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Summary record of the 1760th meeting

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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.

problem by proposing a draft article 5[5] which provided that the penalty for any of the offences set forth in the code would be that laid down for the graver crimes by national legislation, leaving it to the tribunal competent to try the accused to determine the actual penalty. However, that article had not been included in the final version of the draft. The 1954 draft code had been equally silent on the subject of jurisdiction. The Commission had discussed the question both in connection with genocide and in general terms and had appointed two different Special Rapporteurs to study the possibility of setting up an international jurisdiction to try international crimes. The Special Rapporteurs had submitted their reports to the Commission at its second session, in 1950.[6] Unfortunately they had arrived at different conclusions; one of them had favoured the establishment of a special international jurisdiction, while the other had adopted a more guarded position. The General Assembly had then set up two successive committees to deal with the issue.[7]

7. The other precedent derived from the work of the Commission, namely part 1 of the draft articles on State responsibility,[8] article 1 of which was entitled "Responsibility of a State for its internationally wrongful acts" and article 2 "Possibility that every State may be held to have committed an internationally wrongful act", while article 19 characterized as "international crimes and international delicts" certain internationally wrongful acts. Paragraph 2 of article 19 defined international crimes by reference to an objective element—"the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community"—combined with a subjective element, namely "that its breach is recognized as a crime by that community as a whole". That general definition was followed, in paragraph 3, by an enumeration which was not exhaustive. The categories of international crimes thus listed included offences against the peace and security of mankind.

8. Apart from the 1954 draft code and part 1 of the draft articles on State responsibility, there were a number of other precedents. In 1954 the General Assembly had deferred consideration of the draft code pending completion of the work on the Definition of Aggression. That question had been entrusted to a special committee which had sat from 1968 to 1974 and whose work had led to the adoption by the General Assembly, in 1974, of the Definition of Aggression.[9] The Commission should, of course, take into consideration the terms of that definition, as well as a number of other important international instruments, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[10] and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*.[11] In the same context, he cited the international instruments on the prohibition of nuclear weapons, bacteriological weapons and certain other weapons of mass destruction, and the prohibition of the use of outer space for military purposes. Equally relevant were the instruments prohibiting the use of force for the establishment or maintenance of colonial domination.

9. Another important instrument was the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft,[12] in which connection the concept of a universal crime had been recognized. Jurisdiction to try the offences in question was no longer determined by the nationality of the perpetrator of the offence or by the place of its commission. The courts of the State where the offender was found were also competent. The offence was regarded as one which affected humanity as a whole and which could therefore be tried by the courts of any country.

10. Against that background, he would give his reply to the Special Rapporteur's questions regarding scope and method. To begin with, he felt that it would be useful for the Commission to include in the draft a definition of what constituted an "international crime" and also to define the concept of "peace and security of mankind". The Commission could either formulate two separate definitions or define the whole concept of an "international crime against the peace and security of mankind" in one formulation. Those initial definitions would help to determine the contents of the draft code, namely the crimes to be included in it and those to be excluded.

11. He urged the Commission to adopt the same method as that followed in paragraphs 2 and 3 of article 19 of part 1 of the draft articles on State responsibility, namely to formulate a definition of the crimes concerned in general terms and to follow it up by a non-exhaustive list. The list would be in three parts. The first would enumerate crimes already recognized as such under existing international law, and the second, crimes under international conventions in force or instruments already adopted by the United Nations. In connection with that second category of crimes, it was essential to proceed by reference, in such a way as to make it clear that the Commission would not be reviewing the provisions of those instruments or redefining the crimes set forth therein. The third category would be a more flexible one and would cover any offence which might derive from the violation of a rule of *jus cogens*.

12. However, the Commission should make it clear—as it had done in the above-mentioned article 19—that not every breach of an international obligation constituted an international crime. In order to be so described, the breach would have to be a grave one. Moreover, the offences in question had to affect the peace and security of mankind directly. Such acts as piracy, counterfeiting and

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[5] See 1758th meeting, footnote 19.

[6] A/CN.4/15 (report of R. J. Alfaro) and A/CN.4/20 (report of A. E. F. Sandström).

[7] See 1755th meeting, footnote 17.

[8] *Yearbook . . . 1980*, vol. II (Part Two), p. 30.

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

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

[11] 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.

[12] United Nations, *Treaty Series*, vol. 860, p. 105.

the unlawful seizure of aircraft could not be held directly to affect the peace and security of mankind, and could therefore be excluded. He also agreed with the Special Rapporteur (1755th meeting) that it was not desirable to mention the political element, because that could lead to controversial interpretations. For the time being, he would not go into the question of which offences should be included in the list. He felt that the matter should be dealt with only at a later stage.

13. Lastly, he felt that it was necessary to include a separate section dealing with the question of exceptions, namely to state the acts which did not constitute offences. That point had been dealt with in article 19 of part 1 of the draft on State responsibility in combination with the definition of the various acts constituting offences. His own suggestion would be that separate provision should be made for such matters as self-defence and actions taken under United Nations sanctions.

14. Turning to the question of the subjects of international law to be covered by the code, he urged the Commission to be consistent with the approach it had adopted in its draft on State responsibility. In article 19 of part 1 of that draft, it was clear that the State as such incurred responsibility. Even the list of offences contained in the 1954 draft code and the terminology used therein had made it clear that acts for which individuals were held responsible were acts of State. To take the example of aggression, no penal code referred to aggression, which could only be the act of a State. The same was true of unlawful annexation of territory. In view of those precedents and of the opinion of most writers, the Commission should recommend that the draft code should recognize that an international crime could be committed by a State. He suggested that the relevant passage of the code should specify that an international crime could be committed either by a State or other legal entity, or by an individual.

15. While thus advising that the Commission should be consistent with its decision on article 19 of part 1 of the draft on State responsibility, he at the same time urged caution. In that connection, he drew attention to the following passage in the Special Rapporteur's first report (A/CN.4/364, para. 45):

> . . . The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated . . . Toppling the State from the lofty pedestal . . . and prescribing for it a course of conduct and a code of ethics to be followed under pain of coercive sanctions would clearly amount to a complete reversal of hitherto prevailing ideas and concepts.

Thus, even if the criminal responsibility of a State were to be recognized, there would remain the very difficult problem of how to prosecute and punish it. He suggested that, while recognizing the responsibility of the State as it had done in article 19 of part 1 of the draft on State responsibility, the Commission should restrict to individuals the application of the provisions on penalties and jurisdiction. It should then await the reaction of the Sixth Committee of the General Assembly on the subject. In that connection, the Commission should endeavour not to create difficulties for the acceptance of the draft by the Sixth Committee and subsequently by Governments. Moreover, the implementation of the code would be difficult even with respect to individuals. It would be necessary to determine who would prosecute, who would pronounce the sentence and who would execute it.

16. Clearly, the two questions of punishment and jurisdiction required further study by the Commission, which would have to decide whether the penalty must be clearly defined in each case. In that connection, it was possible that the *nulla poena sine lege* rule might not be sacrosanct. One possible solution would be to adopt the system embodied in the deleted article 5 of the 1954 draft code.[13] The system of leaving it to the competent court to decide the penalty was not unusual. To some extent it was applied in all legal systems, since judges had considerable discretion—usually within certain specified limits—for determining the penalty to be applied to each offender.

17. With regard to the question of jurisdiction, he noted from paragraph 23 of the Special Rapporteur's report that in 1937 two conventions had been adopted at Geneva on the subject of terrorism: the first was the Convention for the Prevention and Punishment of Terrorism,[14] which had been signed by a number of States but had been ratified only by India, and the second was the Convention for the Creation of an International Criminal Court,[15] which had been signed by 13 countries but ratified by none. The instruments on the Nürnberg and Tokyo Tribunals at the end of the Second World War had related to war crimes, crimes against the peace and crimes against humanity. In the light of those and other precedents he agreed with the Special Rapporteur that the Commission would be well advised to question the General Assembly about its terms of reference and whether or not it was necessary also to draft a statute for an international jurisdiction. In that regard, it was worth noting that the setting up of an international jurisdiction to deal with matters of public international law was invariably a very difficult task, as had been seen at the recent Third United Nations Conference on the Law of the Sea.

18. Mr. EVENSEN said that the introductory historical chapter in the Special Rapporteur's admirable report (A/CN.4/364) was a depressing reminder of the basic ills of modern society, which were becoming increasingly serious with technical developments that unfortunately seemed uncontrollable.

19. The Commission's starting-point for its current examination of the topic was the General Assembly's request in its resolution 36/106, in which it had invited the Commission to resume its work with a view to elaborating a draft code which would take into account new developments. There were four interesting elements in the mandate thus conferred upon the Commission: (*a*) it referred to the elaboration of a draft code; (*b*) the work to be undertaken by the Commission was seen as a prolongation of its previous work, which had resulted in the formulation of the 1954 draft code; (*c*) the

[13] See 1758th meeting, footnote 19.

[14] League of Nations, document C.546(1) M.383(1).1937.V.

[15] See 1755th meeting, footnote 9.

Commission had to take into account new developments in international law; and (*d*) it should not confine itself to a mere codification but should work towards the progressive development of international law.

20. With respect to the title of the future draft code, he agreed with those members who had pointed out (1758th meeting) that, in the 1954 text, the French title, which used the term *crimes*, was preferable to the English one, which spoke of "offences", and also to the Spanish one, which used the term *delitos*. The English title should read: "Draft Code of Crimes against the Peace and Security of Mankind".

21. Turning to the question of the form in which the Commission should present the results of its work, he said that a closer examination of the term "code" was necessary. That term was used in internal law to designate major enactments such as the French Civil Code of 1804 or the penal codes of various countries. In international law, however, the term "code", under the 1969 Vienna Convention on the Law of Treaties, was one of the many designations of an international agreement governed by that Convention, which included "treaty", "convention", "statute" and "pact". The word "code", however, was also used at the international level with an entirely different connotation in such expressions as "code of conduct", the provisions of which were not legally binding but merely defined the behaviour that it would be desirable for States to adopt. Obviously, the General Assembly had not entrusted the Commission with the drafting of a mere code of conduct in that sense. That being so, the Commission might prepare a draft treaty and designate it a "code" in order to indicate its fundamental and comprehensive character. The Commission's mandate, however, did not oblige it to adopt that formula.

22. He believed that, with the guidance of the Special Rapporteur, the Commission should be able to frame a set of principles which, by their authority and weight and because they reflected the fundamental bases of a law on international crimes emanating from legal, ethical and even religious tenets, would constitute general principles of law accepted by all. Those principles would stem not merely from natural law but also from customary international law and from the basic tenets of the Charter of the United Nations. Accordingly, the Commission's main object should be to submit to the General Assembly a draft code which could be adopted by the Assembly in the form of a declaration or proclamation by consensus or unanimous decision. By its very nature, such an instrument would become a pillar of the legal order which could serve as a basis for efforts to create a more peaceful, more humane and, above all, more responsible world. An international instrument adopted in that manner would not be open to any of the objections, based on the principles of *nullum crimen sine lege* and *nulla poena sine lege*, which had been advanced against articles 227 to 230 of the Treaty of Versailles of 1919,[16] the Charter and Judgment of the Nürnberg International Military Tribunal of 1945[17] and the Charter of the International Military Tribunal for the Far East of 1946.[18]

23. However, that instrument would continue to have one obvious weakness, which was illustrated by the 1919 and 1945/1946 precedents. In both cases, the vanquished had been placed under the jurisdiction of the victors, who had enforced the basic principles of law through *ad hoc* jurisdictions which they themselves had set up. The Commission should do its utmost to overcome that difficulty, but it should remember that its primary task was to formulate a draft code which defined the crimes punishable under international law.

24. Turning to the questions put to the Commission by the Special Rapporteur, and more especially that of the crimes to be covered by the code, he stressed that the Commission's task went beyond mere codification. State practice, especially in time of war but unfortunately also in peacetime, did not provide much encouragement for codification. As he saw it, the Commission was really being called upon to elaborate principles for the future. If, however, the term "codification" was taken as involving the drawing up of a comprehensive code which took into account the progressive development of the principles concerned, he would not object to such a procedure.

25. With regard to the crimes to be covered by the code, he did not favour the idea of enumerating such crimes, but the method of setting forth only general principles might be equally unsatisfactory. The Commission should strive to determine categories of crimes by describing in general terms the main constituent elements thereof, and, in addition, giving examples, an approach already used to some extent in the 1954 draft code. It should, however, be made perfectly clear that those examples did not constitute exhaustive lists.

26. The 1954 draft code was, of course, the natural starting-point of the Commission's work but, at the same time, it had to be carefully scrutinized in the light of later developments in the form of international conventions and innumerable resolutions and declarations of the General Assembly. Perhaps the Commission should also take into account other current developments, such as the terrifying technological evolution, the galloping arms race and the abhorrent violations of human rights.

27. In the light of all those developments, a number of obvious flaws in the 1954 draft code became apparent. Thus article 1 appeared to suggest that the enumeration of offences in the code could be regarded as exhaustive. That same article stated far too absolutely that only individuals were to be punished under the code. Clearly, those provisions would have to be tempered in the light of the results arrived at by the Commission with regard to State responsibility for criminal acts.

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[16] *British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), pp. 103–104; see also United Nations, *Historical survey of the question of international criminal jurisdiction* . . ., p. 60, appendix 3.

[17] For the Charter of the Nürnberg International Military Tribunal, see United Nations, *Treaty Series*, vol. 82, p. 284.

[18] See United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XIV, No. 349 (10 March 1946), p. 361; and No. 360 (26 May 1946), p. 890 (amendments).

28. Similarly, article 2 stood in need of complete overhaul. Its paragraphs 1 and 2, dealing with aggression, obviously needed to be amended to take into account the Definition of Aggression adopted by the General Assembly.[19] Paragraph 6 of that same article, dealing with terrorism, provided that only the act of a State in undertaking or encouraging terrorism constituted an international crime. However, recent experience showed that terrorist acts committed by groups or bands without the complicity of State authorities should likewise be considered crimes under the code. Consideration should also be given to the suggestion by a number of Governments that the taking of hostages should be classified as a terrorist act (see A/CN.4/365, para. 95).

29. The provisions of paragraph 11 relating to genocide contained certain unacceptable restrictions, since they covered only inhuman acts committed "on social, political, racial, religious or cultural grounds". The Commission should either delete that enumeration of grounds or add to it the words "or on any other ground". With regard to violations of the laws and customs of war, the brief reference in paragraph 12 was inadequate because of recent technical developments and the large number of relevant international instruments adopted since 1954.

30. Several Governments had emphasized in their replies (*ibid.*, paras. 80–84) the importance of condemning the use of nuclear weapons and other weapons of mass destruction as an international crime, in line with the General Assembly decisions of 1978 and 1981. In his opinion, it would not be sufficient to declare that the first use of such weapons constituted an international crime. Nuclear weapons and other weapons of mass destruction were by their very nature a crime against the peace and security of mankind. They did not enable any distinction to be made between civilian populations and military forces or between civilian objectives and military objectives or permit compliance with the rule that civilians enjoyed general protection against dangers arising out of military operations. Moreover, the use of such weapons violated the ban on the use of weapons that might be expected to cause widespread, long-term or severe damage to the international environment. The same considerations applied to biological and certain other dreadful weapons resulting from the technological revolution and the suicidal arms race.

31. The Commission should accordingly consider making additions and amendments to paragraph 12 of article 2 of the 1954 draft code so as to refer to such serious violations of the peace and security of mankind as the testing, production, deployment or use of (*a*) nuclear weapons or other weapons of mass destruction, (*b*) biological or chemical weapons and (*c*) weapons aimed at the alteration or destruction of the environment or having such effects, as well as the use of areas that were the common heritage of mankind (including the sea-bed and the ocean floor and outer space) for any of the purposes mentioned under (*a*), (*b*) and (*c*) above, and the use of weapons causing unnecessary or unreasonable suffering.

32. He noted the Special Rapporteur's suggestion (1755th meeting) that the code might also cover such violations as the destruction or grave damage of the environment by pollution, piracy and the international trade in narcotics. His own view was that to broaden the scope of the code to include violations of that kind would tend to weaken it, except that gross acts of hijacking and piracy might be considered as acts of terrorism.

33. On the other hand, the Commission should consider amending the draft code to extend its scope to certain acts contrary to the security of mankind, such as *apartheid*, racial discrimination, slavery, colonialism and other grave violations of human rights. It followed from that enumeration that the fact of making a distinction between political crimes and other crimes would add little or nothing to the definition of crimes against the peace and security of mankind.

34. With regard to the suggestion that the code should lay down penalties, he felt that consideration should be given to reintroducing a provision based on the original article 5[20] which the Commission had finally discarded in 1954. Such a provision would serve, among other things, to counter objections based on the principle *nulla poena sine lege*. Perhaps it would suffice to state that the penalty should be a penalty ordinarily applied under internal law in cases of serious crimes and to leave it to the competent jurisdiction to determine the type and magnitude of the penalty.

35. The question of statutory limitations had been raised during the discussion. In his view, cases of such gravity as those to be provided for by the code should be governed by the principles laid down in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[21] The rule in the matter was that no statutory limitations applied.

36. On the question of the subjects of law to which the code would apply, the Commission should not confine itself to crimes committed by individuals. Most of the acts to be covered by the code were of such a nature and gravity that they could be committed only by States. Aggression was a good example. It was true that certain sanctions, such as imprisonment, could not be applied to States, but it was not the sanction that made an act criminal but the nature of the act itself. To provide for the possibility of condemning the State as an entity for the perpetration of grave violations of international law would have a considerable preventive effect; the sanctions to be applied should, of course, be of a special nature, such as punitive damages or war reparations.

37. Referring, lastly, to the question of implementation of the code, he said that, like other members of the Commission, he supported the idea of preparing a draft statute for an international jurisdiction. He felt, however,

[19] See footnote 9 above.

[20] See 1758th meeting, footnote 19.

[21] United Nations, *Treaty Series*, vol. 754, p. 73.

that that task should be taken up at a later stage. For the time being, the Commission should concern itself with formulating the code, specifying what made certain acts criminal under international law. Once that task was completed, the Commission could decide to take up—or might be entrusted with—the question of jurisdiction. The code of crimes against the peace and security of mankind was an instrument with intrinsic value and should not be subordinated to the thorny question of creating an international criminal tribunal or extending the jurisdiction of the ICJ. To deal with that question might cause the Commission to fail in the basic task of drafting the necessary code of international crimes.

38. Mr. OGISO said that he, too, thought that the topic under consideration was a political one and, to that extent, accepted that the Commission had to respect the political will of the international community, as expressed in the relevant General Assembly resolutions and, more particularly, in resolution 36/106. By requesting the Commission to elaborate a draft Code of Offences against the Peace and Security of Mankind, the General Assembly had surely called for the formulation of a legal instrument leading to the establishment of an international criminal law; the intention could not simply have been to ask the Commission to engage in a theoretical exercise of legal systematization without regard to the enforceability of the future code. The question arose, however, whether the political will of the international community, as expressed in that resolution, was based on the clear recognition that the international criminal law that would result from the elaboration of the code would be ineffective and futile unless it was applicable and enforceable in an impartial and objective manner and unless it enjoyed the support of international society as a whole. Was the General Assembly of the opinion that such conditions already existed in contemporary international society to an extent that justified the Commission's embarking upon the enormously ambitious task of establishing an international criminal law? On the one hand, the performance of that task would absorb much of the Commission's energy and time; on the other hand, any result which was not altogether satisfactory would involve a risk of certain principles being abused or used for political propaganda purposes. The outcome in such a case would be not only futile but actually detrimental to the Commission's authority. The Commission should therefore proceed with the utmost circumspection; and the need for caution was not made less relevant by the existence of the Definition of Aggression adopted by the General Assembly in 1974,[22] a text which was more in the nature of guidelines addressed to the Security Council and whose relevance to the proposed draft code was consequently limited.

39. Any law, whether international or domestic, had to be backed by appropriate means of implementation and accepted by society as an enforceable norm. The pursuit of doctrinal or theoretical possibility was not enough. Criminal law, more than any other, required the certainty of implementation, and that implementation, in turn, was predicated upon objectivity and impartiality. A code of offences which might form the basis of international criminal law had to be applicable with strict impartiality to all States, all relationships between States and all responsible individuals. The prospect of universal adherence and impartial enforceability therefore had to be sufficiently assured. Failure by any single major Power to support the code would render it useless. Considering the differences of view that had emerged within the Commission, it was highly unlikely that the international community would, now or in the foreseeable future, give universal support to the proposed code. He was unable to agree with the argument that the General Assembly's request in resolution 36/106 absolved the Commission from the obligation to raise fundamental questions. On the contrary, it was the Commission's duty to draw the General Assembly's attention to any problems that might arise, especially problems of a fundamental nature.

40. Turning to the questions posed by the Special Rapporteur in his first report (A/CN.4/364, para. 69), he said, in reply to the first question, that the proposed code should concern itself solely with acts universally recognized to be crimes under international law as constituting offences against the peace and security of mankind. That being so, piracy or hijacking of aircraft should not be included in the draft. Moreover, the Commission should be careful not to place excessive emphasis on the "progressive development" aspect of its task. In view of the political nature of the subject, there was always a risk that a political slogan lacking the required degree of legal maturity might creep into the code, thus turning it into a political or theoretical manifesto rather than a legal instrument. That would clearly be harmful to the Commission's authority as well as contrary to its desire to contribute to the well-being of the international community through the progressive development of international law. In other words, in drawing up the list of offences, the Commission should beware of giving free rein to its imagination and should come back again and again to the fundamental question as to whether each offence was recognized by the whole community of nations as being a crime against the peace and security of mankind. It should also give due regard to existing conventions, such as those on genocide and on hijacking, and avoid the possibility of duplication or confusion. In that respect, too, restraint was called for.

41. With regard to the question of the subjects of law, he was of the view that criminal responsibility, and particularly that arising from the type of offences being considered, attached to individuals only. The concept of criminal responsibility of legal persons, such as private companies, admittedly existed in some legal systems, including that of his country, where juridical persons could be fined for their wrongdoings; however, its application was restricted to very limited fields of activity and to cases considered absolutely necessary in order to achieve certain objectives, mainly of a technical nature. The concept did not exist in the Japanese criminal code for general application. Criminal responsibility of legal

[22] See footnote 9 above.

persons should be regarded as a legal fiction, and he saw no justification for introducing the concept into international law, particularly when the object was to punish outrageous acts against mankind as a whole. Moreover, any attempt to punish an offending State would necessitate the establishment of an appropriate supranational mechanism, which, in all honesty, was hardly a realistic prospect for the foreseeable future.

42. In reply to the question concerning the method to be used, he was in favour of what the Special Rapporteur had called the inductive method, without, however, necessarily precluding the possibility that the draft might include a few general principles, which, of course, should command the consensus of the international community at large if the code was to become a viable legal instrument. The principle *nullum crimen, nulla poena sine lege*, which was universally accepted, might be included in the code as meeting that condition.

43. Lastly, on the question of the implementation of the code, he again emphasized the uselessness, and indeed the danger, of drawing up a list of offences not backed by the necessary enforcement provisions. The proposed code must be applied universally, objectively and impartially, and an international mechanism guaranteeing such application, including but not limited to a truly international tribunal, must be established. Punishment imposed in an arbitrary and unpredictable way constituted an injustice in itself. Nothing less than the world's confidence in international law was at stake. The obstacles to effective implementation were numerous; the shortcomings of the existing practice of national jurisdiction accompanied by extradition were only one example. There again, everything depended on the fundamental question whether the international community was prepared to give unanimous backing to the code, not merely by adopting a resolution requesting the Commission to prepare a draft, but by throwing its full weight behind the impartial and objective enforcement of the code if the Commission succeeded in drafting it.

44. In conclusion, he said that everything should be done to avoid a situation in which the victor, for his own satisfaction, condemned the defeated in the name of justice while the same offences committed by the victor went unpunished, as, in his personal opinion, had been the case with the Tokyo Tribunal.

45. Mr. YANKOV said that the Special Rapporteur's first report (A/CN.4/364) had provided a sound basis for discussion and stimulated new ideas. The division of opinion apparent at the current stage of the work should be considered a positive phenomenon, since it offered grounds for reflection and an exchange of views. It was perhaps inevitable that the debate had, in substance, followed the main trends as they emerged from the discussions in the Sixth Committee of the General Assembly. Another major contribution of the report was that it had encouraged further exploration of various important aspects of the topic. Without necessarily sharing all the views expressed in the report, he acknowledged the importance of the questions posed by the Special Rapporteur in its concluding section.

46. In replying to those questions, he wished first of all to affirm that consideration of the question of offences against the peace and security of mankind and elaboration of a code reflecting the new political realities were both timely and feasible. The proposed instrument should be prepared on the basis of the 1954 draft code, taking into consideration the development of international law since that time and, more particularly, the Definition of Aggression adopted by the General Assembly,[23] the recent development of humanitarian law, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[24] the International Convention on the Elimination of All Forms of Racial Discrimination,[25] the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[26] and other relevant international instruments relating to international security and the prevention of nuclear war.

47. As to the scope of the future code *ratione materiae*, he acknowledged that, if work was resumed on the basis of the 1954 draft, the scope of that draft should be extended to such crimes as racism, racial discrimination and *apartheid*, acts damaging the environment in a manner which threatened the security of mankind (as provided for in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977[27]), the use of nuclear and other weapons of mass destruction, etc. Codification should, in other words, be confined to offences which, by their magnitude and gravity, constituted breaches of peace and security or threatened the peace and security of mankind. In that connection, the Commission would at some point have to proceed to a close scrutiny of the relevant international instruments in order to establish a list of such offences. It should adopt a cautious and circumspect approach in order to avoid unnecessarily broadening the scope of the code. He agreed with the view put forward by the Special Rapporteur and supported by Mr. Calero Rodrigues (1758th meeting) and other members of the Commission that only offences against peace and security *stricto sensu* should be taken into consideration.

48. A realistic approach was required with regard to the scope of the draft code *ratione personae*. Two preliminary questions had to be answered. The first pertained to the Commission's previous position, as reflected in the draft of 1954, and more specifically, to the question whether, under article 1 of that draft, only individuals could be responsible for offences against the peace and security of mankind. The question was not only of theoretical and historical value; its consideration could provide the Commission with relevant material for a possible

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[23] See footnote 9 above.

[24] See footnote 21 above.

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

[26] See footnote 11 above.

[27] General Assembly resolution 31/72 of 10 December 1976, annex; see also United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), p. 125.

decision. The second question pertained to the feasibility and advisability of going further than the 1954 draft at the present time.

49. With regard to the first question, he was of the opinion that the Commission had deliberately confined the scope of the draft code to individuals and had explicitly excluded groups, States and other entities from the subjects of law incurring international criminal responsibility. In support of that assertion, he quoted from the report of the former Special Rapporteur, Jean Spiropoulos,[28] and from the Commission's commentary to article 1.[29] Such being the case, it was permissible to ask whether any new developments had occurred since 1954 which might justify extending the scope of the instrument *ratione personae*. In any event, the view expressed by some members of the Commission that article 1 of the 1954 draft code did not confine criminal responsibility to individuals was clearly unfounded.

50. Nor was there any contradiction or incompatibility between the personal character of criminal responsibility and the nature of the offences listed in article 2, which used the expression "by the authorities of a State". The convincing reasoning contained in the report of the former Special Rapporteur[30] showed that, although the Commission had been cognizant of the connection between the two, it had adhered to the view of the Nürnberg Tribunal to the effect that it was men, not abstract entities, who committed crimes which required punishment under international law.

51. A measure of caution and realism was indispensable when considering the criminal responsibility of subjects of law other than individuals. The question was not whether State organs or authorities could commit a criminal act, but who should be punished and by whom. It was not, of course, possible to exclude all reference to States, but the question of implementation was paramount.

52. In dealing with that question, the last of those posed by the Special Rapporteur, the Commission should again display the necessary wisdom and realism. There were a variety of possibilities: recourse to judical organs set up by international conventions to try specific categories of international crimes, recourse to national courts, the establishment of *ad hoc* tribunals through international treaties, or other similar institutions. For the time being, and before the General Assembly had taken a political decision in the matter, the Commission should not commit itself to a particular course but confine itself to emphasizing the close connection between the draft code and its institutional aspects.

53. Lastly, he said that he preferred the inductive method without, however, ruling out altogether the possibility of drawing up general principles and criteria. The Commission should exercise great caution in drawing analogies with internal penal law. The 1954 draft code could provide a useful basis for work, provided that the list of offences contained in article 2 was revised to take account of current political realities and the development of international law.

54. In conclusion, he said that the Commission should objectively reflect in its report the diversity of views expressed and should seek further instructions from the General Assembly on the question of jurisdiction.

Organization of work (*continued*)*

MEMBERSHIP OF THE PLANNING GROUP

55. Mr. YANKOV (first Vice-Chairman of the Commission) proposed that the membership of the Planning Group should be the following: Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Jacovides, Mr. Malek, Mr. McCaffrey, Mr. Reuter, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov and Mr. Yankov. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

It was so agreed.

The meeting rose at 1.10 p.m.

1761st MEETING

Monday, 16 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, 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. McCAFFREY expressed appreciation to the Special Rapporteur for his clear and concise report (A/CN.4/364) and his masterful introduction, both of

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[28] *Yearbook . . . 1950*, vol. II, pp. 260–261, document A/CN.4/25, chap. III.

[29] *Yearbook . . . 1951*, vol. II, p. 135.

[30] *Yearbook . . . 1950*, vol. II, p. 261, document A/CN.4/25, paras. 53–56.

* Resumed from the 1755th meeting.

[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.*