

Document:-
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Summary record of the 1756th 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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(<http://www.un.org/law/ilc/index.htm>)*

of a reasonable number of meetings of the Planning Group at the present session.

39. Mr. CALERO RODRIGUES asked for an assurance that the recommendation of the Enlarged Bureau took due account of the availability of documents. He would be strongly opposed to embarking upon the consideration of any item unless the basic documentation had been circulated to members at least two weeks in advance. As for the possibility of afternoon meetings, the Drafting Committee had enough work to keep it occupied on most afternoons throughout the session, so the issue hardly arose.

40. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, in view of its particularly heavy programme of work, the Drafting Committee would have to begin its work the following week and perhaps schedule other meetings in addition to those in the afternoon. It would examine successively the draft articles on jurisdictional immunities of States and their property, the draft articles on State responsibility and the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, work that would take it approximately up to mid-June.

41. Mr. DÍAZ GONZÁLEZ said that he shared the view expressed by Sir Ian Sinclair and asked Mr. Yankov, as Chairman of the Planning Group, to arrange for the Group to hold a meeting as soon as possible.

42. Mr. YANKOV said that he, too, was of the view that the recommended timetable should be regarded as indicative and tentative and should be reviewed from time to time. In particular, he noted that only five working days were set aside for the discussion of item 3, for which he was the Special Rapporteur. It was to be hoped that additional time could be gained, either as a result of early completion of the consideration of other items, or by some other rearrangement of the programme. With regard to the question of meetings of the Planning Group referred to by Sir Ian Sinclair, several speakers in the Sixth Committee had stressed the desirability of the Group holding more meetings at the present session. In his capacity as first Vice-Chairman of the Commission, he intended to start consultations forthwith on the Group's membership and schedule of meetings.

43. Mr. MAHIOU said that, at first sight, the recommendation of the Enlarged Bureau seemed to set a timetable which made it possible to examine all the topics on the agenda, in keeping with their priority and the progress of work on them. However, it seemed that it would be difficult to adhere strictly to the timetable. It was certain that, in practice, the detailed nature of the discussion on any given question would mean that the timetable would not be followed. When a report as important as that of Mr. Evensen on the law of the non-navigational uses of international watercourses was circulated, it would be necessary for members of the Commission and the Drafting Committee to have the

requisite time to study it. The order indicated by the Chairman of the Drafting Committee for the examination of the draft articles was already different from that of the work of the Commission. Hence some degree of flexibility would be necessary.

44. Mr. ROMANOV (Secretary to the Commission), replying to the point raised by Mr. Díaz González, said that, according to information available to him, the basic documents on items 1 and 5 would be available for distribution in time to enable members to study them well in advance of the dates recommended for the consideration of those items. The Secretariat would urge the responsible services to expedite the production of the documents in question. As for the compendium of international instruments relevant to item 4, the text was to be sent from New York for reproduction at Geneva on 9 May.

45. The CHAIRMAN said that, if he heard no objection, he would take it that the recommendation of the Enlarged Bureau (ILC(XXXV)/Conf.Room Doc.2) was approved on the understanding that the programme for the organization of work would be applied with considerable flexibility.

It was so agreed.

46. Mr. ROMANOV (Secretary to the Commission) said that Thursday, 12 May and Monday, 23 May (Ascension Day and Whit Monday, respectively) had been designated as official holidays of the United Nations Office at Geneva, and he drew attention to official memoranda to the effect that arrangements for meetings to be held on those days should be made only in exceptional circumstances.

47. The CHAIRMAN said that, in the light of that information, he assumed that the Commission would not wish to meet on 12 May and 23 May 1983.

It was so agreed.

The meeting rose at 12.45 p.m.

1756th MEETING

Friday, 6 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. SUCHARITKUL warmly congratulated the Special Rapporteur on the objectivity, candour and clarity displayed in his first report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364).

2. The report called for a number of preliminary comments. Although he would not go into the historical background of the topic, he wished to recall that, of the 26 States that had signed the Final Act of the first Peace Conference held at The Hague in 1899, only four had been Asian States (China, Japan, Persia and Siam). At the second Hague Peace Conference in 1907, 16 Latin-American States had joined those signatories.⁴ The First World War had been a world-wide one in that some Asian countries had fought in the European theatre of operations. The Second World War had been broader in scope, since virtually all regions of the world had taken part in it. Several territories in Asia and the Pacific had been occupied, civilians and soldiers alike had been involved and forced labour had been established. The Tokyo Tribunal, which had been set up after the Nürnberg Tribunal, had included among its members Indian, Dutch and Australian judges. The charges that had been brought and the judgments rendered by that Tribunal filled more than 100 volumes and, in its work, the Commission should take account of such important international case law.

3. With regard to the scope of the draft code, he said that he agreed with the distinction drawn by the Special Rapporteur between crimes under international law, namely those defined by international law without any reference to internal law, and another category of crimes which had consequences and effects capable of transcending frontiers, but which were not as a rule crimes under international law. The Commission should restrict its work to the first category. In the past, piracy on the high seas committed outside territorial waters had been recognized as an offence under international law and pirates could be tried by any court of a coastal State. The Commission was now dealing with particularly serious offences which threatened the peace and security of mankind. Such offences concerned mankind as a whole and not only one territory or country.

4. Such offences could be committed by an individual,

but were usually committed by a State, by a State organization, by a group of States or by all of them. National case law did afford examples of convictions of national, international or internationalized juridical persons. The murder of an ambassador by one State in the territory of another State came under international law in that a State was involved in the murder and the ambassador was a person protected by a convention. The Commission must consider whether States could be indicted: the penalties to be imposed could take the form either of restrictive measures or of *capitis diminutio*.

5. Although the list of offences drawn up in 1954 would serve as a starting-point, the Commission should also take account of developments which had taken place since that time. Acts of air piracy, which had become increasingly frequent in recent years, could constitute offences against the peace and security of mankind.

6. The Commission would have to decide how to define the applicable procedures and whether an international penal jurisdiction should be established. In his opinion, such a jurisdiction would ultimately have to be set up. After recognizing the liability of States in civil matters, setting up courts for the peaceful settlement of disputes between States and considering international liability for injurious consequences arising out of acts not prohibited by international law, it would have to consider the possibility of applying a code of offences against the peace and security of mankind.

7. Mr. MAHIOU, referring to the approach to be adopted in discussing the broad topic under consideration, suggested that, instead of expressing their views on the entirety of the text proposed, members of the Commission should deal with it point by point; that would probably make for a more fruitful exchange of ideas.

8. Mr. BALANDA congratulated the Special Rapporteur on his first report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364) which fully and clearly described the main problems that arose in connection with the consideration of the draft code. The report, its introduction by the Special Rapporteur and the analytical paper prepared by the Secretariat on the topic (A/CN.4/365) would greatly facilitate the Commission's task. The report called for a number of comments and raised certain questions.

9. In the first place, the draft Code of Offences against the Peace and Security of Mankind differed from most of the topics the Commission had considered so far. Those topics mainly concerned States, while the draft code was of concern to each member of the Commission in particular, from both the scientific and the human points of view, since it dealt mainly with mankind and its survival. Those human considerations should induce the Commission to adopt a progressive approach to its discussions.

10. In the second place, it could be asked whether there was enough political will to include the draft code in the international body of laws. In his view, such political will definitely existed and States had sought on several occasions to punish "the most serious offences", as shown by the establishment of the Commission on the Responsibility of the Authors of the War and on Enforcement of

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

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

³ *Idem*.

⁴ See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 229 *et seq.*, "Summary of the signatures, ratifications, adhesions and reservations".

Penalties; by the Geneva Protocol of 24 October 1924,⁵ which had established the principle of compulsory arbitration and had, for the first time, termed war of aggression an international crime; by the declaration of 24 September 1927,⁶ which had been adopted under the auspices of the League of Nations and had been worded along the same lines as the Geneva Protocol; and by the Kellogg-Briand Pact,⁷ to which more than 60 States had acceded. After the Second World War, the General Assembly had taken account of the concerns of States by requesting the International Law Commission, in resolution 177 (II) of 21 November 1947, to formulate the principles recognized by the Nürnberg Tribunal, to draw up a list of acts constituting offences against the peace and security of mankind and to prepare a draft code of such offences. Consideration of the draft code had been suspended for several years, but, at its thirty-third session, the General Assembly had decided to resume it and, in its resolution 37/102 of 16 December 1982, it had requested the Commission to examine the question as a matter of priority.

11. In the third place, such offences should not be regarded as things of the past. Technological developments, the arms race and the hegemonism of certain States suggested that the world was not at present safe from offences against the peace and security of mankind. The elaboration of a draft code on such offences was fully justified by the preventive and dissuasive effect such an instrument would have.

12. In the fourth place, it could be asked how the draft code would fit into the United Nations system. In the preamble to resolution 35/49 of 4 December 1980 relating to the draft code, the General Assembly had recalled its belief that

... the elaboration of a Code of Offences against the Peace and Security of Mankind could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations.

It was quite clear that, in the General Assembly's opinion, the elaboration of a new draft code could only contribute to the strengthening of the Charter.

13. Lastly, the elaboration of the draft code under consideration should be an opportunity for the Commission not only to codify, but also to develop, international law in general and to contribute to the development of international penal law. In internal penal law, which defined offences clearly and precisely, there was a legal framework in which the conduct of offenders, who were usually individuals, could be assessed, as well as means of suiting penalties to circumstances. Judging by the observations on the draft code made by delegations in the Sixth Committee of the General Assembly (see A/CN.4/365, sect. V), the Commission would have to deal with the criminal

responsibility of States. If it did so, it would have to make certain adjustments to take account of new circumstances. It was because of such adjustments that the draft code would be of a progressive nature and, thus, contribute to the establishment of a new legal order.

14. In internal penal law, the State exercised sovereignty over a specific geographical area and everyone in that area. The fact that the draft code would not fully take account of the concept of territoriality was no reason to reject it. Switzerland was considering the possibility of exchanging Swiss ordinary-law criminals serving their sentences abroad for criminals of other States serving their sentences in Switzerland. Following the Second World War, the Nürnberg and Tokyo Tribunals had introduced the concept of the international criminal responsibility of the individual: the individual had thus moved from the internal level to the international level. Those examples called for an open-minded attitude during the elaboration of the draft code.

15. Opinions differed with regard to the criminal responsibility of States, juridical persons and *de facto* groups, but such differences should not be an insurmountable problem. Changes were now taking place in the penal law of States. For example, the French draft penal code provided for the punishment of offences committed by juridical persons; and, in Zairian case law, judgments had been rendered in which criminal responsibility had been attributed to juridical persons and the penalties had taken account of the nature of the offenders. International law could not fail to take account of the development of internal penal law. In the context of the new law, he would be in favour of the non-applicability of statutory limitations to offences, as in the case of war crimes, and of the principle of compulsory extradition.

The meeting rose at 11.10 a.m.

1757th MEETING

Monday, 9 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

⁵ See 1755th meeting, footnote 6.

⁶ *Ibid.*, footnote 7.

⁷ *Ibid.*, footnote 8.