Document:-

A/CN.4/SR.1758

Summary record of the 1758th 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

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.

adopted a definition of aggression. It had taken the same decision with regard to the establishment of an international criminal jurisdiction[7] and, although it had adopted the Definition of Aggression in 1974,[8] it had reverted to the question of a draft code only relatively recently. It remained silent on the question of an international criminal jurisdiction, despite the importance of the latter for the preparation of a draft code.

5. The draft code adopted in 1954 gave great importance to the "Nürnberg principles". Article 1 set forth the principle of the responsibility of individuals for crimes under international law; article 2 contained a list of acts considered to be offences against the peace and security of mankind; article 3 recognized the criminal responsibility of Heads of State and of government officials; and article 4 recognized responsibility in international law for acts committed pursuant to an order of a superior. The "Nürnberg law" had been the subject of heated comment. In any event, regardless of the opinion which might be held as to the principles on which it was founded, the 1954 draft provided a sound basis for the preparation of a code. Of course, account should be taken of developments in international criminal law since that date. Such developments concerned the conception of principles themselves; they also included the lengthening of the list of acts considered, by a large number of recent international instruments, as crimes that might be covered by a Code of Offences against the Peace and Security of Mankind. The draft code would have to be reviewed in the light of developments since 1954.

6. With regard to the major question of the scope of the draft code, a decision must first be taken on whether the code to be drawn up was to be a draft code of international criminal law concerning acts qualified as international offences, or a draft code confined to offences falling within the strict category of offences against the peace and security of mankind. The analytical paper prepared by the Secretariat (A/CN.4/365) included an impressive list of acts which, according to the comments made by Governments, should be included in the draft code: piracy, the slave trade, crimes directed against the economic interests of States, damage caused to the environment, the hijacking of aircraft, acts committed against the safety of international civil aviation, the taking of hostages, terrorism, imperialism and expansionism, the fact of obliging large numbers of persons to leave their country against their will and to seek asylum elsewhere, racial discrimination and racism, and so forth.

7. It appeared from the formal proposals which lay at the origin of the 1954 draft code and from the work which had led to its adoption that it was confined to offences against the peace and security of mankind. In its report on its third session, the Commission pointed out that

> . . . the term "offences against the peace and security of mankind" . . . should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security. For these reasons, the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters; nor does it include such matters as piracy, traffic in dangerous drugs . . ., etc.[9]

He wondered whether the Commission now intended to change its position so as to include in the draft code international offences such as slavery or piracy, simply because the punishment of such offences was provided for by international conventions. On the other hand, he wondered whether it should exclude offences of a serious nature which could affect good relations among States, crimes which were the subject of recent international conventions such as offences against persons enjoying international protection, the hijacking of aircraft, or unlawful acts directed against the safety of international civil aviation.

8. With regard to the legal definition of the various acts considered to be offences against the peace and security of mankind, account should be taken of developments in international criminal law—for example, the Definition of Aggression adopted by the General Assembly in 1974, or the concept of a crime against humanity, for which the fact that it had been committed in time of war or in time of peace was today of little importance. That new concept had been incorporated in international law by the conclusion and entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide[10] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[11]

9. Furthermore, the draft code should be reviewed from the standpoint of the motives for crimes, which played a decisive role in the definition of offences against the peace and security of mankind. The charter of the Nürnberg International Military Tribunal referred to *political*, *racial* or *religious* grounds,[12] to which the 1954 draft code added *cultural* grounds. The Convention on the Prevention and Punishment of the Crime of Genocide referred to acts committed with intent to destroy, in whole or in part, a *national*, *ethnical*, *racial* or *religious* group.

10. The text of the draft code could also be improved with regard to offences committed in violation of the laws and customs of war, in other words war crimes in the strict sense. In its commentary to article 2, paragraph 11, of the draft code,[13] the paragraph on war crimes, the Commission stated that it had considered whether every violation of the laws or customs of war should be regarded as a crime under the code, or only acts of a certain gravity, and that it had adopted the first alternative. It was to be hoped that the Commission would reconsider its decision in the light of the international instruments which had inclined

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[7] See 1757th meeting, footnote 8.

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

[9] *Yearbook . . . 1951*, vol. II, p. 134, document A/1858, para. 58 (*a*).

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

[11] *Ibid.*, vol. 754, p. 73.

[12] Art. 6, subpara. (c) of the Charter (United Nations, *Treaty Series*, vol. 82, p. 288).

[13] *Yearbook . . . 1951*, vol. II, p. 136.

to the adoption of the second of the alternatives considered. Thus the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity tended to view only grave war crimes as not being subject to statutory limitations. Indeed, the States parties to the four 1949 Geneva Conventions were bound under those conventions to take the necessary legislative measures to establish suitable penal sanctions only in the case of serious crimes.[14]

11. On considering the principles relating to the application of punishment set forth in the 1954 draft code, the question could be asked whether the Commission should not envisage the principle of the responsibility of States as such, although article 1 referred only to the responsibility of individuals. Under article 3, the official status of the perpetrator of an offence did not relieve him from responsibility. The question arose whether the Commission should not consider adopting the text proposed by the former Special Rapporteur, the late Jean Spiropoulos, in his first report on the matter in 1950, according to which

> Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code shall be responsible therefor under international law and liable to punishment.[15]

Article 4 of the 1954 draft code, which concerned the effect of an order of a superior, did not appear to present any difficulty from the standpoint either of substance or of form.

12. Other principles or concepts should, however, be considered in connection with the review or preparation of the draft code: the principle of the non-retroactivity of criminal law, the concept of self-defence, and the non-applicability of statutory limitations to serious crimes under international law, for example.

13. With regard to the implementation of the code, the Commission had never lost sight of the possibility of setting up an international criminal jurisdiction to try to punish the perpetrators of the offences set forth in the code. The question could be raised whether the Commission, even at the current preliminary stage of the resumption of its work on the draft code, might not draw the attention of the General Assembly to resolution 1187 (XII) of 11 December 1957, in which the Assembly had decided to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of a draft Code of Offences against the Peace and Security of Mankind. Some speakers had considered that the question of the implementation of the code should be put aside for the time being. In his opinion, the Commission, in its report to the General Assembly, could only stress the link which existed between the draft code and the setting up of an international criminal court, and state whether or not the establishment of that court would be necessary for the implementation of the code being prepared.

14. Mr. CALERO RODRIGUES said that, while he shared to some extent the doubts expressed by certain members regarding the usefulness of the proposed draft Code of Offences against the Peace and Security of Mankind, he considered that the Commission should simply carry out its work at the technical level, in deference to the instructions of the General Assembly.

15. The Commission had before it an excellent first report by the Special Rapporteur (A/CN.4/364), who had presented it as an exploratory report and invited the members of the Commission to reply to a number of questions. Before going into those questions, he reminded the Commission that the proposed code would not form part of the traditional "international penal law" which regulated relations between the legal orders of various States and which had been compared with private international law, but would instead constitute "inter-State penal law" or "supranational penal law", in the words of the Special Rapporteur (*ibid.*, footnote 32), or what Claude Lombois had called "*droit des infractions internationales*" (the law of international offences).[16]

16. The code would deal with what the Special Rapporteur had appropriately termed "crimes under international law *stricto sensu*" (*ibid.*, para. 34). That concept was not a new one. It was embodied in part 1 of the draft articles on State responsibility, article 19, paragraph 2 of which defined an international crime in the following terms:

> 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.[17]

The code would thus address itself to acts which affected a fundamental interest of the international community, namely the peace and security of mankind, and those acts had been defined as crimes. With regard to the title of the code, he would prefer the English version to read "crimes against the peace and security of mankind" rather than "offences against the peace and security of mankind". On that basis, the only offences to be included in the code should be those acts that could be considered crimes under international law because they violated the fundamental interests of mankind in matters of peace and security. There was no need to include in the code crimes under internal law that were internationally punishable or "crimes which are internal crimes and whose internationalization is due solely to the fact that a State is implicated in their perpetration" (*ibid.*). Those categories should not be taken into account for the purposes of the future code.

17. Turning to the possible distinction between

[14] See, for example, arts. 129 and 130 of the Geneva Convention relative to the Treatment of Prisoners of War (United Nations, *Treaty Series*, vol. 75, pp. 236 and 238).

[15] *Yearbook . . . 1950*, vol. II, p. 270, document A/CN.4/25, para. 100.

[16] C. Lombois, *Droit pénal international* (2nd ed.) (Paris, Dalloz, 1979).

[17] *Yearbook . . . 1976*, vol. II (Part Two), p. 95.

"political" and "non-political" crimes, he fully subscribed to the Special Rapporteur's view (*ibid.*, para. 38) that the political criterion appeared inadequate, and considered that the reference made in 1954 to a political element was confusing and unnecessary.

18. With regard to the Special Rapporteur's first question, as to which offences should be included in the code, his reply would be international crimes (in the sense of article 19 of part 1 of the draft articles on State responsibility) which directly affected international peace and security. Admittedly, that did not dispel every possible doubt. There remained such questions as determining which of the examples given in paragraph 3 of article 19 were to be included in the code. He felt that it would not be appropriate to attempt to answer such questions at the current stage. When the Commission's work had proceeded further, and in the light of concrete suggestions for articles made by the Special Rapporteur, it could try to be more specific.

19. The second question was that of the attribution of international criminal responsibility under the code. It involved a decision as to whether to accept or reject the theory of criminal responsibility of States. There had, of course, been a prolonged discussion between advocates and opponents of that theory and, whatever the appeal to the legal mind of the arguments of such writers as Vespasien Pella in favour of the criminal liability of States, it was apparent that any attempt to incorporate the legal consequences of that concept in a legal instrument—in the form of penalties to be applied to the State itself—would be a totally futile exercise, with no hope whatsoever of achieving practical results.

20. Probably it was not necessary to answer that question either in the affirmative or in the negative. He emphasized that article 1 of the 1954 draft code did not exclude the criminal responsibility of the State; it stated that the responsible individuals must be punished, and it could well be that those individuals were criminally liable under international law because they were responsible for the acts of a State. Examples could be given from national law of individuals who were punished for the actions of legal entities: thus, in the case of a fine imposed for a wrongful act committed by a corporation, that corporation was liable to the fine but, in the case of a penalty of imprisonment, it was the individuals responsible for the actions of the corporation who were sent to prison. The criterion thus established in the 1954 draft was a practical one but, at the same time, not repugnant to strict legal logic. Furthermore, it appeared compatible with the terms of article 19 of part 1 of the draft on State responsibility. The concluding sentence of paragraph (21) of the Commission's commentary to the article clearly favoured that interpretation:

> The need to prevent the breach of obligations which are so essential would indeed appear to warrant both that the individual-organ committing such a breach should be held personally liable to punishment, and that concurrently the State to which the organ belongs should be subject to a special regime of "international responsibility".[18]

[18] *Ibid.*, p. 104.

21. With regard to methodology, the Special Rapporteur had put to the members of the Commission, in chapter III of his report, a number of questions, some of which could be considered rhetorical, since the answer was not in doubt. The first question was whether the code should follow the 1954 pattern, limiting itself to a list of offences. On that point, he agreed with the Special Rapporteur that a penal code which said nothing about penalties was of no use to contemporary society (*ibid.*, para. 50). At the sixth session of the Commission, in 1954, Georges Scelle had observed that the deletion of the original article 5 of the draft (relating to the punishment of the offences defined in the code)[19] "made the whole code illusory".[20] For his part, he believed there would be no point in resuming work on the draft code in order to arrive at an instrument which was so incomplete, unsatisfactory and lacking in practical value.

22. It was essential for the code to observe the principle *nulla poena sine lege*. That principle was perhaps difficult to apply in international law but, unless the code prescribed penalties, it would be useless. The code should at least indicate how and by whom the penalties should be determined, although that constituted an unsatisfactory second choice. The determination of penalties could be left to the competent tribunal, as had been done in the original article 5 discarded in 1954. Another solution was to leave the question of penalties to national legislation, a very unsatisfactory solution which would result in the imposition of different penalties for the same offence. The best solution was of course for the code to determine the penalties itself.

23. The second question was whether the 1954 list of offences should be retained. There was no doubt that that list was in need of revision, but it nevertheless constituted a possible basis for the Commission's work. He himself believed that it would be useful, although not essential, to supplement the original list. He looked forward to the submission by the Special Rapporteur of a revised list of offences based on the 1954 text, article 19 of part 1 of the draft articles on State responsibility, and the relevant United Nations conventions and General Assembly resolutions.

24. There remained two other questions: to whom should the penalties be applied and by whom should they be applied? The first depended on the question whether penalties could be imposed on States. If so, it was clear that a penalty imposed upon a State must necessarily be different from a penalty imposed on an individual. On that point, without rejecting outright the criminal responsibility of the State, he took the view that actual penalties should be imposed on individuals, namely the individuals answerable for the actions of the State.

25. As to the second question—who should apply the penalties?—it was a problem which did not present itself

[19] Draft article 5 had read:
"The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence."
(*Yearbook . . . 1951*, vol. II, p. 137.)

[20] *Yearbook . . . 1954*, vol. I, p. 139, 268th meeting, para. 55.

in national law, which had appropriate implementation machinery. No such machinery existed in international law, hence the close link between the international penal code and the question of international jurisdiction. That connection had been very properly stressed by the Special Rapporteur (*ibid.*, para. 59), who had indicated that the establishment of an international jurisdiction could be a necessary and vital complement to the draft code. The Commission would be justified in taking that view on grounds of legal logic, but the question was not a legal one: it was clearly a political issue which had to be decided in a political forum, namely the General Assembly. For that reason, he fully agreed with the Special Rapporteur's suggestion (1755th meeting) that the Commission might question the General Assembly about its terms of reference and whether or not it was necessary also to draft a statute for the international jurisdiction.

26. There was, unfortunately, a bad precedent in the matter. In 1948, when adopting the Convention on the Prevention and Punishment of the Crime of Genocide,[21] the General Assembly, by its resolution 260 B (III), had invited the Commission to study "the desirability and possibility of establishing an international judicial organ". Having received a positive reply from the Commission—a technical reply, of course—the General Assembly had set up a committee (followed by another, two years later) to prepare a draft statute for an international criminal court.[22] As Lombois had pointed out, that had constituted "a curious reversal of roles": a body of jurists had been asked a political question and then a political body of the General Assembly had been entrusted with the technical task of elaborating a draft.[23]

27. In the present case, it was essential to be clear and precise. The Commission should express to the General Assembly the view that the question of the establishment of an international criminal jurisdiction had to be decided on political grounds by the Assembly. If the Assembly were to decide that such a jurisdiction could be established, the Commission's task in preparing the draft code would be made easier. Should the Assembly not take that decision, the Commission's task would become very difficult; it would have to consider whether or not a meaningful code could be prepared and might even come to the conclusion that the whole exercise would be pointless and should be discontinued. He did not wish, however, to sound unduly pessimistic, as the Commission was only just beginning its work on the topic. It could count on the competence and ingenuity of the Special Rapporteur to explore all possibilities of achieving results that would constitute a positive contribution to the development of international law in a particularly sensitive and important field.

28. Mr. USHAKOV congratulated the Special Rapporteur on his outstanding work, although the report (A/CN.4/364) was not beyond criticism on some points. The Commission's task was clearly defined by the relevant resolutions of the General Assembly. It was to resume its work with a view to elaborating a draft Code of Offences against the Peace and Security of Mankind, and there was no question of anything other than the preparation of that Code. In particular, the General Assembly had not requested the Commission to deal with the question of implementation. Furthermore, the 1954 draft provided the Commission with a sound basis for its work.

29. An examination of that draft showed that it dealt with only part of international offences—crimes under international law committed by individuals; it did not deal with States. Besides, the Commission had to deal with crimes of States under the item of its agenda relating to State responsibility. The responsibility of States had been termed international responsibility. He did not see why international law should be treated like criminal law. As he saw it, there was a criminal responsibility of individuals for offences under criminal law and a responsibility of States, termed "international responsibility", which could be political or material. To confuse the two responsibilities was to create difficulties.

30. Article 19 of part 1 of the draft articles on State responsibility concerned international crimes and international delicts of States.[24] It would have been better to use another term. With its limited vocabulary, legal language had given the same term to two very different things. Crimes and delicts of States were crimes and delicts under international law because the responsibility to which they gave rise was international; the international crimes of individuals were crimes under criminal law which, by agreement between States, were recognized as being international. That agreement could be based on international custom or on a treaty of universal scope, such as a codification treaty. The consequence of such an agreement was that States had an inescapable obligation to prosecute the perpetrators of those crimes under their domestic legislation or extradite them so that they could be prosecuted in the State in which the crime had been committed or in the State of which they were nationals. States had thus established a jurisdiction which was in a sense universal, because any State could punish the perpetrator of such a crime regardless of his nationality and without the principle of territoriality having to apply. The creation of an international criminal court in addition to that jurisdiction was conceivable, but would depend on the will of States. It was not the case that, in the absence of such a court, it was not enough to recognize some ordinary offences as international crimes committed by individuals, as the latter were prosecuted and punished, under existing arrangements, thanks to co-operation among States. Those offences—for example, piracy or counterfeiting—were serious crimes. However, for the purposes of the draft code it was only the gravest among them which could be taken into consideration, and a method must be found for identifying those which truly threatened the peace and security of mankind.

[21] See footnote 10 above.

[22] See 1755th meeting, footnote 17.

[23] Lombois, *op. cit.*, p. 83, para. 78.

[24] See footnote 17 above.

31. The link between the international crimes of individuals and the international crimes of States was not always very clear. An act of aggression could be committed only by a State, but the individuals who prepared it were criminally responsible for it. On the other hand, the crime of genocide, which could also be committed by a State, as provided for in article 19 of part 1 of the draft articles on State responsibility, could also be an international crime committed by individuals without any official link with that State. However, such a crime should also be taken into consideration in the draft. Furthermore, it sometimes happened that the international crimes of States were recognized as such by the international community, but that the latter had not yet established the responsibility of individuals as a result of that crime. An agreement among some States or all the States of the international community was necessary for such responsibility to exist.

32. If all the international crimes of States were considered as entailing the criminal responsibility of individuals, it would be necessary to include a list of international crimes of States in the draft code. In paragraph 3 of the above-mentioned article 19, however, the Commission had confined itself to giving some examples of offences considered by the international community to be international crimes. With regard to civil liability, to which the Special Rapporteur had referred (A/CN.4/364, para 51), he (Mr. Ushakov) pointed out that it would be better to speak of international responsibility, and that, according to the Soviet view as put forward by Grigory Tunkin, such responsibility existed as political and material responsibility.

33. Contrary to what was said by the Special Rapporteur (*ibid.*, para. 36), it was not in the 1954 draft code but in its observations that the Commission had taken the view that the category of offences against the peace and security of mankind "should be limited to offences which contain a political element".[25] He (Mr. Ushakov) considered that it was of little importance whether or not such offences contained a political element. The Commission did not appear to have stated that such offences were political crimes within the meaning of extradition agreements. The term "political crimes" had been used in extradition treaties so that the perpetrators of such crimes should not be extradited. At most, it might be specified that the offences referred to in the draft code were not considered political crimes in the extradition sense.

34. The notion of crimes that were international by their nature (*ibid.*, para 34) was unclear, since crimes could be considered as international offences by individuals only by agreement among the States of the international community. It was in that category of crimes that offences against the peace and security of mankind should be sought, on the basis of any agreements which had been arrived at among States through customary law or conventions or even United Nations resolutions. In that connection, he recalled that, in the Declaration on the Prevention of Nuclear Catastrophe, the General Assembly had proclaimed that "States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity".[26] That crime should certainly be included in the draft code. With regard to crimes against the laws and customs of war, in customary law they had been recognized for centuries as international crimes committed by individuals; the 1899 and 1907 Conventions of The Hague had merely codified the obligation incumbent upon all States to punish the perpetrators of such crimes in accordance with their national law or to extradite them; and the Additional Protocols to the 1949 Geneva Conventions[27] had recognized that States and individuals could be the perpetrators of serious crimes against humanity. The Special Rapporteur had referred to the complicity of States with regard to the international crimes of individuals (*ibid.*, para. 38). That case appeared less likely than the converse, namely the complicity of individuals in the commission of an offence by a State.

35. The inductive method advocated by the Special Rapporteur, which consisted in examining positive law, particularly international conventions, for what was considered an offence against the peace and security of mankind, appeared to be the most appropriate method.

36. He concluded by urging the Commission to prepare a genuine code of offences by individuals against the peace and security of mankind, by selecting the most serious international offences committed by individuals.

37. Mr. LACLETA MUÑOZ stressed that the highly political nature of the subject compounded the difficulties it presented. He considered that the draft should above all cover crimes under international law *stricto sensu*. The second category of international crimes to which the Special Rapporteur had referred (*ibid.*, para. 34) was that of crimes which States could not punish at the purely internal level and which called for international co-operation. When directing the Commission, the General Assembly did not appear to have had such crimes in view. The third category, namely crimes under internal law which took on an international character because of the participation of a State, should be taken into consideration.

38. Conflicting opinions had been expressed as to whether the code should be confined to crimes of individuals or also cover offences by States. It seemed to be accepted that, in the past, only the crimes of individuals had been taken into account, but it did not seem possible at present to leave aside crimes of States. That conclusion flowed not only from article 19 of part 1 of the draft articles on State responsibility,[28] relating to international crimes and international delicts, but also

[25] Observations formulated by the Commission at its third session, in 1951 (*Yearbook . . . 1951*, vol. II, p. 134, document A/1858, para. 58 (*a*)).

[26] General Assembly resolution 36/100 of 9 December 1981, para. 1.

[27] See art. 85 of Protocol I (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 129).

[28] See footnote 17 above.

from the actual text of the 1954 draft code. It could not be argued that that text, despite article 1, concerned solely the conduct of individuals. The various paragraphs of article 2 dealt more or less directly with State responsibility. Thus paragraph (2) concerned "Any threat by the authorities of a State to resort to an act of aggression against another State". That provision referred not to individuals but to the authorities of a State. Of course, those authorities consisted of individuals, but the acts of those individuals were attributable to the State, as was clear from part 1 of the draft articles on State responsibility. It was therefore essential to deal with the international responsibility of States, as otherwise the Commission would go against the attitude it had adopted when drawing up the draft articles on that subject. Difficulties would no doubt ensue, but they must be tackled.

39. If it was difficult to pass over in silence the question of State responsibility, which was different from the responsibility of individuals, it was not easy to ascribe criminal responsibility to States. In the case of international crimes or delicts, the State's responsibility was essentially political. In that connection, he pointed out that, in the Spanish version, the 1954 draft code used the term *delitos*, but that the term *crimenes* would be more correct as it was a question of particularly serious breaches which endangered the peace and security of mankind.

40. Unlike Mr. Ushakov, he did not favour a purely inductive method. Such a method, which should be used to supplement the list of crimes, should be combined with a study of the incontrovertible principles which prevailed in the sphere. With regard to the list of crimes, the Commission should confine itself to including in the draft code serious crimes under international law which endangered the peace and security of mankind. Needless to say, offences such as piracy, which were committed by individuals, did not normally endanger the peace and security of mankind, unless they were repeated frequently with the support or tolerance of a State. The members of the Commission seemed to consider that it was not necessary to refer to the political element. Any offence which endangered the peace and security of mankind surely included a political motive which it would be pointless to mention.

41. Finally, the implementation of the code, however utopian it might be, could not be passed over in silence. It was important to take account of what was legally and politically feasible. The international community was heading towards institutionalization, towards the replacement of individual justice by international co-operation in the framework of a new international order which reduced the exclusive power of States to mete out justice. Consequently, the draft code would be fruitless unless it was combined with an effort to institutionalize the machinery for its implementation. Of course, it would be difficult to bring a State before a criminal court, but it was essential to consider the matter. The situation was simpler in the case of individuals, although the question of what would happen to an individual protected by a State could be asked. Besides, it was hard to imagine an international crime not involving some participation by a State. In conclusion, he wondered how effective a code whose implementation was not guaranteed by the existence of institutional machinery could be. Its provisions would be invoked in vain, and the perpetrator of an international crime who fell into the hands of the State accusing him might possibly find himself delivered up to the vengeance of that State.

The meeting rose at 12.55 p.m.

1759th MEETING

Wednesday, 11 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, 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. RIPHAGEN said that the very title of the topic under consideration typified a modern approach to international law by presupposing, first, that mankind was a homogeneous and, to that extent, solid group comprising all human beings and, second, that there existed a set of categorical imperatives, as the Special Rapporteur had put it in his first report (A/CN.4/364, para. 54), which were valid for every human individual. In a world where the notions of "mankind" and "categorical imperatives" really prevailed, offences against the peace and security of mankind would doubtless be punished. In the real world, however, that was not the case because of the existence of independent powers—States or groups of people wishing to form a State or at least to keep their collective identity—which were in fierce competition

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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.*