Document:-

A/CN.4/SR.1757

Summary record of the 1757th 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:-

1983, vol. I

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. Lacleta 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.

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[5] See 1755th meeting, footnote 6.
[6] *Ibid.*, footnote 7.
[7] *Ibid.*, footnote 8.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/364,[2] A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2[3])

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. STAVROPOULOS said that, of all the items on the agenda, the topic under discussion was the one with the longest history both in the United Nations and in the Commission itself. Since the Commission, in response to a request made by the General Assembly in 1947, had submitted its first draft Code of Offences against the Peace and Security of Mankind, the General Assembly had on several occasions decided to defer consideration of the matter before referring it to the Commission again in 1981. The question that came to mind was what had led the General Assembly to the belief that it could now deal successfully with an item which it had avoided facing for almost 30 years, particularly since the experience of the United Nations in dealing with the matter had, if anything, been rather adverse. If he had been a representative to the General Assembly when the resolution relating to the draft code had been debated, he would have shared the doubts expressed by Canada and France.[4] But since the resolution had been adopted,[5] the Commission had a duty to discharge, and it had to ensure that the task was performed effectively.

2. When introducing his first report (1755th meeting), the Special Rapporteur had raised the question whether it was possible to define the crimes but not the penalties. There was a further question to consider, namely whether it was possible to have a code without a penal jurisdiction to enforce it. That was a point which should be given particular emphasis in the preliminary report which the Commission was to submit to the General Assembly at its thirty-eighth session. A decision by the General Assembly that a penal jurisdiction to enforce the code was indeed necessary would not, of course, make matters easier; quite the contrary. He believed nevertheless that such a jurisdiction was indispensable.

3. In 1957, the General Assembly itself had recognized the relationship between international criminal jurisdiction, aggression and the draft Code of Offences against the Peace and Security of Mankind. It would be recalled that the question of establishing an international criminal jurisdiction had first been raised by the General Assembly in 1948 and that the Commission, at its second session, in 1950, had concluded that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and possible.[6] The two Committees of 17 set up by the General Assembly in 1950 and 1952, respectively, had prepared a draft statute of an international criminal court and had submitted it to the General Assembly[7] which, in 1954 and again in 1957, had decided to postpone consideration of the matter until it had taken up the report of the Special Committee on the Question of Defining Aggression and the draft Code of Offences against the Peace and Security of Mankind.[8] In 1968, when discussing the report of the Special Committee on the Question of Defining Aggression, the General Assembly had decided to complete a first discussion of the question of aggression and to defer the other two items to a later session, when further progress would have been made in arriving at a generally agreed definition of aggression. A draft Definition of Aggression had been submitted to the General Assembly at its twenty-ninth session, in 1974, and the Secretary-General, in a memorandum addressed to the General Committee, had drawn the attention of Member States to the three related questions.[9] On that occasion, the General Assembly had adopted the Definition of Aggression[10] by consensus but had taken no action on the two other issues, namely the draft code and the establishment of an international criminal jurisdiction.

4. Now that consideration of a draft code had been resumed and that a definition of aggression was available, it appeared that the international community should also deal with the question of an international criminal jurisdiction. Many States, including most of the permanent members of the Security Council, had expressed that view during the recent discussions in the General Assembly on the question of a code. The history of the item under consideration proved the existence of an indissoluble link between the two concepts; indeed, article 1 of the 1954 draft code provided that individuals responsible for offences against the peace and security of mankind, as defined in the code, should be punished. If the General Assembly were to decide that the question of establishing an international criminal jurisdiction should be taken up once more, the 1953 report of the second Committee of 17[11] could serve as a basis for discussion in the Sixth Committee of the General Assembly or in the Commission.

5. The international community should not continue to be unprepared to enforce justice when faced with war crimes and crimes against mankind itself, as had happened in the First and Second World Wars and in a considerable number of undeclared wars since then. In the First World War, the principle *nullum crimen, nulla poena sine lege* had prevailed; in the Second, it had been

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[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 *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 11th meeting, paras. 7–12 (Canada); and 15th meeting, paras. 9–10 (France).

[5] General Assembly resolution 36/106 of 10 December 1981.

[6] See 1755th meeting, footnote 16.

[7] *Ibid.*, footnote 17.

[8] General Assembly resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957.

[9] A/BUR/182, para. 26.

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

[11] See 1755th meeting, footnote 17.

ignored. In view of the uniquely atrocious quality of the acts perpetrated, and against the background of the Kellogg-Briand Pact,[12] the United Nations War Crimes Commission had decided to disregard the principle when drafting a procedure for trying German war criminals, and that decision had eventually led to the establishment of the Nürnberg and Tokyo Tribunals. He agreed with the view expressed in the Special Rapporteur's report (A/CN.4/364, para. 25) that the Nürnberg system was an important precedent, but that its incidental and contingent features and the *ad hoc* character of the Tribunal which it had instituted were matters for regret. The system had been criticized for placing the vanquished under the jurisdiction of the victors. Everything possible should be done to avoid the recurrence of such a situation. Without a law defining both the crime and its punishment, the draft code might merely be a stylistic exercise.

6. Mr. BARBOZA stressed the preliminary nature of the remarks he was proposing to make on a subject which he considered vast and difficult. The Commission must first of all determine the scope and structure of the draft code, as it had been requested to do by the General Assembly in resolution 37/102. The fact that the study of the topic had been interrupted since 1954 was due not only to a technical reason, namely the lack of a definition of aggression, but also to the political difficulties involved. True, a political will to achieve concrete results had existed for some time, but it was of a general nature and became less clear-cut on particular aspects of the subject, especially criminal penalties, the establishment of an international jurisdiction and the criminal responsibility of the State. Certain difficulties were perhaps also due to the topic's lack of unity and the fragmentation would become even greater if the State were considered as a potential accused. The Commission should, therefore, review the work already done and consider whether certain hypotheses should be corrected, bearing in mind particularly that a definition of aggression now existed, and whether others should be added to the draft in the light of events since 1954.

7. So far as the scope of the draft was concerned, the Special Rapporteur had explicitly drawn attention to the risk of applying criteria which were too broad and would thus rob the topic of its specific nature. The title of the topic, which was very general, offered little help in the search for an adequate criterion. It referred to "the peace and security of mankind", a concept broader than that of "international peace and security" which figured in the Charter of the United Nations. The content of the latter expression was much more clearly delimited than that of the former.

8. According to paragraph 2 of article 19 of part 1 of the draft articles on State responsibility,[13] an internationally wrongful act resulted from the breach of an international obligation essential for the protection of fundamental interests. Any international crime could affect the peace and security of mankind once the fundamental values referred to in article 19 were threatened, thus theoretically jeopardizing the peace and security of mankind. A specific criterion therefore had to be found to identify the crimes that should be taken into consideration in the draft. Piracy, a typically international offence although committed by individuals, should not be included in that category of crimes. One day, a category of crimes against the security of international means of transport or international trade would perhaps be established. For the moment, the point at issue was to give a content to the term "mankind" in order to determine the nature of the crimes to which the draft should apply. Certain crimes not envisaged in 1954 should be included, such as *apartheid*, colonialism, the retention of territories obtained by aggression, the employment of mercenaries and, possibly, the violation of treaties providing for the denuclearization of certain territories. All those crimes in fact endangered the peace and security of mankind. The criterion which would confer unity upon the topic need not necessarily appear in the draft; it could be mentioned in the commentary. In the absence of such a criterion, the Commission would not elaborate a code of offences against the peace and security of mankind but a code of international crimes.

9. He saw no need to introduce a political element into the concept of crime under international law. Even in internal law, the question of political offences was extremely complex. It was legal thinking that had assimilated offences under ordinary law containing a political element to political offences in the light of the perpetrator's intention. But political offences were not enumerated in any criminal code. The Commission, whose role was more like that of a legislator, should leave it to legal writers to determine whether crimes against humanity were political crimes and should not allow the inclusion of a particular crime in the draft to depend upon its political or non-political nature.

10. The subjects of international criminal responsibility could be individuals, States or certain groups in internal law. The individual seemed to be the typical subject of responsibility of the kind envisaged. It was usually thought that the individual attained the international level through the penalty. That had been the case well before the Judgments of the Nürnberg and Tokyo Tribunals, both with regard to piracy and to breaches of the customs of war. The penalty inflicted on the individual could be effective and could be punitive or preventive in nature.

11. The international criminal responsibility of States was connected with the establishment of an international criminal jurisdiction and with the stipulation of penalties appropriate to the nature of a State. There appeared to be no theoretically or legally insurmountable difficulty in that connection. The penal sanctions which could be taken against a State would then imply collective responsibility. That concept had certain weaknesses, it was true, as it meant that members of a group, although innocent, were subject to punishment by the mere fact of belonging to the group. The justice of that notion was arguable, but that it corresponded to the concept of

[12] *Ibid.*, footnote 8.

[13] For the text, see *Yearbook . . . 1976*, vol. II (Part Two), p. 95.

punishment in international law could not be denied. An economic measure taken by way of reprisals in accordance with international law was sometimes prejudicial to citizens who bore no responsibility for the perpetration of the wrongful act which had given rise to that measure.

12. International sanctions could be simple reparations or they could take the form of penal sanctions. Reprisals, which were regarded as international sanctions, already contained a certain punitive element. The principle of reciprocity did not rule out going a little further than simple reparations. That was what distinguished a criminal sanction from a civil one. The fact that a sanction was described as a penalty and that it was inflicted by a court and not by a State was immaterial. In its Judgment of 5 February 1970 in the *Barcelona Traction* case, the ICJ had declared that certain offences violated obligations of concern to the international community as a whole.[14]

13. Those views, however, gave rise to practical difficulties. What States would sign an international instrument which was liable to place them in the dock? The Commission should indicate to the General Assembly that there was no legal obstacle to making States the subjects of criminal responsibility, but that a political decision would be necessary to that end. In that case, it might perhaps be advisable to bring forward the second reading of part 1 of the draft articles on State responsibility[15] and, more particularly, that of the provisions relating to the origin of State responsibility. No clear distinction had been drawn previously between civil and criminal responsibility. Moreover, there existed practically no precedents in the matter of criminal responsibility of States.

14. With regard to juridical persons in private law, he pointed out that the Nürnberg Tribunal had exercised great caution in examining the possible consequences for individuals of the criminal nature of certain associations under German internal law. A tendency to inflict punishment on juridical persons under private law certainly existed, but it was a limited one and met with resistance because it implied a certain form of collective responsibility which was not acceptable under internal law.

15. Mr. RAZAFINDRALAMBO noted that, in resolution 36/106, the General Assembly had invited the Commission to review the 1954 draft code with the required priority, taking into account the results achieved by the process of progressive development of international law. It was in that light that the main problems arising in connection with the examination of the draft should be viewed.

16. In the title of the topic, the General Assembly appeared to have accentuated the notion of crime. The Commission should therefore ponder the question of the kind of crimes to be considered—in other words, the scope of codification. But it should adopt a method which would enable it to choose between categories of offences and to evaluate the degree of responsibility or accountability. The Commission could either draw upon the structure of internal criminal codes by including an introductory part devoted to general principles, or follow the example of the drafters of the Charter of the Nürnberg Tribunal by adopting an attitude of prudent reserve. In the former case, it would have to sift through all the general principles of international law which might be relevant to the proposed codification. Moreover, there would be a risk of the list of crimes being regarded as exhaustive. If the Nürnberg Tribunal had been bound by certain principles generally recognized as inviolable, such as that of the non-retroactivity of criminal laws or that of *nullum crimen sine lege*, it would have had great difficulty in operating. Furthermore, the fact of spelling out certain principles, such as that of *nulla poena sine lege*, would have the consequence of tying the Commission down in its future work. The Commission had therefore been right in 1951 not to venture upon listing the general principles that were applicable.

17. With regard to the scope of the draft and the methodology of codification, the Commission had some indications from paragraph 2 of article 19 of part 1 of the draft on State responsibility,[16] as well as the wishes expressed in the Sixth Committee. Numerous gaps in the list of offences against the peace and security of mankind had been pointed out (see A/CN.4/365, paras. 55 and 72–105). It should not be too difficult to determine crimes that were international by their nature in the light of draft article 19, already mentioned.

18. The situation was less straightforward with regard to crimes which were international by virtue of conventions. In order to classify them as crimes it would be necessary to refer to the criteria applied in determining crimes which were international by their nature, so that this category of crimes, or at least those among them which fell into the first category of crimes by their nature, should not constitute a category apart. In any case, a safeguard clause should be included in respect of the effect of conventions in force relating to specific offences.

19. The same criteria appeared valid with regard to the possible incrimination of a State and its participation in the commission of a crime, either as perpetrator or as accessory. Indeed, complicity in the commission of any of the crimes by nature was already covered by paragraph (13) (iii) of article 2 of the 1954 draft. As for States responsible for crimes which were not international by nature, it appeared advisable to leave them to be dealt with either by the mechanisms provided for in the conventions relating to the offence or by domestic courts.

20. He agreed with the distinction drawn by the Special Rapporteur between political crimes and crimes under ordinary law and was of the opinion that the Commission had been right not to include in its 1954 draft any distinction based on the political or non-political nature of the perpetrator's motives. At most, the political end pursued might possibly affect the question of the perpetrator's

[14] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment, *I.C.J. Reports 1970*, p. 32, paras. 33–34.

[15] For the text of part 1 of the draft articles adopted on first reading, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

[16] See footnote 13 above.

responsibility. From that point of view, the distinction between political and non-political offences might just be warranted if the codification were to endorse the position taken by the Commission in 1954 and apply only to individuals, to the exclusion of juridical persons. Such a distinction would, however, be of limited usefulness because certain offences against the peace and security of mankind could only be imputed to States, whose political motive was only too evident. *Apartheid* provided a striking example.

21. He also endorsed the views expressed by the Special Rapporteur as to the criminal responsibility of the State. The existence of such responsibility gave rise to the question of penalties and of the implementation of the code. There seemed to be no reason why the penalties applicable to international crimes, including those which, as appropriate, could be applied to guilty States, should not be listed. In that respect, the Commission might draw not only upon the penalties imposed by the Nürnberg Tribunal, but also upon the array of sanctions provided for by the United Nations Charter and extensively used by the Security Council.

22. The application of penalties presupposed the existence of a jurisdiction to pronounce them. At a time when the efforts of the international community were directed towards the establishment of a new international or world order, to think of orienting those efforts towards the punishment of crimes against the peace and security of mankind was hardly out of place. The countries of the third world, which had been and could be the victims of numerous crimes of that nature, were unanimous in their resolve to fill the legal gap created thus far by the refusal to give serious attention to the topic under consideration. They hoped that the Commission would, within a reasonable period of time, submit to the General Assembly a draft code which would be viable and operational and would no longer constitute a mere catalogue of the crimes in question.

23. Sir Ian SINCLAIR said that the topic under consideration was manifestly of great importance and significance. The generation which had come to maturity during and after the Second World War was well aware of the horrors and suffering inflicted upon individuals and groups during that terrible conflict. The notion *inter arma silent leges* was no longer acceptable. Nor was the subject before the Commission confined to those manifestations of evil which became apparent in times of war or armed conflict. Terror and violence were constantly being practised around the globe and no continent could claim to have been spared from the contagion.

24. The interest which the topic had aroused in the General Assembly and elsewhere could thus be readily understood. However, to believe that the preparation of a draft code would serve as a panacea against all the ills of contemporary society would be mistaken. Such a code could achieve a deterrent effect only if the deterrent were perceived to be real and not illusory—and possibly not even then. The existence of elaborate national penal codes backed by suitable judicial and enforcement machinery had not resulted in the elimination of common crimes in any country; indeed, many of the more sophisticated criminals operated on the assumption that the chances of detection, conviction and eventual punishment were sufficiently remote to make the risk worth while. That did not mean, however, that the existence of a penal code did not have some deterrent effect upon individuals inherently indisposed to accept the need for regulating anti-social behaviour.

25. The relevance of those general considerations to the topic under debate was twofold. On the one hand, it was unrealistic to think that the elaboration of a code, even if accompanied by an international criminal jurisdiction, would have much deterrent effect upon the actual behaviour of States. On the other hand, such a code might have an impact upon the behaviour of individuals because the notion of individual criminal responsibility under international law could be imparted to members of armed forces or to State officials and could influence their actions in particular circumstances.

26. Another risk attendant upon the enterprise on which the Commission was embarking was related to a contemporary phenomenon, the inflation of language. In that connection, he referred to paragraph (59) of the commentary to article 19 of part 1 of the draft articles on State responsibility, in which the Commission sounded a warning against any confusion between the expression "international crime" as used in that article and similar expressions used in a number of conventions and international instruments to designate certain heinous individual crimes for which States were required to punish the guilty persons adequately, in accordance with the rules of their internal law.[17] The concept of an offence against the peace and security of mankind was clearly not coextensive with the notion of "international crime" as elaborated in the above-mentioned article 19; nor was it necessarily coextensive with the breach of an obligation deriving from a rule of *jus cogens*, as the Commission had been careful to point out in paragraph (62) of its commentary.[18]

27. A definition of offences against the peace and security of mankind could start with the notion of crimes which were international by their very nature in the sense that they derived directly from international law. But even within that more general category, the notion of offences against the peace and security of mankind should be taken to denote crimes of such magnitude and intensity that they shocked the conscience of all mankind. As Mr. Sucharitkul had pointed out (1756th meeting), in classical international law the crime of piracy had fallen into that limited category because the pirate had been acknowledged to be *hostis humani generis*, so that any State was entitled to exercise jurisdiction over him in respect of his criminal activities on the high seas. The modern counterpart of that notion would be a category of crimes under international law recognized by the international community of States as a whole as being offences against the

[17] *Yearbook . . . 1976*, vol. II (Part Two), pp. 118–119.

[18] *Ibid.*, pp. 119–120.

peace and security of mankind. Recognition by the international community of States as a whole was surely the key to the problem. In trying to apply that test to the identification of those crimes which should appear in the draft code, the Commission should be careful to distinguish between conduct which might be offensive to the moral conscience and conduct which was so barbaric and so disruptive of peace and security as to qualify the perpetrator as *hostis humani generis*. Certain types of conduct, such as the preparation and waging of wars of aggression, the commission of crimes against the peace, crimes against humanity and war crimes as defined in the Nürnberg principles, certainly fell within the latter category, as did genocide and other comparable large-scale breaches of the most fundamental of all human rights, that pertaining to the integrity and inviolability of the human person. Beyond that, the Commission would have to tread cautiously if it wished to construct a viable and realistic code capable of objective application.

28. That the draft code should apply to individuals seemed beyond question; but could it, and should it, be applied to States as such? Realism surely dictated a negative answer. To the extent that the activities of a State resulted in an act of aggression or a threat to, or breach of, international peace and security, the international community had at its disposal a whole panoply of measures of a coercive or semi-coercive nature which could be taken by the Security Council under Chapter VII of the Charter with a view to restoring the situation. The idea of solemnly indicting a State or collective entity for a criminal offence under international law seemed to him to savour of the absurd, at least in the existing state of international relations.

29. Lastly, a very real dilemma arose in connection with implementation. Drafting a code would inevitably involve drawing up a list of crimes, many of which would be imbued with highly political elements or would have been committed for political motives. That being so, it would be highly imprudent and dangerous to leave it to national courts to enforce that code on the basis of the principle of universal jurisdiction. No matter how objective the national court might be in seeking to apply the code, it would inevitably be argued that justice had not been done. There would be overwhelming difficulties in procuring evidence. Indeed, it was not too far-fetched to suppose that the peace and security of mankind might be just as adversely affected by the holding of such a trial before a national court as by the commission of the original offence.

30. Implementation of the code should therefore be ensured by an international criminal court. But was there enough common will in the international community to envisage such a radical development? In the context of its work on the law of treaties, the Commission had deliberately refrained from seeking to identify rules of *jus cogens*, but had pronounced itself clearly on the consequences of a violation of a rule of *jus cogens*. In its work on the draft Code of Offences against the Peace and Security of Mankind, it had to proceed in the opposite direction. It would have to enumerate and define those gravest of all international crimes which qualified to be treated as offences against the peace and security of mankind. At the same time, if its work was to be meaningful and not simply an exercise in semantics, it would have to consider carefully how the code would be implemented. As the Special Rapporteur's report demonstrated (A/CN.4/364, paras. 60–65), the history of work on the question of establishing an international criminal court was far from encouraging. If the Commission concluded that it was too dangerous to entrust the implementation of the code to national courts, further guidance should be sought from the General Assembly on how it envisaged that the code would be applied. An international penal code which could not be enforced impartially and objectively would be a mockery and a delusion, and would do grave disservice to the cause of international justice.

31. Mr. REUTER congratulated the Special Rapporteur on the clarity, precision and sobriety of expression of his first report on the draft Code of Offences against the Peace and Security of Mankind. The report tackled many issues with regard to which some hesitation was permissible, and the reflections to which it gave rise should be formulated with caution.

32. The Commission should embark upon the examination of the topic in a spirit of obedience to the General Assembly and should endeavour to do useful work — that was to say, work of an essentially legal nature. To remain on strictly legal ground within so eminently political a field would, however, be difficult if only in the matter of defining international crimes. The Commission should, furthermore, take account of international conventions in force or in the process of elaboration and of recommendations by the General Assembly.

33. The Special Rapporteur had raised three major questions, that of the scope of the draft, that of the methodology of codification and that of the implementation of the code. So far as methodology was concerned, he suggested that the question should be put to the General Assembly. The procedure was an unusual one; the Commission generally made suggestions. In order to facilitate matters for the General Assembly, the Commission might perhaps state its preferences when asking for instructions.

34. With regard to the scope of the topic to be dealt with by the Commission, it might be advisable to assess the extent of the material effort involved. The preparation of a report could take between 5 and 10 years; the elaboration of a draft code might take 15 to 20 years. The Commission should adopt a position on that point with a view to informing the General Assembly.

35. The Commission would have to decide whether it was going to deal with both crimes by private persons and crimes by States or with crimes by private persons only. By private persons, he meant individuals and groups of individuals. The Commission had already adopted a position on international crimes committed by States in article 19 of part 1 of the draft articles on State responsibility.[19] That provision defined a scale of gravity of

[19] See footnote 13 above.

international offences, but it said nothing about the régime governing international crimes. If, within the framework of the examination of a draft Code of Offences against the Peace and Security of Mankind, the Commission chose to deal with both crimes by private persons and crimes by States, a problem of demarcation would arise, since part 1 of the draft articles on State responsibility dealt with international crimes of the State in general and the draft under consideration with a specific category of international crimes. Apart from that minor question of demarcation of work areas, a problem of substance was also involved. In principle, the existence of a crime by a State also implied an individual crime; an act of aggression could not be imputed to a State without someone being individually responsible for it. The reverse, however, was not the case, since individual crimes might well not be State crimes.

36. The Commission would have to make a further choice: should the draft code contain general rules or special rules? To confine the code to special rules would mean producing a second edition, revised, corrected and supplemented, of existing texts such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[20] or the Convention on the Prevention and Punishment of the Crime of Genocide.[21] Yet treaties remained operative as between States, and it would be an extremely grave matter if the Commission, subordinated as it was to the General Assembly, departed from its exploratory role and attempted to correct the Assembly's work. If there were disputes which prevented the General Assembly from arriving at a solution in an area not regulated by a convention, the Commission could not act as the arbiter between two opposing trends. On the other hand, there were problems in criminal law which had not been envisaged in those texts and in respect of which the Commission could make suggestions: statutory limitations on international offences committed by States, aggravating circumstances, justificatory facts, mitigating circumstances, provocation, threat and complicity.

37. A third question on which the Commission would have to take a decision was whether to confine itself to drawing up a list of offences, and perhaps of penalties, or to embark upon the subject of application of penalties. A schedules of penalties for States—for example, deprival of a part of the national territory, whose size would vary according to the gravity of the crime—was difficult to imagine because every problem was specific to itself and because the criminal responsibility of States was a political responsibility. Because of that, punishment was not something that a judicial body could be asked to dispense or apply. On the other hand, the establishment of an international court of justice for private individuals could be envisaged; the General Assembly might be asked for its views on that point. The Commission should ask itself what was politically and legally possible in the contemporary world. A universal competence to punish and an obligation to extradite might have to be envisaged.

38. Mr. BOUTROS GHALI said that he would confine himself to a few preliminary considerations which might be modified in the course of the debate. An initial problem which had attracted his attention was whether the establishment of an international jurisdiction entrusted with the implementation of the code should be envisaged. In other words, was it necessary to consider the question of the procedural rules which the operation of such a jurisdiction presupposed? While recognizing the close connection between an offence and its punishment, he suggested that the Commission should defer the study of that problem to a later stage and concentrate exclusively on elaborating the draft code. Such a deferral was warranted for two reasons: first, it corresponded to the general evolution of international law, which had begun with the normative stage before going on to the institutional stage; second, by reducing the volume of work to be done, the Commission would proportionally increase the practical possibilities of elaborating the code. A suggestion to that effect might be made to the General Assembly.

39. A second problem related to codification. It might be asked why the Commission, which had been requested to prepare a Code of Offences against the Peace and Security of Mankind in 1947, had failed to complete its task and why the idea of the code had recently re-emerged. The first draft had been too closely tied to the Nürnberg principles and had been embarked upon in a cold war context. Today there was something of a revival of the cold war, but the situation contained a new element in the form of new conventions which had been elaborated or were in preparation. A growing maturity of the international community had made public opinion aware of the need for a draft code.

40. That being so, the question arose of how those conventions should be reviewed and integrated in the draft. The discussion on the draft code might cast doubt upon certain principles proclaimed in the conventions. Furthermore, the elaboration of the draft would perhaps make the Commission's work in connection with other agreements more difficult. Without minimizing the importance of the Nürnberg and Tokyo Judgments, he would suggest that the Commission should give far more attention to conventions already concluded and implemented and should draw up a list of such instruments. Such a list would help the Commission and the Special Rapporteur to assess the amount of work that would be needed and the General Assembly to visualize more clearly what work it was requesting and, consequently, to form a clearer picture of the code to be elaborated.

41. Summing up, he suggested that the Commission should at first tackle the subject with limited ambitions. If it did so, there would be no need to fear the profound divergences in international opinion as to the elaboration of the draft code.

[20] General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

[21] United Nations, *Treaty Series*, vol. 78, p. 277.

MEMBERSHIP OF THE DRAFTING COMMITTEE

42. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided that the Drafting Committee should be composed of the following 15 members: Mr. Lacleta Muñoz (Chairman), Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Flitan, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov and Mr. Jagota, *ex officio* member as Rapporteur of the Commission.

It was so agreed.

The meeting rose at 5.55 p.m.

1758th MEETING

Tuesday, 10 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta 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.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/364,[2] A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2[3])

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MALEK said that, in order to determine what was required of the Commission with regard to the agenda item under consideration, it was necessary to refer to the relevant General Assembly resolutions, and particularly to resolution 36/106, in which the Commission was invited to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. In resolution 37/102, the General Assembly requested the Commission to continue its work with a view to elaborating the draft code, taking into account the decision contained in paragraph 255 of its report on its thirty-fourth session;[4] in that paragraph, the Commission expressed the intention to proceed, at an early stage during its thirty-fifth session, to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. It would present to the General Assembly at its thirty-eighth session the conclusions of that general debate. In accordance with resolution 37/102, the Commission should furthermore submit a preliminary report to the General Assembly bearing, *inter alia*, on the scope and structure of the draft code.

2. The Commission now had before it the first report of the Special Rapporteur on the matter (A/CN.4/364), and in the interests of the future discussion a historical review of the question was perhaps in order. Following a proposal presented by the United States of America, the General Assembly had on 11 December 1946 adopted resolution 95 (I), in which it had affirmed the principles of international law recognized by the Charter of the Nürnberg International Military Tribunal and by the Judgment of that Tribunal, and had directed the Commission to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the Nürnberg principles. After the Judgment had been pronounced and the General Assembly had affirmed the principles of international law enshrined in the Charter and Judgment of the Tribunal, the General Assembly had decided to proceed to formulate those principles and to consider three closely related fundamental issues: the preparation of a draft Code of Offences against the Peace and Security of Mankind, the establishment of an international criminal jurisdiction and the definition of aggression.

3. At its second session, in 1950, the Commission had adopted a formulation of the principles recognized in the Charter of the Nürnberg International Military Tribunal and in the Judgment of the Tribunal,[5] and at its sixth session, in 1954, it had adopted a draft Code of Offences against the Peace and Security of Mankind.[6] There had been two conflicting lines of reasoning in the Commission at the time: on the one hand, it had been argued that the Nürnberg principles should be reaffirmed in the framework of a general codification of offences against the peace and security of mankind, and that the need to draw up a code of such offences was undeniable; on the other hand, it had been argued that combating crime fell within the domestic jurisdiction of States and that the intervention of an international organization in that sphere was a violation of the sovereign right of States. There, as in other areas, experience had shown that positions could change.

4. Subsequently, the General Assembly had decided to defer consideration of the 1954 draft code until it had

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[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] *Yearbook . . . 1982*, vol. II (Part Two), p. 121.

[5] *Yearbook . . . 1950*, vol. II, pp. 374 *et seq.*, document A/1316, part III.

[6] *Yearbook . . . 1954*, vol. II, pp. 151–152, document A/2693, para. 54.