Document:-

A/CN.4/SR.1759

Summary record of the 1759th 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

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.*

with each other. If mankind as a homogeneous entity and the "categorical imperatives" invoked by the Special Rapporteur were to be made a reality, an organization incorporating those opposing powers was required.

2. But even then there remained two sides to the question. Thus, for instance, the principle of *nullum crimen, nulla poena sine lege* was basically designed to protect the individual against society and the vagaries of public opinion. Furthermore, imperatives were seldom as categorical as they might seem out of their context; the problem of military necessity versus respect for human rights in armed conflict, as well as that of the scope and limits of self-defence, were cases in point. Finally, the question of punishment or non-punishment and its effects both on the criminal and on the general public also had to be considered. In that connection, he thought it inadvisable to draw an analogy between possible punishment imposed on States for offences against the peace and security of mankind and financial penalties imposed on commercial companies found guilty of economic crimes, as the Special Rapporteur had done (*ibid.*, para. 44). Such penalties were perhaps acceptable so far as private economic offences were concerned, although even then they were possibly unjust to individual shareholders. Collective punishment, namely punishment of individuals for acts committed by others, although perhaps an effective deterrent, was definitely not a lofty principle of civilization. The case of an aggressor State which, after its defeat, was ordered to dismantle war factories or deprived of the right to manufacture certain types of armaments (*ibid.*, para. 46) also did not lend itself to analogy, being rather in the nature of an obligation imposed on the State in order to prevent the repetition of an internationally wrongful act.

3. The foregoing should not be interpreted to mean that article 19 of part 1 of the draft on State responsibility[4] was irrelevant to the topic under consideration, but only that the use of the term "international crimes" in that article did not automatically entail legal consequences in the field of penal responsibility of individuals. The two topics should be kept separate. The qualification of certain internationally wrongful acts as international crimes in article 19 was primarily relevant for the determination of the injured State. Article 19 was an important deviation from the classical bilateralism of international law; the proposition was that some internationally wrongful acts were injurious to the international community as a whole, so that all States had the right, and sometimes the duty, to react against such international crimes. The punishment of individuals, however, was an entirely different matter.

4. Turning to the questions put by the Special Rapporteur in the concluding section of the report, he remarked that the problem of implementation of the code was crucial and largely determined the answers to the other questions raised. If the notions of "mankind" and "categorical imperatives" were to be made a reality through the mechanism of individual penal responsibility, an impartial international tribunal capable of meting out justice in concrete situations would have to be instituted. Since it was the conflict between independent Powers which gave rise to most offences against the peace and security of mankind, the normal process of national administration of justice could hardly be adequate. That, of course, was not the case with other offences, such as traffic in narcotic drugs, counterfeiting, hijacking of aircraft and piracy, which were offences against the international order but which could very well be tried by national courts, with some international co-operation.

5. The questions put by the Special Rapporteur could not be answered separately or in isolation from one another. On the topic as a whole, he was inclined to believe that a Code of Offences against the Peace and Security of Mankind should be accompanied by the establishment of an international criminal jurisdiction and should concern only very grave offences committed by individuals which could not be adequately tried by national courts.

6. Mr. FLITAN recalled the preamble and the first two paragraphs of General Assembly resolution 37/102, inviting the Commission to continue its work with a view to elaborating a draft code and requesting it to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, *inter alia*, on the scope and the structure of the draft. Three conclusions emerged from that resolution. First, it was not for the Commission to re-open the issue of the desirability of elaborating a new draft code, since that task had already been entrusted to it by the General Assembly. Second, the Commission's task was in no way delimited, so that it could tackle any aspect of the problem, including that of the implementation of the code. Third, the Commission was not required to elaborate a code covering all violations of international law but one relating exclusively to crimes which endangered the peace and security of mankind. It should therefore leave aside those offences which were transposed from the internal to the international level either by the manner in which their punishment was organized by States or by the fact that a State was the perpetrator or accomplice. The Commission should confine itself to dealing with crimes directed against the peace and security of mankind. The crime of *apartheid*, which because of its scope endangered the peace and security of mankind without having to be transposed from the national to the international level, belonged to that category.

7. In order to discharge its task, the Commission should not only proceed on the basis of the 1954 draft code but should also take account of events which had occurred since then. Among international instruments of a universal nature which had been adopted since 1954 and which the Commission should take into consideration, he mentioned the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,[5] the International Convention on the Elimination of All

[4] *Yearbook . . . 1976*, vol. II (Part Two), pp. 95–96.

[5] 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.

Forms of Racial Discrimination,[6] the Declaration on the Granting of Independence to Colonial Countries and Peoples,[7] the Convention on the Prevention and Punishment of the Crime of Genocide,[8] the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[9] and the important Manila Declaration on the Peaceful Settlement of International Disputes adopted by the General Assembly in 1982.[10]

8. Several paragraphs of the first report by the Special Rapporteur were devoted to the distinction between political crimes and crimes under ordinary law (A/CN.4/364, paras. 36–41). For the purposes of the draft code, that distinction was probably less obvious than the Special Rapporteur implied. However that might be, the indulgence generally shown under domestic law to perpetrators of political offences or crimes should surely not be extended to perpetrators of crimes against the peace and security of mankind.

9. The Special Rapporteur had raised the question whether the draft code, which in its 1954 version had been concerned only with individuals, should not also apply to juridical persons (*ibid.*, paras. 42–46). To dissociate an act committed by an individual from one committed by the State itself was, in his (Mr. Flitan's) view, impossible. The fact that a crime against the peace and security of mankind had been perpetrated by a State leader could in no circumstances exonerate the State from criminal responsibility. Thus the policy of *apartheid*, even though it was applied by individual South African leaders, was a policy which threatened international peace and security and involved the criminal responsibility of the State of South Africa. The very fact that an offence of that kind was directed against international peace and security made it impossible to regard it as entailing the criminal responsibility of the individual who was its perpetrator but not that of the State on whose behalf the individual was acting. Moreover, he failed to see how the draft code could play the preventive role which many representatives in the Sixth Committee of the General Assembly had stressed unless it recognized the criminal responsibility of the State (A/CN.4/365, paras. 121–125). States had to know that, although foreign occupation and annexation might result from decisions taken by a particular State leader, they always involved the criminal responsibility of the State concerned. That being so, it was difficult not to go into the question of the implementation of the draft code and not to envisage the establishment of a competent international jurisdiction to punish States guilty of offences against the peace and security of mankind. The issue was certainly a sensitive one, but if the Commission reached the conclusion that States could commit such offences, it would be inconceivable that the punishment of such crimes should be a matter exclusively for national jurisdiction, the more so as the separation of powers was not clear-cut in all countries.

10. The structure of the draft code should be modelled largely on that of domestic criminal codes. A first part should be set aside for the statement of fundamental principles and for the definition of offences against the peace and security of mankind. A second part should contain a list of such offences, specifying all their constituent elements. The preparation of a nuclear, thermonuclear or bacteriological war should certainly be included in the list, which should not be confined to acts perpetrated on earth but should also cover acts of militarization of outer space. The concepts of incitement, complicity and conspiracy as well as that of the non-applicability of statutory limitations to war crimes should also find a place in the second part. Lastly, a third part should be devoted to implementation and to the execution of penalties imposed by bodies established for the purpose of punishing the offences listed in the second part. The need for co-operation among States with a view to unmasking, arresting and punishing offenders should also be mentioned. In addition, the Commission should attempt to define the notion of the peace and security of mankind. In that connection, the wording of article 4 of the 1954 draft code seemed to be rather too vague and to have the effect of exonerating from criminal responsibility those persons for whom it had been impossible not to comply with an order of their Government or of a superior.

11. Many representatives in the Sixth Committee had emphasized the importance of elaborating the draft code from the point of view of the international climate (*ibid.*, para. 22). Since the end of the Second World War, the international situation had never, perhaps, been as tense as it was at present. The major issues of the day were the cessation of the arms race and nuclear disarmament; the elaboration of the code might well contribute to some extent towards a relaxation of tensions. The numerous countries which had recently achieved independence were resolved to strengthen their national sovereignty against all interference in their domestic affairs and to dispose of their own natural wealth. If the future code led to the penalization of all acts which ran counter to those countries' legitimate concerns, there was no doubt that it would contribute towards improving the international climate.

12. Mr. QUENTIN-BAXTER remarked that a certain parallel could be drawn between the matter under consideration and the great debate on the right of peoples to self-determination which had taken place within the United Nations in the 1950s. Although the subject had been regarded as too important and too politically charged to be entrusted to the Commission or some other legal body, the debate had nevertheless been sustained by legal considerations. Two principal opposing views had come to light in the discussion: one side had argued that, however important as a political principle, the right to self-determination could never be an individual human right; the other side had maintained that the right to self-determination was so important that, without it, no

[6] United Nations, *Treaty Series*, vol. 660, p. 212.

[7] General Assembly resolution 1514 (XV) of 14 December 1960.

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

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

[10] General Assembly resolution 37/10 of 15 November 1982, annex.

other human right was even worth talking about. Both sides, of course, had been right in their own terms. But it was clear that the question of the right to self-determination could not be removed from the sphere of politics into that of an autonomous legal order governed exclusively by legal rules. Whatever its importance, the right to self-determination had to be considered in relation to political circumstances; failure to do so could result in a serious threat to the sovereignty of nations.

13. For similar reasons, he felt that the Commission was currently faced with a topic fundamentally different from those with which it had dealt since 1954. There was an essential difference between devising a system of autonomous legal value and drawing up a set of rules designed to influence the course of policy. The fact that the Charter of the United Nations had not ruled out the need for laws of war had been a rude awakening, and a large part of the United Nations' efforts in the legal field had been concerned of late not with building an autonomous legal order, but with formulating legal principles capable of informing policy decisions. The way in which the legal and political documents resulting from those efforts were evaluated depended on the commentator's point of view: in terms of autonomous legal rules, it was easy to hold those documents in disregard; on the other hand, seen as a means of ensuring that political decisions were not arbitrary but took account of objective factors and principles of fairness and justice, those documents were unquestionably very important.

14. The work of the Commission generally fell within the autonomous legal system, relatively independent of policy. In the case of the topic under consideration, the Commission was stepping out of a familiar field into a very different one, in which, of course, other United Nations bodies, such as the Commission on Human Rights, had long been active. In breaking new ground, the International Law Commission should be aware that the question of the role of the United Nations with regard to individual rights or obligations was as yet by no means resolved.

15. In his opinion, the Nürnberg principles and the draft articles of 1954 already covered all the matters with which the Commission was now concerned. The fact that in the intervening period the nature of offences had become more complex and that the international community had become aware of the difficulty of applying such principles in a divided world did not add anything new. The current tendency to charge individuals with universal crimes, if allowed to develop in a disorganized way, would surely be more of a threat than an encouragement to the future world order to which everyone aspired.

16. The Commission should be particularly careful with regard to the connection between the topic under consideration and the question of State responsibility. The United Nations organ responsible for dealing with political issues and for taking decisions in the event of acts of aggression, threats to the peace and breaches of the peace was the Security Council. The Council's discretion in the discharge of its primary political responsibility to Member States could not be limited, although, of course, its decisions should always be rooted in legal principles. That was the reality and he, for one, would be sorry if the Commission's action were to conflict with it.

17. Replying to one of the questions raised in the Special Rapporteur's first report (A/CN.4/364, para. 69), he said that he did not believe that States should be regarded as the subjects of the code; that would be a most regrettable departure from the Commission's approach. While recognizing the complicity of the State in many offences against the peace and security of mankind, as shown by the Nürnberg and Tokyo Tribunals, he hoped that the difference between the State and the individual would be kept in mind. As for the other questions raised in the report, it was difficult to answer them without knowing whether the Commission was merely being asked to perform the rather modest task of expressing some legal ideas to assist the policy work of the United Nations or whether the General Assembly considered that the time was ripe to remove the question of offences against the peace and security of mankind from an essentially political context and make it an autonomous subject in the sphere of law. The mere fact that the topic had been referred to the Commission was not sufficient to remove it from one field to the other. All other issues were contingent upon that distinction.

18. Mr. BALANDA said that he wished to elaborate on some points which he had only touched upon in his first statement (1756th meeting), to reply to arguments advanced by several members of the Commission, and to try to answer the questions asked by the Special Rapporteur.

19. On the subject of the Commission's mandate with regard to the elaboration of the draft code under consideration, he seriously doubted whether the Commission should, as certain members had maintained, exclude the criminal or political responsibility of States from its work. The fact that article 1 of the 1954 draft mentioned only the responsibility of individuals under international law did not mean that the intention had been to exclude State responsibility. Acts listed as constituting offences against the peace and security of mankind included aggression, incursions, annexation and blockade, acts which could be performed only by States. In the Charter of the Nürnberg Tribunal, the intention had been to penalize acts by heads of State and Government. The persons brought before the Nürnberg Tribunal had acted not only as individuals, but also as State agents.

20. There were also arguments of a non-legal nature in favour of including State responsibility in the discussion on the draft code. In its resolutions 33/97 and 35/49, the General Assembly had invited Member States and relevant international intergovernmental organizations to submit their views on the *procedure* to be followed in the future consideration of the draft code. In resolution 37/102 it had requested the Commission to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, *inter alia*, on the *scope* and the *structure* of the draft code. In the discussions which had preceded the adoption of those resolutions there had

never been any question of limiting the subject. It had been their sponsors' idea that the Commission should envisage the responsibility of individuals, States or groups of States. The analytical paper prepared by the Secretary-General pursuant to paragraph 2 of General Assembly resolution 35/49[11] showed that States themselves had envisaged both the criminal responsibility of States and the possibility of establishing an international criminal jurisdiction. The Commission's mandate with regard to the draft code could not, therefore, be confined to only one aspect of the problem.

21. He further noted that, in the opinion of the General Assembly, the preparation of a draft code was bound to contribute to strengthening the Charter. In the preamble to its resolutions 36/106 and 37/102 relating to the draft code, the General Assembly had referred to Article 13, paragraph 1*a*, of the Charter of the United Nations, which provided that the General Assembly should initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. Going back in time, it would be seen that it had not been by chance that the General Assembly had in 1946 affirmed the principles contained in the Charter of the Nürnberg Tribunal;[12] it had been aware of the criticisms to which that affirmation might give rise, but had wanted those principles to be set in the general context of the progressive development of international law. The notion of the individual's criminal responsibility under international law had at that time been new and controversial. The recognition of the universal competence of States to extradite or try major war criminals and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[13] were two further elements in the progressive development of international law. The Commission should not be afraid to promote that development in accordance with article 1 of its Statute. Law, including international law, was an instrument in the service of man and, as such, had to be capable of developing in line with requirements.

22. The General Assembly had expressed its will by requesting the Commission to resume the elaboration of the draft code and, in so doing, to take account of the present situation. That will was comprehensive in the sense that the question of State responsibility could not be excluded from the Commission's work. If there was a will to hold the State responsible, the legal means of putting it into effect would be found. He had referred (*ibid.*) to judgments rendered by Zairian courts in which criminal responsibility had been attributed to juridical persons, and he agreed with Mr. Barboza (1757th meeting) that technically it was not absolutely impossible to envisage attributing criminal responsibility to States. It would suffice to adapt the penalties to the special nature of the perpetrators of the crimes. Moreover, there existed certain kinds of reparations, such as apology and the expression of regret, which were appropriate to international responsibility.

23. The establishment of an international criminal jurisdiction was unavoidable—despite the difficulties connected with the operation of such a jurisdiction and the procedure to be followed—if the future code was to be made effective. The idea of an international jurisdiction was not new. The Commission on Human Rights had entrusted an *ad hoc* committee with setting up an international jurisdiction within the framework of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.[14]

24. The General Assembly's concern was the same whether the point at issue was human rights or the draft Code of Offences against the Peace and Security of Mankind. Commission on Human Rights resolution 12 (XXXVI) of 26 February 1980, on the implementation of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, General Assembly resolution 34/24 of 15 November 1979, on the implementation of the Programme for the Decade for Action to Combat Racism and Racial Discrimination, the "Study concerning the question of *apartheid* from the point of view of international penal law"[15] and the documents of the *Ad Hoc* Working Group of Experts relating to the study on ways and means of insuring the implementation of international instruments such as the above-mentioned Convention, including the establishment of the international jurisdiction envisaged by the Convention,[16] supplied useful evidence in that respect. The General Assembly had wished to attribute responsibility to States and it believed that violations of human rights and offences against the peace and security of mankind could not be ascribed exclusively to individuals. Today, there existed *de facto* groups which "claimed" responsibility for crimes committed against persons.

25. Sanctions were the corollary of every code. The draft code under consideration should provide for sanctions; however, in reply to the Special Rapporteur's question whether all crimes covered by the draft and all sanctions should be explicitly defined in that instrument, he took the view that, in elaborating the draft code, the Commission should not follow the model of national criminal codes. In that connection, he endorsed the view expressed by Poland in its comments and observations submitted in pursuance of General Assembly resolution 35/49.[17] There was a need for flexible definitions which made it possible to take future developments into account. Such flexibility was not incompatible with the principle *nullum crimen sine lege*. To be able to connect the indictable offence with a rule was enough. If the rule was violated, the sanction followed. A schedule of sanctions applied under internal criminal law could not be transposed to the draft code. What mattered in the

[11] A/36/535.

[12] General Assembly resolution 95 (I) of 11 December 1946.

[13] See footnote 9 above.

[14] See footnote 5 above.

[15] E/CN.4/1075 and Corr.1.

[16] E/CN.4/1426 and E/CN.4/AC.22/1980/WP.2.

[17] A/36/416, p. 8, para. 7; see also A/36/535, para. 216.

present case was the will to punish and to penalize, a will which would also have a deterrent effect.

26. With regard to the methodology of codification, the question had been raised whether the draft code should include a part stating the general principles applicable or whether an empirical approach should be adopted. He had no very decided views on that point; in the interests of clarity it might be desirable for the basic principles to appear in a part of the draft specially set aside for that purpose. The most important point, however, was that the code should, in one form or another, include guiding principles to be used in determining the acts declared to be criminal and the applicable sanctions, those sanctions being suited to the nature of the subject of international law. Lastly, the future code should take account of certain special circumstances, such as self-defence or the endeavour to achieve liberation from all forms of domination. It should also deal with the questions of complicity, the non-applicability of statutory limitations to certain crimes, and extradition.

The meeting rose at 12.15 p.m.

1760th MEETING

Friday, 13 May 1983, at 10 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

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. JAGOTA said that the topic under discussion was a sensitive subject with which the Commission had already dealt from 1949 to 1954 and on which opinions were divided, as was shown by the comments of Governments and the statements made in the Sixth Committee of the General Assembly and summarized in the excellent analytical paper prepared by the Secretariat (A/CN.4/365). The topic constituted a separate item of the General Assembly's agenda instead of being merely considered as part of the Commission's report. There was also a division of opinion as to whether the topic should be dealt with by the Commission or by a special body.

2. The Commission was called upon to examine a number of issues in the light of the existing situation, including the prevailing insecurity in international relations. Those issues were the contents of the draft code, whether to include in it provision for penalties, and implementation. On the latter point, there were several possibilities: one was to set up a separate international criminal jurisdiction, another was to entrust a special chamber of the ICJ with that jurisdiction, and a third was to leave it to national courts to prosecute and punish offences under the code. There was a considerable division of opinion on that matter, as felicitously described by the Special Rapporteur in his admirable report (A/CN.4/364, chap. IV). In particular, some of those who were favourable in principle to the idea of setting up an international criminal jurisdiction had doubts regarding its practical feasibility.

3. In the conclusion of his report, the Special Rapporteur had put to the Commission a number of questions relating to the scope of the topic, methodology and implementation of the code. In its resolution 37/102 the General Assembly had adopted a somewhat simpler approach to the question by referring to the scope and the structure of the draft code. For his part, he welcomed the approach of the Special Rapporteur and would examine the first two points together and then deal with the third one separately.

4. The first issue which called for attention was that of the offences to be covered by the code and the subjects of law which could be held responsible. The determination of offences and subjects of law was closely linked to the question of the method to be followed in formulating the code. Should the Commission follow the same method as for the 1954 draft code or adopt that applied in article 19 of part 1 of the draft on State responsibility[4] or, if feasible, combine the two methods?

5. The 1954 draft code did not contain any definition of an international crime; nor did it define the concept of "peace and security of mankind". The method followed was to list the offences covered by the code. Furthermore, only the individuals responsible for the acts constituting offences were held liable, to the exclusion of the State or other subjects of international law — although it was clear that only a State could commit some of the acts treated as crimes in the 1954 draft, such as the annexation of territory by means contrary to international law.

6. The 1954 draft code was silent on the subject of penalties, differing in that respect from national penal codes. The Commission had attempted to solve that

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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 . . . 1976*, vol. II (Part Two), pp. 95–96.