

Document:-
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Summary record of the 2383rd 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:-
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from the territorial integrity or political independence of a State. However, the Commission was still far from securing a satisfactory definition in terms of criminal responsibility. It would help things if the Commission could decide whether a prior determination by the Security Council was a necessary precursor to a legal finding of guilt and if it decided that the crime of aggression should be tried only by an international criminal court.

The meeting rose at 12.55 p.m.

2383rd MEETING

Thursday, 11 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,² A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. DE SARAM, commenting in general on the draft Code of Crimes against the Peace and Security of Mankind, said that the question of the crimes to be regarded as crimes against the peace and security of mankind had always been enthusiastically debated, whether in the Commission, the Sixth Committee of the General Assembly or other deliberative bodies, and it was always likely to be a matter of some controversy. That was not surprising, since the words “against”, “peace”, “security”, and “mankind”, which appeared in the title of the draft Code, were difficult to define and open to subjective interpretation. The draft Code, unlike the other topics on the Commission’s agenda, touched on some of the

most sensitive aspects of relations between States, some of the most fundamental principles and some of the most important provisions of the Charter of the United Nations. It also contained non-legal or quasi-political components that fell outside the field of competence of the Commission’s members.

2. Yet the time had come for the Commission, which had so far been divided as to a “minimalist” or a “maximalist” approach, to take a firm stand on the scope *ratione materiae* of the draft Code if it wanted to submit the result of its work to the General Assembly within a short time. Obviously, the decisions to be taken by the Commission in that respect should be arrived at by way of a consensus and the Commission’s overall objective should be to agree a consensus text. It was apparently with that in mind that the Special Rapporteur had endeavoured to put forward proposals that could command the support of all members of the Commission, notwithstanding their individual concerns, so that the General Assembly could quickly be provided with a text that it could adopt by a large majority. In his view, those proposals provided an extremely constructive basis for discussion and should enable the Commission’s work on the draft Code to proceed. It was important, however, for the Commission to make it quite clear in its report that its objective had been to agree a text that was the subject of a clear consensus. That search for a consensus showed that the Commission was contributing to the progressive development of the law. Obviously, however, a code that was the result of decisions by consensus could not be regarded as comprehensive and definitive. It should therefore be made clear, perhaps in a preamble to the Code, that the scope of the Code could be enlarged in the future by way of amendments as and when further possibilities for consensus emerged. Accordingly, it would be necessary to record in the Commission’s report ideas and views that had been expressed but not adopted in order not to stand in the way of a consensus.

3. The most difficult question concerned the general nature and purpose of the Code, on which opinions were apparently sharply divided. In the view of some members of the Commission, the purpose of the Code was to declare that some acts were so fundamentally outrageous that they must be characterized as crimes and appear as such in a code of crimes against the peace and security of mankind, the principal purpose of which was to “declare” that they must be the object of worldwide condemnation. Other members considered that the purpose of the Code was to lay down precise rules for application by national or other criminal courts when they had to try particular individuals being prosecuted for crimes. A code that performed both functions, namely, that would at the same time be a general declaration, albeit in the form of a convention, and contain precise provisions for application in criminal proceedings, might be confusing—and that would diminish its effectiveness. Consequently, if the Code was to be a meaningful instrument, its provisions must be applicable in the prosecution of individuals. It was therefore necessary to formulate the provisions very precisely and, in so far as possible, on the basis of existing general international law, that is to say mainly treaty law and such other rules as “were evidence of a general practice accepted as

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

law", within the meaning of paragraph 1 (b) of Article 38 of the Statute of ICJ. Those requirements would, of course, have implications for the decisions that the Commission would take on the specific elements to be included in, or excluded from, the Code. The proposals which had been made by other speakers in that connection should be considered carefully. Attention had been drawn to certain acts which could in some cases be attributable to individuals and the nature and gravity of which were such that it should be possible to arrive at a consensus on the need to place them within a code of crimes against the peace and security of mankind. Care should, however, be taken not to move away from the strict context of the subjects mentioned during the debate. For instance, in his view, the Commission should not in any way diminish the weight of the rule of international law that condemned the unilateral recourse to force except in self-defence.

4. As to the question of aggression, if the purpose of the Code was taken to be the establishment of precise norms which would ultimately enable individuals to be prosecuted—an approach he favoured—the Definition of Aggression³ was not appropriate. True, that definition had been the subject of a consensus, but it had been a fragile and carefully balanced consensus, as Mr. Villagrán Kramer had pointed out (2382nd meeting). Three possibilities were open to the Commission: (a) it could redefine aggression, which was virtually impossible; (b) it could make no reference to it in the Code, which would not be very well advised and could undermine the credibility of the Commission; or (c) it could use, but not define, the expression "war of aggression", which appeared in the Charter of the Nürnberg Tribunal⁴ and in the principles recognized by the Tribunal.⁵ The last of those solutions, though not perfect, seemed to be the most appropriate and a clear explanation of the reasons for such a choice should be given in the report.

5. Lastly, it was essential for Governments to have adequate time and information so that they could be informed of the proposed provisions and their implications, particularly concerning matters relating to national criminal jurisdictions. Without such prior briefing, it would be difficult for a number of countries to participate fully in the General Assembly's deliberations on the draft Code. The more fully Governments participated in the discussions and negotiations on the matter, the more readily they would appreciate the purpose and provisions of the Code and abide by the resulting treaties and conventions.

6. Mr. GÜNEY noted with satisfaction that, in the thirteenth report (A/CN.4/466), the Special Rapporteur had managed to reduce the number of crimes falling within the scope of the provisions of the Code, retaining only those crimes clearly delimited from a legal standpoint and universally regarded as "crimes of crimes", in other

words, acts whose status as a crime against the peace and security of mankind was indisputable. In so doing, he had taken account of political realities and clearly expressed political wills. The thirteenth report had thereby gained in concision and clarity while retaining the qualities of the previous reports and the Special Rapporteur was to be congratulated for accomplishing a valuable and commendable task.

7. Turning to the articles themselves, he noted that the definition of aggression proposed in draft article 15 (Aggression), adopted on first reading, covered all "acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" (para. 4 (h)) and was based on the Definition of Aggression adopted by the General Assembly. In his view, the Commission would be wise to restrict itself to a general definition together with a non-exhaustive enumeration. Moreover, that was the practice followed in the international conventions that defined international crimes. With regard to genocide, he endorsed the Special Rapporteur's opinion that it was preferable to stay close to the text of the Convention on the Prevention and Punishment of the Crime of Genocide, the only crime on which the international community was in very broad agreement. In draft article 21 (Systematic or mass violations of human rights), as the elements constituting the crimes referred to were not defined, it would be desirable further to specify the scope of the restriction introduced by the expression "in a systematic manner or on a mass scale" and to state clearly that the Code would apply only to acts of exceptional seriousness and of an international scope. In draft article 22 (Exceptionally serious war crimes), attacks against civilian populations should be included among the acts listed.

8. The inclusion of draft article 24 (International terrorism) constituted real progress, for terrorism in all its forms was universally regarded as a criminal act which was also international in scope when it was systematic and prolonged. That text was all the more important, given that no single international definition of terrorism existed. The scope of the article should perhaps be extended to include not only acts of terrorism committed by agents or representatives of a State, but also those committed by individuals acting on behalf of groups or private associations. As the international community had contented itself with drafting conventions on specific acts that were unanimously condemned, it was important to devote an article in the draft Code to that question and it would be necessary to explain clearly in the commentary the reasons for its inclusion. Lastly, the increasingly close linkage between international traffic in narcotic drugs and international terrorism—"narco-terrorism"—fully justified the inclusion in the draft Code of a provision on illicit traffic in narcotic drugs, which, on account of its destabilizing effect on certain countries, was truly a crime against the peace and security of mankind.

9. Mr. YAMADA said that he shared the view of the Special Rapporteur on article 15 that a precise legal definition of the concept of aggression was almost impossible and that he was thus prepared, for practical reasons, to accept the new definition proposed. However, it must not be forgotten that aggression was more than just the use of armed force. It implicitly contained the element of

³ General Assembly resolution 3314 (XXIX), annex.

⁴ See 2379th meeting, footnote 12.

⁵ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (hereinafter the "Nürnberg Principles") (*Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45).

an organized attack. He approved of the new wording of article 15, paragraph 1, which took account of the comments of the Government of Paraguay⁶ and which should also be used in paragraph 1 of articles 21, 22, 24 and 25. He noted, however, that, in the new paragraph of article 15, the Special Rapporteur had replaced the word “committed” by the words “planned or ordered”, but had not done so in the following articles. In his opinion, paragraph 1 of each of the articles should mention only the principal act of a crime, that is to say “committed”, for any person who planned or ordered the commission of a crime was an accessory before the fact and could be punished by virtue of the provisions of article 3 (Responsibility and punishment) of chapter II (General principles).

10. With regard to draft article 19 (Genocide), he had no comment on paragraph 2, as it reproduced article III of the Convention on the Prevention and Punishment of the Crime of Genocide. However, he wondered how the concept of “direct and public incitement” in paragraph 3 of article 19 was to be construed and sought the views of the Special Rapporteur and of the Commission on that point.

11. He raised that question because Japan had not acceded to the Convention on account of what it saw as a legal obstacle constituted by the provision on incitement to commit genocide contained in article III of the Convention. He pointed out that, although the terms “incitement” and “abetment” were sometimes treated as synonyms, they were entirely different concepts in Japanese criminal law, in which “abetment” was accessory to a principal crime, while “incitement” was an independent crime.

12. Illustrating his point, he explained that a person who was making a public statement in front of a crowd and who accused a foreign minority group residing in Japan of harming the country’s traditional culture and exhorted the crowd to eliminate it would be charged with the crime of “abetment” if the crowd reacted positively by committing hostile acts against the minority group, but not if the crowd did not respond to his exhortations. However, the speaker might be prosecuted for “incitement” even if the crowd did not respond to those exhortations because the crime of “incitement” was an independent crime. In order not to encroach on freedom of expression, “incitement” was rarely cited in Japan, and only in the most serious cases.

13. He was not opposed in principle to using the word “incitement” in article 19, paragraph 3, but would like the denotation of that word to be more clearly defined. Recalling that Mr. Fomba (2382nd meeting) had stressed the seriousness of acts of instigation in Rwanda, he wondered whether Mr. Fomba had had in mind the concept of “abetment”. It was his understanding that the concept of incitement in article 19 referred to an independent crime and applied only to genocide (since it did not recur in any other provision of the draft articles), but he would be grateful for further information and clarifications on the points he had raised.

14. With regard to article 19, paragraph 4, he noted that “attempt” was categorized as a crime. “Attempt” was an effort to commit a crime, amounting to more than mere preparation or planning for it. If the Commission decided that the Code must punish complicity, which included acts of preparation and planning, it must also punish “attempt”. The Commission must also decide whether it was to be punished only in the case of genocide or in the case of other crimes as well. Specifically, was it necessary to include a separate clause on “attempt” in each article or should there be a single clause setting forth the general principle at the start of chapter II?

15. With regard to article 21, noting that the Special Rapporteur gave a detailed explanation of his reasons for omitting the mass element in his new formulation, he said that he personally was not convinced that their systematic nature alone was sufficient to characterize the crimes covered by that article. He reserved the right to comment on other draft articles at a later stage in the debate.

16. Mr. KUSUMA-ATMADJA, congratulating the Special Rapporteur on his report, said that, after the draft articles had been considered on first reading, he had had a difficult choice to make between a maximalist and a restrictive approach. He had wisely chosen the minimalist tendency by reducing the number of crimes in the Code to six. If the definition of a crime against the peace and security of mankind was that the crime must affect mankind as a whole, then the inclusion in the Code of international terrorism and illicit traffic in narcotic drugs raised a problem, all the more so as wilful and severe damage to the environment had been withdrawn from the list of crimes, even though it seemed similar to the two crimes just mentioned. Although international terrorism and illicit traffic in narcotic drugs were serious, it was open to question whether they were crimes against the peace and security of all of mankind. In cumulative terms, perhaps they were, but was that not also true for wilful and severe damage to the environment? To make his point more clearly, he suggested that the Commission should look at the distinction between extremely serious international crimes and crimes against the peace and security of mankind in the context of its work on the draft statute for an international criminal court.

17. At the forty-sixth session, the question of how the Commission should proceed with its work had come up in view of the link between the draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind.⁷ The Commission had decided to carry out those two activities in parallel, while seeking to ensure the best possible concordance between the two drafts. Two different approaches had been used: a more theoretical one for the draft Code and a pragmatic one for the draft statute, on which rapid results had been required. The two parallel approaches had been followed under the guidance of the Special Rapporteur, who had seen to it that they were pursued with success. The Commission had now completed its work on the draft statute for an international

⁶ *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/448 and Add.1.

⁷ *Yearbook* . . . 1994, vol. II (Part Two), para. 56.

⁸ *Ibid.*, paras. 42-91.

criminal court⁸ and was considering the draft Code of Crimes against the Peace and Security of Mankind on second reading.

18. Turning to the list of crimes contained in the thirteenth report, he said that, out of the same concern for harmonization, he was in favour of retaining the first four offences mentioned in the draft articles and taking up the remaining two in the context of the system set up during the work on the draft statute. That should not give rise to too many problems for the crime of illicit traffic in narcotic drugs, but the crime of international terrorism was a more borderline case. It was to be hoped that, over the next five years, the work on the two drafts would have advanced enough so that a more meaningful attempt at harmonization could be made.

19. In conclusion, he said he had every hope that, when the international criminal court had been established, the two systems provided for by the two drafts could be combined to create a permanent international criminal court set up by a treaty or a convention. That dream, which might come true in 50 years, could in any case be the inspiration for the Commission's activities.

20. Mr. JACOVIDES said he owed it to the memory of the late Ambassador Rossides, a former member of the Commission and a strong advocate of the Definition of Aggression,⁹ to reply to the comments Mr. Rosenstock had made on the definition of aggression (2382nd meeting). Further research and discussions with other members of the Commission, including Mr. Rosenstock, had confirmed his impression that the Commission's work on the draft Code, begun in 1947, had long been impeded by the lack of a widely accepted definition of aggression. That obstacle had been removed with the adoption by the General Assembly of the definition of aggression, which had been the culmination of seven years of work.

21. By its resolution 2230 (XXII), the General Assembly had established a Special Committee on the Question of Defining Aggression consisting of 35 Member States which had been responsible for considering all aspects of the question—all aspects, not only the political ones—so that an adequate definition of aggression could be prepared. The Special Committee had held seven sessions from 1968 to 1974 and, at its 1974 session, had adopted by consensus a draft definition of aggression which it had recommended to the General Assembly for approval.¹⁰ The General Assembly had adopted that definition, likewise by consensus, in its resolution 3314 (XXIX).

22. While he did not think that that definition of aggression was necessarily perfect, it was still valid in that it provided as good a definition as could be achieved through compromise. He referred in that connection to the pertinent comments made by Mr. Villagrán Kramer (2382nd meeting) on the status of the definition in Latin American regional law.

23. However, with regard to criminal responsibility in the current version of the draft article on aggression, he could go along with the proposal made by the Special Rapporteur.

24. Before concluding, he said he had not heard any comments on the second point he had raised (2382nd meeting), namely, whether the Security Council had ever relied on or been guided by General Assembly resolution 3314 (XXIX), adopted after seven years of work, in determining the existence of an act of aggression as part of its responsibilities under Article 39 of the Charter of the United Nations. He would be grateful for information about the Council's practice in that regard, for it would be indicative of the extent to which the Council took seriously the resolutions that the General Assembly adopted by consensus.

25. Mr. YANKOV expressed his thanks to the Special Rapporteur for having taken account of the comments made by Governments and the members of the Commission. He had done so by avoiding highly controversial issues, not out of fear of polemics, but in an effort to base his proposals on common ground, and by limiting the list of crimes to those that met the requirements of seriousness and "massiveness" that could jeopardize the international legal order.

26. In the past, the idea of a comprehensive conceptual definition comprising the essential objective components of crimes against the peace and security of mankind had been attractive. The turn taken by the discussion, however, had shown that, at the present stage at least, such a definition was impossible and might vitiate the very essence of the Code. Nevertheless, an effort should be made to set out in the body of the Code itself, and not only in the commentary, the inherent characteristics of crimes against the peace and security of mankind, such as seriousness, "massiveness" and effects on the foundations of the international legal order. That would facilitate the task of any court that might some day use the Code, for it would have at its disposal a line of reasoning that was better structured from the legal point of view.

27. Referring to some of the crimes set out in the restricted list and, first, to aggression, he said he agreed that General Assembly resolution 3314 (XXIX), should not be set aside entirely. The Assembly's intention had clearly been not to incorporate in a code of crimes the Definition of Aggression, but rather to provide political guidance to a political decision-making body, not to a judicial organ. As a lawyer, he could not condone the realism, and indeed opportunism, with which some members of the Commission accepted the power structure within the international community or the fact that, of the nearly 200 States making up that community, the five permanent members of the Security Council never committed illegal acts because they had veto power. The democratic principles of law required equality before the law and, although he was not a Utopian, he sincerely hoped a legal order marked by equal application of the law for all, without exception, would soon come into being. That was why he believed, in respect of article 15, that a listing of certain limitations and modalities would be in conformity with the general principle of equality before the law. The Charter gave the Council the power

⁹ See footnote 3 above.

¹⁰ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr.1), pp. 11 et seq.*

to determine the existence of a situation that threatened the peace and security of mankind, that is to say of an act of aggression. But the Council was not justified in going further by setting up courts to which it gave instructions on the penalties to be applied to individuals. Personally, he regretted that the United Nations had so easily accepted the Council's acquisition of such competence, indeed super-competence, in legislative matters. He remained convinced that it should be indicated, if not in the body of the article, at least in the commentary, that a decision by the Council could not have the effect of determining the nature of the penalty to be imposed on an individual who had committed an act of aggression. That, at least, would represent some progress on the road towards equality before the principles of law.

28. He could give his general approval to what the Special Rapporteur said about the crime of genocide in his thirteenth report. He also shared the view of the Government of the United Kingdom about the relationship between the Code and article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which provided for the compulsory jurisdiction of ICJ in the case of disputes between Contracting Parties, and he thought that that rule might also be applied to the punishment of individuals. With regard to the comment of the Government of the United States that the crime of genocide was already defined by the Convention, there were other factors to be taken into consideration, for example, the question of incitement, raised by a previous speaker.

29. Article 21 required more detailed consideration because, once again, the emphasis ought to be placed on at least the three criteria mentioned, namely, seriousness, massive nature, and violation of the international legal order. The definition of such crimes ought to be similar to the one for crimes against humanity, in order to make a clear distinction from violations of human rights under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, respectively, and from the machinery provided for therein.

30. Article 22 constituted a good basis for the work of the Drafting Committee.

31. With regard to international terrorism (art. 24), the list of acts should be reviewed if the aim was to stick to the concept of "crimes of crimes". There again, the three objective criteria of seriousness, massive nature and violation of the international legal order ought to make choices possible.

32. In the case of article 25 (Illicit traffic in narcotic drugs), whatever the seriousness of the crimes, they did not have a place in the Code, for the existing legal framework offered the necessary means and machinery for their suppression.

33. In contrast, he thought that in shortening the list of crimes the Special Rapporteur had been wrong to delete wilful and severe damage to the environment. With regard to the Special Rapporteur's criteria, it was not unrealistic to envisage that a group of terrorists or an organization possessing the necessary materials, techniques

and knowledge could create a situation equivalent to the Second World War by damaging the environment.

34. The CHAIRMAN, speaking as a member of the Commission, said that the drafting of an international criminal code was the axis on which the whole international criminal justice system was to turn. From the beginning of the Commission's work on the draft Code, it had been apparent that progress would be made only by virtue of the agreements and consensus which could be reached on a few important problems.

35. The definition of aggression had been the first stumbling block in the 1950s. When Mr. Thiam had been appointed Special Rapporteur, at the thirty-fourth session, in 1982, there already existed a definition regarded as an important success of the international community and supposed to offer a sufficient basis for determining an act of aggression.

36. Other elements of the Code had caused difficulties, including its actual purpose. Even today, some members of the Commission had different preferences as to the form which the Code should take: convention, draft declaration or model principles enabling a State to react in the absence of a central machinery, or an international criminal code. The approach finally adopted, that of a code based on national codes and containing precise definitions, rules of evidence and other carefully defined elements to enable criminal actions to be brought, entailed an extremely difficult exercise which, as the example of the draft statute for an international criminal court showed, would take very many years to complete. The statute, very carefully drafted and completed by the Commission at its forty-sixth session, had been submitted to the General Assembly. It was assailed by all sorts of questions and now seemed to be hanging fire.

37. The essential purpose of the Code ought to be to define a set of crimes in general terms in order to provide the various organs of the international community, including States themselves, with guidelines for determining whether certain acts or activities were criminal or unlawful. From that standpoint, the actual definition of the crimes would have less importance and could survive with less precision. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,¹¹ as well as other declarations adopted by the Sixth Committee, offered a framework for legal deliberation and guidance for the behaviour of States in their bilateral and multilateral relations. A declaration of that kind on a code of crimes might also be very useful and would not be subject to the same rigour as an actual code. In any event, whatever the nature or form of the Code, it would never cover all the crimes which people, individually or collectively, would like to have included in it. In many respects, it was destined to be imperfect. For example, the inclusion of certain crimes in the Code would not necessarily determine the fate of other crimes which had been excluded for various reasons. In that sense, the reduction of the number of crimes contained in the list adopted on first reading from

¹¹ General Assembly resolution 2625 (XXV), annex.

12 to 6 had no substantial effect on the seriousness or the nature of those crimes in international practice and doctrine. Perhaps the crime of colonial domination no longer had more than a historical importance. It had nevertheless been committed for more than two centuries and its victims had numbered in the millions. That was also true of apartheid, which for a very long time had affected the peace and security of mankind, and of crimes against humanity, which were not new phenomena. While he trusted the view of the Special Rapporteur that a shorter list of crimes would make the Code more easily acceptable for a larger number of States, he would truly back that view only if the Special Rapporteur made it the final conclusion of the second reading. Personally, he would have liked to see at least colonial domination and apartheid included in a Code conceived in fact as a symbolic instrument which could be used by individual States to identify certain acts or activities. If the Code could perform at least that function, the achievement would be a considerable one.

38. The Special Rapporteur had used two criteria to decide whether a given crime should be included in the draft Code: the seriousness of the crime and its acceptance by States for inclusion. The second criterion was debatable, since the Commission's role was precisely to submit its legal assessment of doctrine and State practice for subsequent review by States. It could therefore not prejudge their position and eliminate some crimes on the basis of the limited number of comments which had been submitted to it, especially since those comments were generally not final ones, as shown by the case of the statute for an international criminal court. Accordingly, the comments received from Governments, certainly few in number, were insufficient for establishing any *opinio juris* and could not justify the deletion of some crimes from the list adopted on first reading.

39. Another important subject of debate in the Commission had in fact two aspects. First, should aggression be defined in the Code or should the issue be left as it stood? Secondly, should the Security Council be the only organ competent to determine aggression and its legal consequences? The issue was a very important one which was and would remain interconnected with the question of the right of veto in the Council. Therefore, as the previous speaker had emphasized, the whole international system of criminal justice must meet the criteria of universality, objectivity, impartiality and equality of all before the law.

40. However, a decision by the Commission to leave it to the Security Council to define and determine aggression in a specific case would not bring all the other organs of the international community to a standstill or freeze any legal consequence. The general powers of the Council were not an obstacle to the exercise of their own powers by other organs, subject to certain provisions such as Article 12 of the Charter of the United Nations.

The meeting rose at 11.50 a.m.

2384th MEETING

Tuesday, 16 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,² A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. IDRIS said that the proposals and comments contained in the Special Rapporteur's excellent thirteenth report (A/CN.4/466) provided a reasonable balance for the structure of the draft Code of Crimes against the Peace and Security of Mankind. He appreciated the Special Rapporteur's political wisdom and pragmatism in proposing that the list of crimes should be more restricted. However, there should not be any change in the aim of drafting an instrument of the widest possible acceptability and effectiveness.

2. The Special Rapporteur's intention to limit the list to crimes that were generally agreed to constitute crimes against the peace and security of mankind was a wise one, but it entailed rethinking the question of whether the title of the Code should refer only to those crimes. If the criterion was crimes whose characterization as such was hard to challenge, then it would certainly cover crimes not only against the peace and security of mankind but also crimes that threatened the survival of mankind. Mass killings of groups of people, prevention of births within a group, imposition of living conditions intended to bring about the physical destruction of a group, and the various forms of genocide were some examples of such crimes. Similarly, crimes against humanity such as international terrorism or illicit drug trafficking were not only crimes against the peace and security of man-

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook . . . 1995*, vol. II (Part One).