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Summary record of the 1882nd 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:-
1985, vol. I

character, recognized as such by the international community of States, or by States parties to certain agreements or treaties. Therefore it was possible to give a general definition of an international criminal offence as an act by an individual, or group of individuals, that presented a danger to mankind as a whole, such as piracy or issuing counterfeit money. An international criminal offence against the peace and security of mankind would be defined as an act by an individual, or group of individuals, which constituted a danger to the maintenance of the peace and security of mankind, a danger to the maintenance of international peace and security, and which was recognized as such by the international community.

45. Moreover, in his opinion it would be essential to specify in the future draft the persons whose responsibility could be incurred and which concrete acts by them could incur such responsibility. In that regard, he considered the second alternative proposed by the Special Rapporteur for draft article 2 unsuitable, namely: "State authorities which commit an offence against the peace and security of mankind are liable to punishment." What punishment could be meted out to the authorities of a State, as opposed to agents of the State who, within such authorities of the State, were responsible for an offence against the peace and security of mankind?

46. As to the phrase "Any internationally wrongful act ... is an offence against the peace and security of mankind", used in both the alternatives proposed by the Special Rapporteur for draft article 3, he queried whether it was possible to speak of an internationally wrongful act in the case of an individual, whether an individual could be held guilty of a serious breach of an international obligation when he had no national obligations and still less any international obligations.

47. In short, for the purpose of preparing the draft under consideration, it was impossible to draw on article 19 of part 1 of the draft articles on State responsibility, and a general definition could be given of an international criminal offence against the peace and security of mankind. Concrete offences that constituted a danger to the maintenance of peace and security of mankind, to the maintenance of international peace and security, would still have to be defined on the basis of the decisions of the international community in that matter, and on treaties which had been concluded.

48. He reserved the right to speak later on the draft articles submitted by the Special Rapporteur. In his view, the Commission should consider them one by one and, for the moment, confine itself to discussing the Special Rapporteur's proposals, without making suggestions for the incorporation of any particular offence, which would make the work even more complex.

The meeting rose at 1 p.m.

1882nd MEETING

Wednesday, 15 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, 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. 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. MAHIOU said that with the Special Rapporteur's third report (A/CN.4/387) the Commission was taking up what might be the most difficult part of its work on the topic: the more thorough specification of concepts and definitions. As he would have to be absent, he would confine himself, although with regret, to making a few comments.

2. His first comment concerned the general approach to the topic. He always preferred an analytical, concrete approach, and in the present case he favoured the approach of trying to characterize and define offences or categories of offences so as to make concrete progress in the work. He supported the general plan submitted by the Special Rapporteur, although he was aware of the importance of the general principles. Like Sir Ian Sinclair (1881st meeting) he wondered whether the Commission could really make progress in defining and identifying offences if it did not concurrently study the question of general principles. Of course a starting-point had to be chosen, and the Special Rapporteur had preferred, for the time being, to concentrate on the definition of offences and of concepts. For his own part, he supported that position, but he would like the Commission at the same time to begin thinking about the general principles; for the parallel consideration of the definition of offences and concepts and of general principles might enable it to make real pro-

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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.

gress in preparing the draft code. He was sure the Special Rapporteur would take that point into account when drafting his next report.

3. His second comment concerned the problem of the criminal responsibility of the State, which had been set aside for the present and was still controversial. He believed indeed that, in order to make progress in its work, the Commission should, for the time being, concentrate first and foremost on individual responsibility, it being understood that State responsibility, which was difficult to characterize at the current stage, must be borne in mind. That raised the problem of the relationship between the topic of State responsibility and the draft code. Those two topics might sometimes appear to overlap, but in his opinion that was not really the case. For if the Special Rapporteur for State responsibility and the Special Rapporteur for the draft code were concerned with the most serious international crimes, those against the peace and security of mankind, the two approaches, which were complementary, did not encroach upon one another. The former Special Rapporteur was mainly required to study consequences, in other words secondary rules. The latter, on the other hand, was required to identify concepts and define offences, in other words to state primary rules: that was a characterization phase. Thus, as matters now stood, the two areas were clearly defined, even though there were probably close links between them. But there was also perhaps a closer link between part 1 of the topic of State responsibility and the draft code, to which he would revert later when he came to allude to article 19 of part 1 of the draft articles on State responsibility.[6]

4. His third comment concerned the authors of offences, whom the Commission was called upon to identify, and the offences attributable to them. The Special Rapporteur's third report provided elements for reflection on those matters; but perhaps it was too elliptical on some points and might raise doubts in the Commission. It was true that the statements made so far had thrown some light on the question of offences and their perpetrators. Although, at the previous meeting, the Special Rapporteur had asked the Commission not to dwell too much on the concepts of individuals, State authorities, State agents and the State, he (Mr. Mahiou) felt bound to discuss them, since they formed the heart of the subject: it was necessary to know who would be punished. The Special Rapporteur explained in his third report (A/CN.4/387, para. 11), that the draft under consideration dealt only with the criminal responsibility of individuals. Thus the individual became a central concept, which required a sufficiently clear definition to prevent any misunderstanding about the content of the word "individual". But perhaps the ambiguity arose from the report itself, in particular, he thought, from two sentences. The Special Rapporteur indicated (*ibid.*, para. 12) that, in the case of certain offences, such as those jeopardizing the independence or territorial integrity of a State, only State entities could apply the necessary means; and, referring to other classes of offence, such as genocide and other inhuman acts, he said (*ibid.*, para. 13) that the participation of individuals, which was unimaginable in theory, seemed to be impossible in practice.

5. For his own part, he was not sure that those affirmations were absolutely true in all cases. Taking the frequently cited example of mercenaries, who had sometimes successfully threatened the stability of certain States and Governments, he noted that some States had been accused of hiding behind those operations. But in fact such operations could be carried out even without States being really involved in them. It was not impossible for groups of individuals to commit genocide or other inhuman acts at the instigation of a State or with its complicity, but in weak States, such groups might also attack a particularly weak minority and try to exterminate it by action that might be called independent. In other words, the material acts in question could be committed at the instigation of a State or with its help, but they could also be committed autonomously. The problem thus arose whether, in the latter case, such acts were offences against the peace and security of mankind. That was the problem of legal characterization, which involved reference back to the definition of offences against the peace and security of mankind. Depending on the definition adopted, any particular act might or might not be characterized as an offence against the peace and security of mankind.

6. Without prejudice to the future work of the Special Rapporteur, he believed that, if the Commission were simply to decide that criminal intention, for instance the intention to overthrow a Government or exterminate a minority, an intention by which a Government could be animated just as much as a group of individuals, was the constituent element of an offence against the peace and security of mankind, there would then be an offence against the peace and security of mankind, even though the corresponding material acts were carried out by individuals. If, on the other hand, the Commission decided that such intention was not sufficient and that there must also be presence of State agents or State authorities, the same material acts carried out by individuals would not fall within the category of offences against the peace and security of mankind. But the situation was complex. There were three possible cases. The first was the case of individuals acting in the name of the State as State agents and committing a crime characterized as an offence against the peace and security of mankind: that was a clear situation, which was the very heart of the subject. The second case, quite the contrary, was that of individuals trying to destabilize a Government, to commit an act of genocide or other inhuman acts, apparently without the participation of the State, and it would be necessary to characterize that situation. The third case, which was an intermediate one, was that where the acts were committed by individuals at the instigation and with the encouragement—incidentally, very difficult to prove—of a State. In a word, it was the case where there was indirect intervention by a Government. The problem was whether those three factual situations could be legally characterized in the same way, or whether they should not be differently characterized, with different results in regard to consequences. That was a complicated problem.

[6] See 1879th meeting, footnote 9.

7. If the Commission adopted a very narrow definition of an offence against the peace and security of mankind, in other words a definition which necessarily required the implication of a State or of State authorities, its work would be simplified: it would be able to identify much more clearly the offences to be included in the draft code, as well as the individuals to be prosecuted. But it would then be disregarding the existence of a number of much more complicated situations which were difficult to apprehend, such as the case of acts committed by individuals whose relations with the State were unclear, and *a fortiori* the case of acts by individuals who apparently had no connection with the State. The Commission would thus be in danger of omitting from the draft code a number of offences which a weak State, notwithstanding its will to do so, could neither prevent nor punish. If the perpetrators of such offences took refuge in another country, on what basis could they be prosecuted and punished, since they would escape the internal law of the country in which they had committed their crime? Thus the question arose whether the Commission wished to cover such situations or whether, on the contrary, it wished to exclude them from the code and, if so, why.

8. His fourth comment concerned the link which the definition of offences against the peace and security of mankind made it necessary to establish between the draft code under consideration and article 19 of part 1 of the draft articles on State responsibility. It was only natural that there should be differences of opinion, for the drafting of article 19 itself had given rise to a debate. In his third report (*ibid.*, para. 66), the Special Rapporteur, after making a choice himself, invited the Commission to take a position on the question whether the definition of offences against the peace and security of mankind should be associated with article 19 or whether it should be drafted in a different way. There could be no doubt that the differences of opinion also showed that there were ambiguities. Mr. Calero Rodrigues (1880th meeting) had criticized the Special Rapporteur for not proposing a definition that was independent of article 19, and had questioned the usefulness of drafting a code of offences against the peace and security of mankind which was not independent of that article. Mr. Ushakov (1881st meeting) believed that article 19 and the draft code, which differed as to their bases and consequences, had nothing to do with each other, even though there might be a link between them. He himself thought the situation was probably much more complicated. He feared that it might not always be easy to draw a distinction between crimes within the meaning of article 19 and the offences to be included in the draft code. There might indeed be cases where crimes under article 19 and individual offences to be covered by the draft code were different, but the same act would often be both a State crime within the meaning of article 19 and an individual offence such as the Commission would wish to include in the draft code. That was where the difficulty lay.

9. Taking aggression as a more concrete example, he cited the case where a head of State ordered aggression against another State: the only act was the signing of the order for aggression. But that act could be characterized in two ways: it was a crime by the State—one State committed aggression against another—but at the same time it was an individual crime by the head of State who had ordered aggression. It was thus the same act, attributable to an individual, that ultimately engaged the responsibility both of the State and of the individual who had given the order. That problem was not entirely new. The same situation could be found in internal law. Although conscious of the difficulty of applying the terminology and concepts of internal law to international law, he would try to illustrate the point by an example taken from internal law. Under the law of some countries, including his own, Algeria, there were cases where the same act engaged two responsibilities, in other words there were two different characterizations in regard to consequences: that applied to the administrative responsibility of the State. The State could be responsible for the act of its agents, officials or civil servants. A distinction was generally made between the personal fault of the official, which engaged his own responsibility, and the fault of his department, which engaged the responsibility of the administration. But it sometimes happened that one and the same act generated both types of responsibility. For the State, being an abstraction, a legal person, acted only through individuals: it was to individuals that the acts were attributable. An act was always attributable to an individual, but there was twofold attribution of responsibility: responsibility of the State and responsibility of the individual. If a civil servant committed a crime in the performance of his functions, he must answer for that crime personally before a criminal court. But as the crime had been committed in the performance of his official functions, the civil responsibility of the State was engaged. There was thus criminal responsibility of the individual who had committed the crime and civil responsibility of the State, which must indemnify the victim or his assigns. One and the same act committed by an individual entailed two different responsibilities.

10. That comparison with internal law made it possible to understand the relationship that could exist between the responsibility of the State and the responsibility of persons committing offences against the peace and security of mankind, each being liable to prosecution under a different régime and with different consequences. In other words, the link between article 19 of part 1 of the draft articles on State responsibility and the draft code lay in the fact that the crime committed by an individual would have the dual consequence indicated. The State as such, like every other legal person, did not materially commit any act. Materially speaking, it was always an individual who committed the act on its behalf. A State did not commit a crime in fact: it did so only legally, in the sense that the crime was legally attributed to it.

11. That distinction should be taken into account in order to grasp the link between article 19 and the draft code. Analysis was difficult because of the terminology, since everyone referred, implicity or expli-

citly, to internal criminal law and was influenced by the definitions and concepts of internal law, which were not necessarily adapted to international law. Whether the reference was to State crimes within the meaning of article 19 or to individual offences under the draft code, it was the same word, *crime*, that was used in French. But they were two different things. He reminded the Commission that, at the previous meeting, Mr. Ushakov had used the expressions *crime pénal* and *crime administratif*. The expression *crime pénal* was a pleonasm, although it was helpful in understanding the problem of characterization. In spite of the identical terminology, in French, a State crime was not the same thing as an individual crime. It was criminal law that characterized the crimes and concepts, and the same should apply in international law. What was in question was the autonomy of characterization in international law, which was similar to the classical autonomy of a legal discipline in relation to any other discipline. In internal law, the characterizations of fiscal law were not the same as those of civil law or commercial law, and the consequences entailed were not the same; the characterization of administrative law could be different from those of civil law.

12. An individual crime and a State crime were two different things, and if the Commission came closer to overcoming the difficulties of defining those concepts, it would be better able to understand the link existing between part 1 of the draft articles on State responsibility, in particular article 19, and the draft code. The expression "crime of the State" could be replaced by the expression "wrongful act of the State" to avoid any confusion between the notions of internal law and those of international law. There were after all wrongful acts or faults by the State and there were crimes by the State; and that was where the controversial notion of "criminal responsibility" came into play. To speak of the criminal responsibility of the State amounted to referring back to the "criminal responsibility of individuals". In his view, there was a responsibility of the State for a wrongful act, but that responsibility was different from the criminal responsibility of an individual. As Mr. Ushakov had pointed out, the criminal responsibility of a State and the criminal responsibility of an individual had neither the same legal basis nor the same consequences. But unlike Mr. Ushakov, he would not say that the Commission should therefore exclude State crimes from the draft code; for if it had to define sanctions against States, the question was whether, after all, it should not do so at a later stage in the preparation of the draft code, after having resolved the problem of the criminal responsibility of individuals. Article 19 remained, in fact, a framework to be filled in, perhaps through work on the draft code—although those were two different spheres.

13. Referring to the list of offences against the peace and security of mankind in chapter II of the third report, he observed that the Special Rapporteur placed aggression first. It was universally recognized that aggression should be one of the first offences to be included in the draft code. The Commission's work on the subject was made easier by the Definition of Aggression adopted by the General Assembly in 1974.[7] But rather complex problems arose: the question was how that definition should be integrated in the draft code. It could not be included as it stood, because it contained many elements—definition of aggression, evidence of aggression, competence of the Security Council and consequences of aggression. He agreed with Chief Akinjide (1881st meeting) that it would be difficult to mention the Security Council in the draft code. He also believed that evidence of aggression had no place in the definition: it belonged elsewhere. Finally, he noted the reference in draft article 4 to territorial acquisition as one of the consequences of aggression (first alternative of section A, subparagraph (*d*) (iii)). However, that consequence was already included in part 1 of the draft articles on State responsibility, where it properly belonged.

14. The threat of aggression should undoubtedly be included in the draft code, but perhaps on condition that it was precisely characterized. On the other hand, it was difficult to conceive that preparation of aggression, which was a vaguer notion, could be considered as an offence against the peace and security of mankind, unless it was presicely defined and characterized. Some members had already said that the difficulty lay mainly in the problem of evidence. The Commission would no doubt have to revert to that point.

15. Interference in internal or external affairs was a "hold all" category, which was not unlike a similar notion in internal law, that of an "act against the internal or external security of the State", which was often opposed by criminologists and jurists because it was difficult to define and easy to extend. Such acts should of course be included in the draft code, but subject to being precisely defined. In his view, the formulation in the 1954 code draft was not entirely satisfactory. In connection with interference in the internal or external affairs of a State, Mr. Boutros Ghali (1879th meeting) had mentioned the interesting and useful work of OAU on subversion, but that work was not altogether satisfactory. In any case, the notion of subversion was too vague and would have to be made more precise before it could be characterized as an offence against the peace and security of mankind.

16. With regard to terrorism, he was inclined to share the views expressed by the Special Rapporteur in two passages of his third report (A/CN.4/387, paras. 126 and 136), subject to one particular. Sir Ian Sinclair (1881st meeting) had pointed out that, according to the Special Rapporteur, there was an offence against the peace and security of mankind when terrorism was organized by one State and directed against another; those two conditions must be satisfied for an act of terrorism to be covered by the draft code. That was true, but all cases of terrorism might not be covered. There could be acts of terrorism organized by a State which were not directed against another State: for example, when a Government persecuted its political opponents or a foreign minority. Did such cases represent an offence

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

against the peace and security of mankind? He himself did not think that the words "directed against another State", used in the two passages he had mentioned, were satisfactory.

17. It was obvious that colonial domination constituted an offence against the peace and security of mankind. It only remained to find the most satisfactory wording. He was prepared to support the formulation proposed by the Special Rapporteur (A/CN.4/387, para. 158, *in fine*), namely "the establishment or maintenance by force of colonial domination", although he thought it could be further improved.

18. He was inclined to regard mercenarism as being linked with aggression, as suggested by the Special Rapporteur (*ibid.*, para. 164). It might be advisable to link mercenarism and aggression, to review the definition of aggression and to clarify the concept of mercenarism in connection with aggression.

19. His comments on economic aggression were the same as those he had made on interference in internal or external affairs and on the preparation of aggression. The Commission must identify economic aggression in its concrete manifestations. It must try to analyse the seriousness of the act, so as to distinguish between economic retaliation or economic hostility, which formed part of the economic policy of States, and real economic aggression, which was intended to disrupt the economic structure of a country and to impair its independence or its economy. There again, the main problem was probably that of evidence: at what point could it be proved that an act relating to a State entailed such a threat to its integrity? But in his opinion, once the security or economic independence of a State were threatened by an act, conduct or an economic measure of another State, there was no doubt that aggression had been committed—economic aggression it was true, but aggression all the same. The concept of economic aggression should be included in the draft code, subject to being more precisely defined.

20. Mr. BALANDA said that he supported the provisional outline proposed by the Special Rapporteur in his third report (A/CN.4/387, para. 4). He agreed that the best way to proceed was to start from what was most certain and move on to what was less so. Thus, at the same time as it was trying to determine and define the offences to be included in the draft code, the Commission could make some progress in outlining a few basic principles, which would help to clarify the subject under study.

21. In his third report, the Special Rapporteur raised the question of the scope of the draft code and, following what he called the general opinion, proposed that the work be confined to the criminal responsibility of individuals. For his own part, he would note in that connection that the word "individual" applied to natural persons, as well as to legal persons. As it stood, the draft code would thus apply mainly to the activities of natural persons. But could it never apply to the activities of legal persons? He himself was prepared to believe that the debate on the problem of State responsibility—whether characterized as criminal or otherwise—was by no means closed. It was, indeed, rather difficult to accept the statement that: "The general view which emerged ... was that, in the current circumstances, the draft should be limited to offences committed by individuals." (*Ibid.*, para. 2). In the Commission, the majority opinion was in favour of taking account of the responsibility of States as such. In the case of the Sixth Committee, it was difficult to speak of a "general view", since at the thirty-ninth session of the General Assembly only 13 interventions had been made on item 125 of the agenda, entitled "Draft Code of Offences against the Peace and Security of Mankind". Although, for the time being, the Commission should concern itself only with the criminal responsibility of individuals, it should not yet renounce consideration of the question of the responsibility of States or of other legal persons or entities. For as Mr. Mahiou had pointed out, there were cases of dual responsibility—of the individual and of the State. Moreover, in his second report (A/CN.4/377, paras. 2-4), the Special Rapporteur had left open the question of the content of the topic *ratione personae*.

22. He wondered whether, at the conceptual level, it was impossible to envisage the criminal responsibility of a State. In the Sixth Committee, some representatives had maintained that the criminal responsibility of a legal person was inconceivable. That might be true under certain legal systems. But the Commission should not, for that reason, renounce consideration, in the light of the different legal systems, of the possibility of establishing, at the conceptual level at least, the concept of the criminal responsibility of certain entities. The legal system of Zaire, which derived from the Franco-Belgian legal system, recognized civil responsibility and, as Mr. Mahiou had pointed out, the Algerian legal system included administrative responsibility, both of which could be applied to legal persons. That being so, was it impossible to envisage the criminal responsibility of legal persons at the conceptual level? In his opinion, responsibility deriving from the commission of acts covered by a penal code could not be characterized otherwise than as criminal responsibility. It would therefore be possible, as part of the progressive development of international law, for the Commission to consider making an effort in that direction.

23. On the relationship between article 19 of part 1 of the draft articles on State responsibility [8] and the draft code, he endorsed Mr. Mahiou's comments. At the 1881st meeting, Mr. Ushakov had said that the Commission should ignore article 19, and Sir Ian Sinclair had expressed the same view, although perhaps in a different form. He himself would also point out that a number of acts could be attributable both to individuals and to entities, so that the Special Rapporteur's third report was ambiguous when he tried to identify the authors of offences against the peace and security of mankind. At its previous session, the Commission had decided to adopt, as the criterion for the selection of offences to be included in the draft code, that of extreme seriousness;[9] and that element appeared in article 19. That being so, the Commission could advance in the preparation of

[8] See 1879th meeting, footnote 9.

[9] *Ibid.*, footnote 8.

the draft code independently of its work on article 19. As Mr. Ushakov had rightly pointed out, the basis of responsibility was different in the two cases. Article 19 dealt with the political responsibility of States, whereas the draft code would deal with criminal responsibility, the subjects of which he would not identify for the moment, since the Commission was not unanimous on that point. There was a further difference: the internationally wrongful act referred to in article 19 could just as well be an omission as a positive act, whereas the draft code could apply only to positive acts. Moreover, article 19 related to acts of States, which were subjects of international law, whereas the draft code would relate to acts committed by individuals and perhaps also to acts by certain entities. It was the element of fault that should be adopted as the criterion for differentiating between the two régimes. In international law, the basis of responsibility was wrongfulness, whereas in criminal law the concept of fault came into play in judging the conduct attributable to a natural or legal person.

24. He thought it would be difficult to include article 19 of part 1 of the draft articles on State responsibility, as it stood, as a definition in the draft code. It would have to be adapted to the draft code, in particular with regard to aggression. Like Sir Ian Sinclair, he emphasized that the Commission should try to adopt a different position according to whether the characterizing authority was a political or a jurisdictional body. In the case of the draft code, the characterization was obviously a legal one: the characterizing body should be jurisdictional, or in any case not political. In the Definition of Aggression adopted by the General Assembly in 1974,[10] it was provided that the Security Council, in the light of the circumstances, might determine that other acts than those enumerated constituted aggression. On that point he agreed with Sir Ian Sinclair that it would be difficult to accept that a political body could characterize as aggression acts other than those enumerated in the code, since that would be contrary to the principle *nullum crimen sine lege*.

25. With regard to the definition of an offence against the peace and security of mankind, he doubted whether it was advisable to define as precisely as possible the concepts to which the draft code would refer. It was certainly desirable to clarify the meaning of the terms used in a text of that kind, to make it easier to understand; but in the present case such an undertaking might have certain drawbacks. It should be noted first that a definition, by the very fact of making a concept more precise, excluded everything that it did not include. In addition, too strict a definition would be an obstacle to further development, in particular to the possibility of enlarging its scope. It would therefore be advisable for the Commission to confine itself to a general definition of an offence against the peace and security of mankind, without defining the various acts which could be considered as falling within that category of offences.

[10] See footnote 7 above.

26. It should also be noted that in internal law, and particularly in criminal law, the rules were strictly interpreted. Contrary to international law, internal law formed a complete and effective system. Moreover, if some people sometimes considered that international law was not real law, it was precisely because of its lack of effectiveness as compared with internal law. As internal law constituted a complete whole, it lent itself to definitions, which made it possible to check the application of the concepts covered. In the sphere of legal appeals, for example, it was by determining whether the lower court had duly applied the law that the appeals court could exercise its supervision; to that end it must be in a position to establish whether an act considered to be criminal by the lower court came within the legal definition of the crime in question. But the system was not the same at the international level, where the administration of justice was not generally subject to a check by a higher court. Consequently, too precise definitions of certain concepts might freeze them unnecessarily and impede their development. In following reasoning based on concepts of internal law, the Commission might also, by seeking precision, move towards the preparation of an international penal code, whereas its task was only to draft a code of offences against the peace and security of mankind. If, in carrying out its task, it burdened itself with elements belonging to internal law, it could only expect difficulties, since international law was not as well equipped as internal law.

27. The autonomy of international law and its progressive development, as distinct from that of internal law, had been publicized by the Nürnberg Tribunal, which, faced with the need to prosecute the major war criminals, had not hesitated to sweep away a number of pinciples considered as fundamental in the criminal law of States. Among the principles and concepts set aside by the Nürnberg Tribunal were those of prescription, non-retroactivity and territoriality, as well as the principle *nullum crimen, nulla poena sine lege*. The Commission, too, should avoid adherence to the concepts and mechanisms of internal law, in view of the possible drawbacks of too close analogies between international law and internal law.

28. In his view, the notion of an offence against the peace and security of mankind, of which the Special Rapporteur emphasized the unity, was in fact a notion *sui generis*, which included both offences against international peace and security and crimes against humanity. As the Special Rapporteur pointed out, offences of the first kind were those concerning the state of non-belligerency, whereas those of the second kind involved a situation that went beyond inter-State relations and involved the protection of the human race. It was thus a matter of protecting the right to life, from the point of view both of physical integrity and of the economic and political existence of States.

29. As to the list of offences against the peace and security of mankind contained in chapter II of the report under consideration, it should not be taken as a starting-point, since it required completion. The first offence mentioned, aggression, should be re-

tained, but it should be given a definition that took account of the requirements of the draft code and was not simply taken over from part 1 of the draft articles on State responsibility. In particular, it was necessary to ensure that the characterization of that offence did not emanate from a political body.

30. Although it was often difficult to determine when there was a threat of aggression or preparation of aggression, those two offences should be included in the draft code; perhaps the emphasis should be placed on the material act, which could be identified and punished.

31. Interference in the internal or external affairs of a State was another offence which should certainly be taken into consideration, if only because it concerned a concept which had been established by Article 2, paragraph 7, of the Charter of the United Nations, but which needed to be more precisely defined. That offence was so serious that it endangered the sovereignty of States and violated the principle of the sovereign equality of members of the international community. Rather than give a definition of the offence, which was not beyond common understanding, the Commission could confine itself to giving a few examples.

32. Subversion was also an offence that had its place in the draft code, despite the difficulties which characterization of the act might involve. In that connection he emphasized the special situation of the developing countries, which were more sensitive than others to certain realities by reason of their vulnerability. Thus the stability of a developing country and its institutions might be endangered by subversive statements broadcast by a neighbouring radio station, whereas a great Power was not so vulnerable.

33. In the case of terrorism, the Special Rapporteur wished to retain only State terrorism. That was not doubt the easier solution, but it raised some difficulties. The Commission would have to try to distinguish between acts of terrorism committed by individuals, which came under ordinary law, and acts in which the State had a hand. In view of the difficulties of producing evidence in such cases, it would probably be better only to mention terrorism and to give some examples. Complicity in terrorism should also be included in the code, since it endangered international peace and security. As the Special Rapporteur had pointed out, such complicity should be distinguished from civil war, which was an act of nationals who opposed the established order, whereas terrorism was an act of foreign subjects who endangered the stability of the State. There was absolutely no doubt that the case of freedom fighters should be excluded, since the legitimacy of their activities had been confirmed, in particular, by the General Assembly in its resolution 3103 (XXVIII) of 12 December 1973.

34. The offences constituted by the breach of obligations under certain treaties, which the Special Rapporteur also proposed to include in the draft code, appeared rather to belong to the topic of State responsibility. For the time being, however, the code was concerned with the responsibility of individuals, the responsibility of States being nevertheless reserved.

35. Although it was difficult to define the notion of colonial domination, that expression was certainly not a slogan, as Sir Ian Sinclair had affirmed (1881st meeting). It implied, in particular, inequalities, injustices, the denial of human rights or rights to natural resources and wealth, discrimination, exploitation or harassment. Any effort to reconquer the sovereignty of a State in order to subject it was not a slogan, but a reprehensible reality. The expression "colonial domination" clearly described a concrete situation which the world had known during a certain period.

36. In view of the unfortunate experiences of his own country in regard to mercenarism, he favoured the inclusion of that offence in the draft code, but he was not sure that it should not rather be treated as aggression. For mercenarism implied disregard of a fundamental principle of the Charter of the United Nations, that of territorial integrity. In any case it did not appear that the work of the *Ad Hoc* Committee on the question of mercenarism should prevent the Commission from taking that subject into consideration.

37. Lastly, economic aggression appeared to be a form of the crime of aggression, which should be redefined from a viewpoint different from that of article 19 of part 1 of the draft articles on State responsibility.

38. Under General Assembly resolution 39/80, the Commission was requested to continue its work on the elaboration of the draft code, taking into account the progress made at its thirty-sixth session as well as the views expressed during the thirty-ninth session of the General Assembly. As the question of nuclear armament had been debated in the Sixth Committee and as any recourse to nuclear weapons constituted a repudiation of humanity, that question should be taken up by the Special Rapporteur in his fourth report.

39. As to the draft articles proposed by the Special Rapporteur, he noted that the Special Rapporteur was much influenced by article 19. But that article dealt with the responsibility of States, whereas for the time being the Commission was concerned only with the criminal responsibility of individuals, without, however, excluding the criminal responsibility of certain entities. In those circumstances, he provisionally supported both alternatives for article 2, the first of which expressed a consensus, while the second suggested the implications of the problem of the criminal responsibility of legal persons.

40. As he was in favour, not of a definition of an offence against the peace and security of mankind, but of a general criterion followed by a non-exhaustive enumeration, he thought the method followed in the 1954 draft code, and by the Special Rapporteur in draft article 4, was the best.

41. Mr. THIAM (Special Rapporteur) said that his third report (A/CN.4/387) dealt only with certain offences and that the next report would cover war crimes and crimes against humanity. It was therefore

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

[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.