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Summary record of the 1879th meeting

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Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/386 and Add.1, ILC(XXXVII)/Misc.1)

[Agenda item 2]

1. The CHAIRMAN announced that, at a private meeting held that morning, the Commission had elected, in conformity with its statute and taking into account General Assembly resolution 36/39, Mr. Gaetano Arangio-Ruiz, Mr. Jiahua Huang, Mr. Emmanuel J. Roukounas and Mr. Christian Tomuschat to fill the casual vacancies caused by the election of Mr. Zhengyu Ni and Mr. Jens Evensen to the International Court of Justice and by the deaths of Mr. Robert Q. Quentin-Baxter and Mr. Constantin A. Stavropoulos.

2. He intended to send telegrams to the four new members of the Commission, congratulating them on their election and inviting them to participate as soon as possible in the present session.

The meeting rose at 12.45 p.m.

1879th MEETING

Thursday, 9 May 1985, at 10.10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Welcome to Mr. Tomuschat

1. The CHAIRMAN congratulated Mr. Tomuschat on his election and, on behalf of the Commission, extended a warm welcome to him.

Draft Code of Offences against the Peace and Security of Mankind[1] (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

2. The CHAIRMAN recalled that the General Assembly, in paragraph 1 of its resolution 39/80 of 13 December 1984, had requested the Commission

> ... to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-sixth session, as well as the views expressed during the thirty-ninth session of the General Assembly.

3. In the same resolution, the General Assembly had also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the conclusions contained in paragraph 65 of the report of the Commission on the work of its thirty-sixth session.[5] The replies of Governments would be communicated to members of the Commission when received. One reply had already been circulated (A/CN.4/392).

4. He invited the Special Rapporteur to introduce his third report (A/CN.4/387), together with the draft articles contained therein, which read:

PART I

SCOPE OF THE PRESENT ARTICLES

Article 1

The present articles apply to offences against the peace and security of mankind.

PART II

PERSONS COVERED BY THE PRESENT ARTICLES

Article 2

First alternative

Individuals who commit an offence against the peace and security of mankind are liable to punishment.

Second alternative

State authorities which commit an offence against the peace and security of mankind are liable to punishment.

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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] *Yearbook ... 1984*, vol. II (Part Two), p. 17.

PART III

DEFINITION OF AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 3

First alternative

Any internationally wrongful act which results from any of the following is an offence against the peace and security of mankind:

(*a*) a serious breach of an international obligation of essential importance for safeguarding international peace and security;

(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples;

(*c*) a serious breach of an international obligation of essential importance for safeguarding the human being;

(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

Second alternative

Any internationally wrongful act recognized as such by the international community as a whole is an offence against the peace and security of mankind.

PART IV

GENERAL PRINCIPLES (PENDING)

PART V

ACTS CONSTITUTING AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 4

The following acts constitute offences against the peace and security of mankind.

A (*first alternative*). The commission [by the authorities of a State] of an act of aggression.

(*a*) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Explanatory note. In this definition, the term "State"

(i) is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(ii) includes the concept of a "group of States", where appropriate.

(*b*) *Evidence of aggression and competence of the Security Council*

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

(*c*) *Acts constituting aggression*

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of subparagraph (*b*), qualify as an act of aggression:

(i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(iii) the blockade of the ports or coasts of a State by the armed forces of another State;

(iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(vi) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(vii) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(viii) the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

(*d*) *Consequences of aggression*

(i) No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression;

(ii) A war of aggression is a crime against international peace and security. Aggression gives rise to international responsibility;

(iii) No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

(*e*) *Scope of this definition*

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

(ii) Nothing in this definition, and in particular subparagraph (*c*), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

(*f*) *Interpretation of the present articles*

In their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provisions.

A (*second alternative*). The commission [by the authorities of a State] of an act of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974.

B. Recourse [by the authorities of a State] to the threat of aggression against another State.

C. Interference [by the authorities of a State] in the internal or external affairs of another State.

The following, *inter alia*, constitute interference in the internal or external affairs of a State:

(*a*) fomenting or tolerating the fomenting, in the territory of a State, of civil strife or any other form of internal disturbance or unrest in another State;

(*b*) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

D. The undertaking or encouragement [by the authorities of a State] of terrorist acts in another State, or the toleration by such authorities of activities organized for the purpose of carrying out terrorist acts in another State.

(*a*) The term "terrorist acts" means criminal acts directed against another State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

(*b*) The following constitute terrorist acts:

(i) any wilful act causing death or grievous bodily harm to a head of State, persons exercising the prerogatives of the head of State, the successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

(ii) acts calculated to destroy or damage public property or property devoted to a public purpose;

(iii) any wilful act calculated to endanger the lives of members of the public, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;

(iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

E. A breach [by the authorities of a State] of obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on strategic structures, or of other restrictions of the same character.

F. The forcible establishment or maintenance of *colonial domination* [by the authorities of a State].

5. Mr. THIAM (Special Rapporteur) said that he was aware of the difficulties of the topic, which lay at the meeting-point of law and politics and therefore touched everyone's sensibilities and deepest convictions. Thus he could only approach with humility the delicate problem of synthesis raised by the drafting of a code. It seemed useful to recall that, after long discussions in the Sixth Committee of the General Assembly and in the Commission, it had been agreed to confine the topic to the criminal responsibility of individuals, leaving aside the criminal responsibility of States, and not to include all international crimes in the draft code, but only offences against the peace and security of mankind. Furthermore, the Commission had decided to take as the basis of its work, subject to the necessary amendments and additions, the draft code that it had elaborated in 1954.

6. The plan he proposed for the future code would be divided into two parts. The first part would deal with the scope of the draft articles, the definition of an offence against the peace and security of mankind, and the general principles governing the subject; the second part would be devoted to acts constituting offences against the peace and security of mankind. Once the Commission had reached a decision on the problem of punishments, it would be advisable either to devote a third part to the implementation of the code, or simply to state a few principles in the code.

7. The general principles to be stated at the end of the first part could not be set out until the offences against the peace and security of mankind had been defined and their nature specified. A number of principles of universal scope could nevertheless be formulated at once, such as those the Commission had derived from the Charter and Judgment of the Nürnberg Tribunal (see A/CN.4/387, footnote 3).[6] Principles I to V and principle VII could be reaffirmed, after due critical screening. Principle VI went beyond the mere statement of a general rule and contained a list of acts qualified as crimes against the peace and security of mankind. A number of other principles, which had been formulated subsequently, could also be set out, such as that of the non-applicability of statutory limitations to offences against the peace and security of mankind, that of universal competence for the prevention and punishment of such offences, and its corollary, the obligation of every State to judge or to extradite.

8. However, there were still other principles governing the subject, including principles more limited in application, whether by reason of the nature of the offences, the status of the offenders or the circumstances. Thus it might be asked whether absolutory excuses, self-defence, or extenuating circumstances could be invoked in respect of certain offences against the peace and security of mankind, especially in cases of annexation, aggression or colonialism. Because the Commission would have to pronounce on all those questions, it would be advisable to leave the formulation of many of the general principles governing the subject until later. Attention must also be drawn to the principles deriving from the abundant jurisprudence of the Nürnberg Tribunal and the courts set up by the Control Council for Germany.

9. Consequently, the report under consideration dealt mainly with the scope of the draft code and with certain offences against the peace and security of mankind, in particular those listed in article 2, paragraphs (1) to (9), of the 1954 draft code. To stimulate discussion, he intended to revert to the question of the scope of the draft *ratione personae*. He noted that the authors of the 1954 draft, in referring to individuals, had used the terms "authorities of a State" and "private individuals" alternately. For all the offences mentioned in article 2, paragraphs (1) to (9), they had used only the expression "authorities of a State", but beginning with paragraph (10) they had added the term "private individuals". A distinction appeared to be really necessary. It seemed inconceivable that private individuals could be the main perpetrators of offences against the independence or territorial integrity of States, such as aggression, the threat of aggression, the preparation of aggression and all the other offences listed in the first nine paragraphs of article 2. Those offences could be committed only by individuals vested with power of command, and they were often analysed as abuse of sovereignty or misuse of power. As to the offences against humanity referred to in paragraphs (10) and (11), it did not seem possible for private individuals to commit all of them. Genocide, which was a systematic attempt to destroy a national, political, ethnic or religious group, could hardly be carried out by private individuals. Only the exercise of State power

[6] See also *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

could procure the means of destruction necessary to commit offences against the peace and security of mankind.

10. It was possible that the concepts of principal author and accomplice were being confused. If a head of State paid an individual to assassinate another head of State, he was committing an offence against the peace and security of mankind. As for the assassin, he might have committed an act of complicity, but he was not the co-perpetrator. He was not the perpetrator of an offence against the peace and security of mankind, but of a separate crime. The motivation was not the same for both acts, and the offences committed did not have the same basis. The head of State was required to respect the rules of international law and he had committed an international crime, whereas the private individual had committed a common-law crime. That being so, it might be questioned whether the draft code should really deal with private individuals. The main purpose of the draft was to impede the improper exercise of State power and to prevent the offences against mankind which could be committed by individuals who were authorities of a State (individuals-organs). He had therefore judged it useful to propose two alternatives for draft article 2 (Persons covered by the present articles). They laid down the principle of the responsibility of individuals and that of the responsibility of State authorities respectively.

11. No definition of an offence against the peace and security of mankind had yet been given. The Charter of the Nürnberg International Military Tribunal[7] contained a list of crimes which were considered to be of that nature, but no criteria for establishing a link between them. In 1954, when the Commission had prepared its draft code, it had kept to the method of the Charter of the Nürnberg Tribunal. Without defining them, it had divided the offences into three categories, namely crimes against peace, war crimes and crimes against mankind, and it had simply added, in article 1, that those were crimes under international law. However, it was not possible to distinguish offences against the peace and security of mankind from other crimes under international law. When the Commission had taken up the subject again, at its thirty-fifth session, it had decided that a general criterion must be found to characterize the offences in question, and it had adopted the criterion of extreme seriousness.[8] Some members, however, had rightly considered that that criterion was too subjective and too vague, and that another should be found. But it had to be recognized that criminal law was entirely pervaded by subjectivity: the seriousness of an offence was judged according to the degree of reprobation it provoked in society. As for the second criticism, a criterion was ultimately only a sign intended to eliminate the particular features of a concept and thus to bring out its essence.

12. It was precisely because the notion of a crime was extremely difficult to define that very few codes contained a definition of it. The French penal code defined a criminal offence only in terms of the seriousness of the penalty to which the offender was liable. When offences were divided into two or three categories, as was the case in most countries of Latin tradition, it was even difficult to define those in one category in relation to those in another, which explained the existence of police misdemeanours and offences tried by a court of summary jurisdiction. Despite the difficulties of the undertaking, it was important at the current stage to try to delimit the notion of offences against the peace and security of mankind more closely and to attempt to define it.

13. In part 1 of its draft articles on State responsibility, the Commission had included article 19, entitled "International crimes and international delicts",[9] which gave the curious impression of a child not wanted by everyone. That article had been criticized for laying down the principle of the criminal responsibility of the State, which some refused to accept. But if the Commission decided to confine itself to the criminal responsibility of individuals, that criticism would no longer apply. The approach of article 19 was acceptable in principle, in so far as that provision attempted to give responsibility an objective basis, namely the breach of an international obligation. In that connection, it would be necessary to establish which were the international obligations whose breach constituted an offence against the peace and security of mankind. When the Commission had drafted article 19, it had indicated that it was because of their extreme seriousness that certain internationally wrongful acts constituted international crimes. Among international crimes, those against the peace and security of mankind were characterized by the fact that they were especially serious for the international community. The particularly serious breaches given as examples in article 19, paragraph 3, were precisely those that constituted veritable crimes against the peace and security of mankind. They concerned the maintenance of international peace and security, the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. As indicated in the commentary to article 19:

> ... The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned.[10]

14. It was in that spirit that he had drafted the first alternative of draft article 3 (Definition of an offence against the peace and security of mankind). The definition he had given was more precise than that which consisted simply of saying that offences against the peace and security of mankind were international crimes. But it was impossible to make the definition more precise without departing from article 19 of part 1 of the draft on State responsibility. Since the debates at previous sessions had shown that

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[7] Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[8] *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

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

[10] *Ibid.*, p. 121, para. 67 of the commentary.

a shorter definition could nevetheless be formulated, he had proposed a second alternative according to which any internationally wrongful act recognized as such by the international community as a whole was an offence against the peace and security of mankind.

15. With regard to the unity of the concept of offences against the peace and security of mankind, he referred the Commission to the discussion of the matter in his third report (A/CN.4/387, paras. 26-39). The vast majority of writers considered that the concept of "offences against the peace and security of mankind" was indivisible, and he believed that that unity should be maintained if only because certain offences against peace were offences against security, and vice versa.

16. In chapter II of his report, dealing with acts constituting an offence against the peace and security of mankind, he had confined himself to offences against international peace and security, in other words to those listed in article 2, paragraphs (1) to (9), of the 1954 draft code. A distinction should be made between offences against international peace and security and offences against the peace and security of mankind. The former could be committed only by States. When a State, by its conduct, violated an international obligation to another State, the victim of that offence could only be a State. On the other hand, the perpetrators of offences against the peace and security of mankind might not be States. They might sometimes even be private individuals acting against State instructions, whose acts, in principle, did not engage State responsibility. Similarly, the victims might not be States, but ethnic groups or civilian populations, especially in the case of genocide or violations of humanitarian law. Offences against international peace and security generally threatened the independence and territorial integrity of a State.

17. The first of those offences was aggression. After long debates, a Definition of Aggression had been adopted by the General Assembly in 1974, based on both a general criterion and an enumeration.[11] Draft article 4, on acts constituting an offence against the peace and security of mankind, could either reproduce the full text of the 1974 definition or simply refer to that definition; the two alternatives he had proposed represented those two options.

18. It was open to question whether the threat of aggression should be retained in the code. In his third report (*ibid.*, para. 89), he had pointed out that the term "threat" could be understood to mean either a risk or sign of danger, or a manifest intention to do wrong or cause harm to another. In all the provisions of the Charter of the United Nations in which the threat resulted from "disputes" or "situations", that term was used as in the first meaning. In his opinion, a threat of aggression was tantamount to aggression and should be prevented and punished as such.

19. With regard to the preparation of aggression, some members of the Commission had asked when such preparation began and ended, and what distinguished it from "preparatory measures". Legal opinion was extremely divided: some writers assimilated preparation of aggression to aggression; others declined to do so if the aggression had not been consummated. In his opinion, the preparation of aggression should not, in principle, be included in the code. True, some national penal codes condemned the preperation of aggression, as did the Charter of the Nürnberg Tribunal. For practical reasons, however, it was doubtful whether "preparation" could really be prevented and punished. The Charter of the United Nations, especially Chapter VII, provided for a whole system of collective security, by which preventive measures could be taken against the preparation of aggression. But it was doubtful whether the preparation of aggression should be included in a code designed to prevent and punish completed acts. There were two possibilities. If the preparation of aggression did not end in aggression, how should it be prevented and punished? And if it ended in aggression, was it not part of the act of aggression?

20. Interference in the internal or external affairs of States raised, first, the problem of the meaning to be given to the notion of interference. It was well known that, at least in certain fields, such as that of human rights, the internal affairs of States were no longer as firmly based on the absolute sovereignty of the State as they had been in the past; to an increasing extent, States were having limits imposed upon them by international declarations or by *jus cogens*. Mention must also be made of the growing number of international treaties and agreements, and of regional organizations. Although interference was still considered to be taboo, a trend towards the delegation of competence was nevertheless discernible.

21. It might be wondered why civil war had been treated as a separate phenomenon in the 1954 draft code. Was the provocation by a State of civil war in another State really different from interference? It was perhaps because the 1950s had seen the birth of the first national liberation movements that some Powers had seen fit to maintain that civil war was an internal affair, which enabled them to justify the attitude they had adopted towards certain national liberation movements. Furthermore, the 1954 draft code did not mention, and distinguish from civil war, the disturbances or riots which one State could provoke within another. If that position were maintained, it would mean that a State which provoked disturbances, riots or even an insurrection in another State was not committing an offence against the peace and security of mankind. He had therefore thought it fit to depart from the 1954 draft code in that respect.

22. In the 1954 draft code, terrorism was considered to be an offence against the peace and security of mankind. That offence took several forms, depending on whether it was terrorism under ordinary law, political terrorism, internal terrorism or terrorism provoked by a State within another State. Only the last form of terrorism should be considered by the Commission. Terrorism was currently used for so many purposes and applied by so many different means

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

that it might be wondered whether, for the purposes of the draft code, it should not be considered to be covered by certain acts already explicitly envisaged by the Commission, such as the hijacking of aircraft, the taking of hostages and acts of violence against persons enjoying special protection. Since he had been anxious to keep to the existing conventions, he had taken the Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)[12] as a guide for the drafting of article 4.

23. With regard to mercenarism, the Commission had considered that it would be appropriate to take into account the work of the *Ad Hoc* Committee on that question.[13] It should be noted in that connection that the 1974 Definition of Aggression referred explicitly to mercenaries in the same paragraph as to armed bands. Hence he had not thought it necessary to draft a special provision on mercenaries or on armed bands.

24. Nor had he submitted a special provision on economic aggression, which could take place in two ways. If a State intervened militarily against another State in the name of defence of vital interests, the case was already covered by the Definition of Aggression. If coercion or pressure was brought to bear by one State against another to compel it to take or not to take a certain decision, that was a case of interference.

25. There remained the question of breach of agreements and treaties designed to ensure international peace and security. In article 4, section E, which was the provision corresponding to article 2, paragraph (7), of the 1954 draft code, he had simply replaced the term "fortifications", which was considered to be outdated, by the words "strategic structures".

26. Finally, he indicated that, on reflection, he was not proposing that the reference to forcible maintenance of colonial domination should be replaced by a reference to the right to self-determination, since that concept was too ambiguous.

27. Mr. REUTER said he was speaking at the current stage in the debate not because he had any fixed opinions on the many questions raised, but simply because he would soon have to leave. He would not discuss all the questions, or event most of them, but would deal mainly with questions of method.

28. He unreservedly endorsed the lines of thought apparent in the plan of work proposed by the Special Rapporteur and wished to dwell on some of the choices made. There was one that seemed to him to be extremely important, and he fully supported it: the Commission should be in no hurry to affirm general principles, in other words general rules applicable to all the offences or even to certain groups of offences. The Special Rapporteur had been perfectly clear on that point.

29. There was another point on which the Special Rapporteur had merely stated his preference, which he himself shared and would discuss, attempting to show how far they committed the Commission and what consequences they entailed. On the basis of the debates in the Commission and the Sixth Committee of the General Assembly, the Special Rapporteur had intimated that the Commission should concentrate its attention on offences committed by individuals. A very important question immediately came to mind, which the Special Rapporteur had mentioned in passing. The Commission was studying offences against international peace and security and against the peace and security of mankind in several contexts. In the context of part 1 of the draft articles on State responsibility, it had provisionally adopted on first reading article 19, entitled "International crimes and international delicts", and it had entrusted Mr. Riphagen with the delicate task of resolving the awkward problem of State offences. In the context of the draft Code of Offences against the Peace and Security of Mankind, it had before it a report dealing with offences by individuals. Hence it would not be considering State offences as such in that context. But a number of problems would still arise.

30. The Special Rapporteur rightly believed that the Commission should substantially follow the old military strategy of attacking where one was strong and not where one was weak. In other words, the Commission should first attack what was relatively easiest in the most difficult topic it had ever had to study, and not exclude, but take up later, what was most difficult. The easiest case was that of individuals committing offences in their capacity as agents of the State, the term "agent" being taken in the broadest sense of "any person through whom the State acts" —by analogy with the definition of the expression "agent of the United Nations" given by the ICJ in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*,[14] namely "any person through whom [the Organization] acts". The Commission should deal with offences committed by individuals, but individuals who had been able to act because they were agents of the State. It was bound to adhere to that definition because it had already taken a position in part 1 of the draft articles on State responsibility. But in doing so, it would come up against a problem of obvious importance: it would have to examine the responsibility of the State for those offences, and do so in the context of the draft articles on State responsibility. Like the Special Rapporteur, he thought the Commission should begin by examining the individual, strictly criminal, responsibility of natural persons who had acted in the name of the State or on its behalf, because that was the most serious case, and perhaps also the most urgent and the easiest.

31. Nevertheless, at a later stage in its work on the draft code, the Commission might explore the possibility of broadening the concept of international crime to include activities carried out collectively by individuals. On that matter, he did not entirely agree with the Special Rapporteur, who had rather optimistically suggested that only through State machinery could large-scale crimes be committed.

[12] League of Nations, document C.546(1) M.383(1).1937.V.

[13] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*c*) (iv).

[14] *I.C.J. Reports 1949*, p. 174.

Unfortunately that was not the case. Indeed, some countries were now completely destabilized constitutionally, ruined, jeopardized by international gangs of drug traffickers—criminal interests, private certainly, but powerful. It was a fact that one great Power—the United States of America—was unable to guard its air frontiers in such a way as to stop the entry of substantial quantities of narcotic drugs into its territory. The United States was a political Power and its stability was not threatened, but what of the poor, underdeveloped States all over the world that could be destabilized in that way?

32. In taking such a firm position on working methods, he was not ruling out the possibility that the Commission might examine international offences by individuals within the framework of the draft code. He hoped, however, that it would do so at a later stage because, as the Special Rapporteur had pointed out, in dealing with that matter the Commission would be faced with confused and complex situations. The position was certainly clear with respect to narcotics, but less so in regard to mercenaries. There were mercenaries who were agents of a foreign State, and it was to them that the Commission should give attention first, whatever definition of "mercenarism" it adopted; and there were other forms of mercenarism. He was not trying to reduce the problem of mercenarism to the problem of international responsibility between States, but simply hoped that the Commission would begin by dealing with the problem of responsibility deriving from the acts of an individual who performed State functions.

33. In following that desirable course, the Commission would have to resolve many problems. First of all, there was the purely material, minor problem of the order of work. If the Commission began by examining the most important and serious cases concerning the individual responsibility of State agents, it would have to take a decision on the problem of the relationship between the definition of an international offence between States and the definition of an international offence by agents representing the State. It would therefore be quite natural to carry out the work on State responsibility and the work on the draft code concurrently, and it would even be natural to begin with State crimes. The practical difficulties were certainly great, but he wished to draw the attention of the Commission to one point. The Special Rapporteur had indeed stressed that it was impossible to separate the criminal responsibility of a leading politician who had ordered and prepared an act of aggression from the criminal responsibility of the State; in other words, it was impossible completely to separate the definition of aggression by a State from the definition of aggression by an individual. In that connection, he fully agreed with the Special Rapporteur that, in regard to individual responsibility, the Commission must rely on already existing material. There already existed a definition of aggression, which was an integral part of the definition of the individual crime of aggression. But was that conclusion absolute? Should not the Commission nevertheless adjust the definition of the individual crime in the light of the definition of the State crime?

34. On that point, he shared the doubts of the Special Rapporteur concerning the preparation of aggression. Personally, although he was prepared to modify it, he would for the moment be inclined to take the following position: the crime of aggression as a crime between States presupposed either a threat of aggression from outside or a beginning of consummation. He believed it would be difficult and unsatisfactory to include the preparation of aggression in the draft code, not only because of questions of evidence, but also because a crime between States had such international consequences and would require from the Commission a definition, an initiative on sanctions of such a nature that he agreed the preparation of aggression should be excluded from those offences, as the Special Rapporteur had proposed. But his position was not the same in regard to individual crimes, provided, of course, that the preparation of aggression was completely manifest and proven. Supposing that, in the historic case of the "Green Plan", a deliberately prepared act of aggression,[15] the 1944 plot of the German generals had succeeded before Munich: there would have been no international aggression, but the authors of the plot would have been the first to demand that those who had so meticulously prepared the aggression should be prosecuted, even though the aggression had not taken place.

35. The Commission should therefore consider, offence by offence, crime by crime, whether there was an international definition, accepted by the United Nations, of a crime between States. That was why he thought the Commission should begin with the crime of aggression, of which there was a definition. In the absence of a definition, the Commission should, in the context of the consideration either of State responsibility or of the draft code, first see what was the most reasonable definition it could give of an international crime between States according to the elements in its possession, and then proceed to examination and adaptation. As the Special Rapporteur had pointed out, the question of individual criminal responsibility involved criminological techniques relating to individuals, the circumstances of intent and knowledge, the conduct of the concerted action, complicity and machinations. The Commission would have to consider whether the individual responsibility of persons acting on behalf of a State needed to be adapted. He realized, of course, that solutions might differ according to the offence. He was glad, therefore, that in the plan he had proposed the Special Rapporteur had wisely reserved the general principles and enumerated a whole series of offences, beginning with the most serious, the best defined, the clearest, and those for the Commission already had very important elements available.

36. The foregoing remarks related both to the plan as a whole, on which his position was extremely firm, and to the scope of the draft. There, he was less decided in regard to principle, but very decided on method. He believed that the Commission should

[15] Plan for the invasion of Czechoslovakia secretly decided on in May 1938 but not carried out owing to the dismembering of that State in the months following the Munich Conference (29-30 September 1939).

begin with the specific case of the responsibility of individuals who had led a State to commit an international crime.

37. Referring again to article 19 of part 1 of the draft articles on State responsibility—an article which had been criticized, but which was the best the Commission had been able to produce—and stressing that, for the time being, that article was nothing less than a programme, a complete general directive, in which the Commission had listed three groups of international crimes and delicts, although without stating the régime applicable to an international crime, he raised the question what régimes would govern international crimes between States, and international crimes by individuals. The Commission did not yet know. It would know if it had defined the general principles and if it had taken a position on at least the minimum consequences. He stressed that point because the Special Rapporteur had cautiously made a brief reference, both in his report (A/CN.4/387, para. 63) and in his presentation of it, to what the minimum régime might be. What would be the régime governing individual international crimes? The maximum system would be an international court, which presupposed the obligation to punish or extradite which in turn simply presupposed the recognition of a universal jurisdiction, in other words the faculty, but not the obligation, to punish.

38. He had thought, listening to the Special Rapporteur presenting his report, that if the Commission had not taken a position it was because it could not do so. Indeed, for certain offences, certain crimes, the situation was not simple. It would be fairly easy to begin with the crime of aggression, but in the case of other offences, such as violation of the right of peoples to self-determination, the situation was much more complex, because some Governments would believe that peoples had a good right to self-determination—the historic decolonization, nearly completed—but other Governments would hold that there was another right of peoples to self-determination, designed, conceived and directed with a view to the complete destabilization of States which had not yet been able to demonstrate the advantages of their structures and to achieve national unity. He certainly did not reject the idea of making violation of the right of peoples to self-determination an international crime between States. He also accepted the idea that there could be an individual international crime by State agents in some cases. But there the Commission would come up against a formidable obstacle if it still wished to impose the obligation to judge or to extradite. Indeed, some very old countries which had suffered from excessive centralization, and were now faced with violent manifestations of unsatisfied regionalism, would not easily agree to bind themselves too absolutely and rigorously by obligations as strict as the obligation to punish or extradite under conditions which no longer really respected human rights.

39. In that connection, he recalled that the Commission had decided, in the context of the draft code under consideration, that an individual violation of a human right was not an offence against international peace and security;[16] and when considering article 19 of part 1 of the draft articles on State responsibility, it had clearly stated that the only violations covered were collective human rights violations involving action against an entire social group. Those were valuable pointers. Nevertheless, it should not be forgotten that there was individual protection of human rights, and that there could be conflict between such individual protection and the mechanisms the Commission would set up to punish a number of international crimes, individual certainly, but directed against peace, against security or against a community.

40. In conclusion, he stressed that the Commission could only begin by thoroughly examining the offences and international crimes, case by case, always bearing in mind the grid of general principles, to see how they were defined and when they applied in each particular case. As it advanced from the easiest and ripest cases to the most difficult, the Commission would gain understanding. The work would be long and arduous, but it was indispensable.

41. Mr. BOUTROS GHALI noted that, in chapter II of his excellent report (A/CN.4/387), dealing with "Acts constituting an offence against the peace and security of mankind", the Special Rapporteur had referred to aggression, the threat of aggression, preparation of aggression, interference in the internal or external affairs of a State, terrorism and colonial domination. He himself believed that a new concept, developed by OAU, could be included in that list, namely the concept of subversion, which was related to indirect aggression, terrorism and mercenarism, and which had been the subject of valuable work on doctrine, to which it would be useful to refer.

42. He pointed out, first, that the Charter of OAU,[17] in article III, paragraph 5, stated the principle of "unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other State". He then recalled that the heads of State and Government of OAU had adopted, at their second ordinary session, held at Accra in October 1965, resolution 27,[18] in which they had listed five possible forms of subversion: African subversive activity carried out from one African State against another; non-African subversive activity planned by non-African Powers and carried out from one African State against another; non-African subversive activity planned by non-African Powers and carried out directly against an African State; non-African subversive activity directed against the whole African continent; non-African subversive activity directed against OAU. They had also listed methods of subversion: launching or financing a press or radio campaign against any member State of OAU; causing dissension within a member State of OAU by fomenting racial, religious, linguistic or other types of disturbance; aggravating existing differences. That

[16] *Yearbook ... 1984*, vol. II (Part Two), p. 12, para. 37.

[17] United Nations, *Treaty Series*, vol. 479, p. 39.

[18] Declaration on the Problem of Subversion (AHG/Res. 27 (II)).

resolution had been discussed at length and had later been mentioned at various conferences of heads of State and Government of OAU.

43. He believed that subversion, together with State terrorism, would become a new form of aggression or threat of aggression, with which the Commission should attempt to deal. In so far as small States and developing States did not have the means to wage conventional wars or to resort to aggression as defined in the Definition of Aggression, they would resort to precisely those indirect forms of aggression, which could lead to destabilization and external interference, and were a definite threat to peace and security.

44. The Special Rapporteur could therefore try to take up that notion of subversion, which would probably enable the Commission better to define such concepts as terrorism, mercenarism and the other forms of indirect aggression, which were becoming more and more dangerous and threatening international peace, security and stability.

The meeting rose at 12.50 p.m.

1880th MEETING

Monday, 13 May 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Jacovides, 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.

Welcome to Mr. Arangio-Ruiz and Mr. Roukounas

1. The CHAIRMAN congratulated Mr. Arangio-Ruiz and Mr. Roukounas on their election and, on behalf of the Commission, extended a warm welcome to them.

Organization of work of the session (*concluded*)*

[Agenda item 1]

2. The CHAIRMAN said that the Enlarged Bureau had held a meeting on Friday, 10 May 1985, at which it had decided to recommend that the Commission should adopt the following timetable:

Draft Code of Offences against the Peace and Security of Mankind (item 6)	9-24 May
State responsibility (item 3)	28 May-7 June
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 5)	10-21 June
Jurisdictional immunities of States and their property (item 4)	24 June-5 July
Relations between States and international organizations (second part of the topic) (item 9)	8-10 July
International liability for injurious consequences arising out of acts not prohibited by international law (item 8) *and*	
The law of the non-navigational uses of international watercourses (item 7)	17-19 July
Draft report of the Commission and related matters	22-26 July

Consideration of a given topic would normally start on a Monday and finish on a Friday. If necessary, however, adjustments would be made and four reserve days, 11, 12, 15 and 16 July, had been set aside for that purpose. It had been suggested that only three days should be devoted to the consideration of agenda items 7 and 8, since two new special rapporteurs had to be appointed for those topics. The three days could, however, be extended to five days if need be.

It was so agreed.

Drafting Committee

3. The CHAIRMAN said that the Enlarged Bureau had also recommended that the Drafting Committee should be composed of the following members: Mr. Calero Rodrigues (Chairman), Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair and Mr. Ushakov, together with Mr. Flitan, *ex officio* member in his capacity as Rapporteur of the Commission. All members of the Commission, however, would be welcome to attend the meetings of the Drafting Committee if they so wished.

It was so agreed.

4. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that the Drafting Committee should hold its first meeting on Tuesday, 14 May 1985, and then meet every Tuesday and Thursday afternoon during the remainder of the session. He further suggested that the Drafting Committee should first deal with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

It was so agreed.

Gilberto Amado Memorial Lecture

5. The CHAIRMAN said that the Enlarged Bureau had further recommended that the informal consultative committee on the Gilberto Amado memorial lectures should be composed of the fol-

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* Resumed from the 1877th meeting.