that were not the case, the General Assembly would obviously not have requested the Commission to prepare a draft code of offences against the peace and security of mankind.

41. It was so true that it was always States that committed very serious offences which jeopardized the peace and security of mankind that, in paragraph 12 of his report, the Special Rapporteur noted—contrary to what he had stated in the above-mentioned paragraph 2—that "these offences [all offences jeopardizing the independence, safety or territorial integrity of a State] involve means whose magnitude is such that they can be applied only by State entities", and that "it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals", and, in paragraph 13, that: "Some of these crimes—*apartheid*, for example—can only be the acts of a State." Those were thus truisms.

42. The draft Code of Offences against the Peace and Security of Mankind could therefore not apply only to individuals and pass over in silence offences which were committed by States and which jeopardized the peace and security of mankind. It had to cover all offences and enunciate primary rules, naturally taking account of the work of the Special Rapporteur who was dealing with the topic of State responsibility and whose specific task was to enunciate secondary and tertiary rules.

43. The Special Rapporteur had rightly established a link between article 19 of part 1 of the draft articles on State responsibility[19] and the draft code by making extensive use, in the proposed first alternative of article 3, of the wording of article 19. During the discussion, several members of the Commission had

[18] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

[19] See 1879th meeting, footnote 9.

stated their views, either in favour of or against, State responsibility and the responsibility of individuals. Mr. Mahiou (1882nd meeting), for example, had explained—while in a way calling in question the Special Rapporteur's statements in paragraphs 12 and 13 of his report—that an act of aggression ordered by a head of State could engage both the responsibility of the head of State as an individual and the responsibility of the State. He had been careful not to refer to "criminal responsibility" and had indicated that it might be possible to use the term "State responsibility for a wrongful act", while Mr. Balanda (*ibid.*) had said that it might be possible to use the term "criminal responsibility of a State". He himself agreed with the comment by Mr. Mahiou, except that, in his own view, there were cases where it was impossible to make a distinction between the two consequences that the same act might have. Such a distinction might be made in the case of an act of aggression which was ordered by a head of State and which engaged, on the one hand, the responsibility of the head of State as an individual and, on the other, the responsibility of the State—which could be characterized either as criminal or otherwise. There were, however, cases where a particular act could not be attributed to any one individual: that was, for example, true of the crime of *apartheid* which could not be attributed to one or more individuals because it was committed by an entire State.

The meeting rose at 1 p.m.

1884th MEETING

Monday, 20 May 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 4[5] (*continued*)

1. Mr. FLITAN, continuing the statement he had begun at the previous meeting, reiterated that in some cases offences against the peace and security of mankind could indeed only be an act by a State, but in some specific, exceptional cases, they could be "personalized" or "individualized". Generally speaking, it would be very difficult to "individualize" offences against the peace and security of mankind. In most instances, only the problem of the responsibility of the State would arise, but since the State, the State apparatus, even the leadership of the State, was a very nebulous concept, it would be very difficult, if not impossible, to identify the person or persons who might have committed an offence against the peace and security of mankind, whereas it was easy to identify a State which had committed such an offence.

2. Some people advocated excluding States from the scope *ratione personae* of the draft code, arguing that the responsibility of States would fall precisely under the draft articles on State responsibility and that the draft code should therefore deal exclusively with individuals, lest the two drafts interfere with each other and lest the autonomy of the future code be affected. In that regard he would reply that the fact that the code would define offences against the peace and security of mankind was in itself enough to establish its autonomy. Moreover, like other members of the Commission, he considered that the draft code should set forth secondary rules particular to offences against the peace and security of mankind, a matter the Special Rapporteur would have to examine in his next report. The tertiary rules need not be enunciated immediately, for the Commission would do so in due course, when the political organs of the international community, which were alone competent in the circumstances, provided guidance for the Commission in that regard. It should be remembered that the enunciation of secondary or tertiary rules had not been laid down as a prerequisite for elaborating part 1 of the draft articles on State responsibility.

3. Again, if the draft code was to apply only to individuals, how, for instance, could punishment be meted out in the case of aggression committed by a head of State, or by a State? What would the penalties be? Who would determine that the head of State, as an individual, was to be judged by a national court, an international tribunal or a political organ?

4. In his opinion, there would be two separate instruments: on the one hand, articles on State responsibility, which might take the form of a convention, a sort of general law on the matter, applying in all cases to all international crimes and delicts, including offences against the peace and security of mankind as well as delicts—which would not be covered by the code; and on the other hand, a code of

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

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

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.