Document:-
A/CN.4/SR.1761

Summary record of the 1761st 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

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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

[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.*

which had distilled a very difficult subject down to its essential points, presented a balanced view of a not uncontroversial topic and focused the Commission's attention on the three fundamental issues that now had to be discussed, namely the scope of the draft, the methodology of codification and the implementation of the draft code.

2. The topic under consideration was one with which his own country had some historical connection, as the first Special Rapporteur, Jean Spiropoulos, had noted in his first report in 1950,[4] and as Mr. Malek had pointed out at the Commission's 1758th meeting. The idea of a code of offences against the peace and security of mankind had been expressed for the first time in correspondence between the United States member of the Nürnberg Tribunal, Justice Biddle, and President Truman, in which Justice Biddle had suggested that the time had come to draft what he had referred to as a code of international criminal law. President Truman had replied that that would be a fitting task to be undertaken by the United Nations and had expressed the hope that the United Nations would "reaffirm the principles of the Nürnberg charter in the context of a general codification of offences against the peace and security of mankind".[5]

3. Acting on President Truman's proposal, the United States delegation had submitted a draft resolution to the General Assembly at its first session calling for the submission of the matter to the Committee on the Codification of International Law. The General Assembly had adopted that draft resolution[6] and, at its second session, had entrusted the Commission with the task of formulating the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal and preparing a draft code of offences against the peace and security of mankind.[7]

4. A fundamental decision determining the method of approaching the subject had been taken by the first Special Rapporteur and the Commission in 1950, as reflected in paragraph 1 of the Special Rapporteur's first report, which read:

1. There were two methods of approaching our subject: one was to elaborate a text with detailed substantive and procedural provisions, an "ideal" draft, similar to the penal codes of municipal law, without paying any regard to the question whether such a draft would have any chance of obtaining the approval of the governments. The other consisted in the elaboration of a text which, based on a realistic approach to our task, could serve as a useful basis of discussion at an international conference. We did not hesitate as to the choice. The General Assembly, directing the International Law Commission to prepare a draft code of offences against the peace and security of mankind, could have in mind but the second method of approach.[8]

5. In his view, the last sentence of the paragraph which he had just quoted was as true today as it had been in 1950 and the Commission would be derelict in its duty not to make the same choice that had been made by its predecessor in 1950. Indeed, the draft code of offences was a subject whose importance to the international community was far too great to allow it to be approached on a strictly idealistic level with no thought being given to its practical utility as a basis for discussion by Governments. The recent unfortunate experience in Vienna with the articles on succession of States in respect of State property, archives and debts[9] stood as a warning in that respect. The draft code was a subject whose importance to the international community was far too great to allow it to be diluted by the introduction of a whole array of purported offences, so that it became just another aspirational document which stood no real chance of being accepted by all the essential components of the international community.

6. The question of the scope of the draft code consisted of two parts. It must first be determined to what acts, activities or practices the draft code should apply, since it was the determination of the acts, activities and practices which constituted offences that was at the heart of the Commission's enterprise. It must then be determined whether there was any justification for a departure from the position taken by the Commission in the 1954 draft code that the code applied not to legal entities, but to individuals.

7. In his first report, the first Special Rapporteur had noted that the Committee on the Progressive Development of International Law and its Codification had originally conceived of the codification project as having three distinct elements, namely the codification of the Nürnberg Principles, the codification of offences against the peace and security of mankind and the codification of "international penal law", which had been described as concerning "every crime in which there was an international element".[10] The international penal code aspect of the project had, however, been dropped and had not been referred to in General Assembly resolution 177 (II). Thus, unless the position of the General Assembly had changed in that regard—and there was no clear indication that it had—it would appear that the Commission should exclude from the scope of the draft code any matters that would fall within such an international penal code. The first Special Rapporteur had concluded, with regard to the intention of the above-mentioned resolution, that the "code of offences against the peace and security of mankind" was "intended to refer to acts which, if committed or tolerated by a State, would

[4] *Yearbook . . . 1950*, vol. II, pp. 255–256, document A/CN.4/25.

[5] United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XV, No. 386 (24 November 1946), p. 954.

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

[7] General Assembly resolution 177 (II) of 21 November 1947.

[8] *Yearbook . . . 1950*, vol. II, p. 255, document A/CN.4/25, para. 1.

[9] The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts was signed on 8 April 1983. For the text of the Convention, see A/CONF.117/14.

[10] *Yearbook . . . 1950*, vol. II, pp. 257–258, document A/CN.4/25.

constitute violations of international law and involve international responsibility"; he had observed that the "main characteristic of the offences in question is their highly *political* nature" and that they "normally would affect the international relations in a way dangerous for the *maintenance of peace*".[11] As Mr. Calero Rodrigues (1758th meeting) and other members of the Commission had pointed out at the current session, however, the criterion of the "political nature" of an offence did not seem to be very useful and probably should not play a role in the determination of the scope of the draft code.

8. The first Special Rapporteur had also concluded that questions concerning conflicts of legislation and jurisdiction in international criminal matters were beyond the scope of the draft code,[12] since they did not normally affect international relations in a way dangerous for the maintenance of peace. The draft code would thus not apply to piracy, traffic in dangerous drugs or in women and children, counterfeiting or interference with submarine cables.

9. When distilled to its essence, the draft code had originally been seen and should be seen today as being restricted to what the first Special Rapporteur had referred to as those acts in violation of international law which would affect international relations in such a way as to be dangerous for the maintenance of peace. He submitted that the scope of the topic under consideration had not changed since it had originally been defined, although the experience of the intervening years might enable the Commission to delineate the contours of the topic with greater precision. Thus, at present, it might be said that the topic related to acts which seriously interfered with the interest of the international community in the maintenance of peace and security. More specifically, an offence against the peace and security of mankind might be said, to use the wording of article 19, paragraph 3 (*a*), of part 1 of the draft articles on State responsibility,[13] to result from "a serious breach of an international obligation of essential importance for the maintenance of international peace and security". That wording might be very useful in helping to answer the question of the scope *ratione materiae* of the draft code.

10. The Commission might also seek guidance in Principle VI of the Nürnberg Principles, which described as "crimes under international law" crimes against peace (which might today be taken to include not only wars of aggression, but also acts of aggression); war crimes; and crimes against humanity (which might today be taken to include gross violations of human rights).[14] Those three categories of acts would appear to be those that would be most commonly accepted as constituting offences against the peace and security of mankind and would also seem to fit the criterion of article 19, paragraph 3 (*a*), of part 1 of the draft articles on State responsibility.

11. In seeking a test or criterion for offences against the peace and security of mankind, the Commission might, as Sir Ian Sinclair had suggested (1757th meeting), draw inspiration from the technique employed in the context of article 19 of part 1 of the draft articles on State responsibility to distinguish more serious breaches of international law from relatively less serious breaches. Paragraph (61) of the Commission's commentary to article 19[15] explained that the criterion formulated in paragraph 2 of that article for determining what it called—he thought inaccurately—an international "crime" had two aspects. Those two aspects would be useful to the Commission in its attempts to define the substantive scope of the draft code.

12. The first aspect was "the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community". Applying that requirement to the draft code, to constitute an offence against the peace and security of mankind, the obligation breached should, by virtue of its content, be essential for the protection of the fundamental interest of the international community in the maintenance of international peace and security.

13. Who, then, determined whether a given obligation was essential? That question was answered by the second aspect of the criterion formulated in article 19, paragraph 2, the commentary to which stated that "the other [aspect], which complements the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the obligation is essential and, accordingly, whether its breach is of a 'criminal' nature".[16]

14. The international community as a whole would thus have to be the judge of whether the obligation breached was essential for the protection of international peace and security and, accordingly, whether its breach was an offence against the peace and security of mankind. It was also explained in the same paragraph of the commentary to article 19 what was meant by the requirement that the obligation should be recognized as essential by the "international community as a whole":

> . . . It certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an "international crime", not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community.

15. In that connection, he agreed with earlier speakers who had pointed out that the kinds of acts or practices that would qualify as "offences" under the draft code were those that shocked the conscience of all mankind. He also associated himself with the cautious and wise approach adopted by Mr. Ogiso (1760th meeting), who had sounded a warning against allowing political slogans to

[11] *Ibid.*, p. 259, para. 35.

[12] *Ibid.*, para. 36.

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

[14] See the formulation of the Nürnberg Principles adopted by the Commission at its second session, in 1950, in *Yearbook . . . 1950*, vol. II, pp. 374–378, document A/1316, part III.

[15] *Yearbook . . . 1976*, vol. II (Part Two), p. 119.

[16] *Ibid.*

masquerade as legal principles. That explained the importance of a consensus by the entire international community on the offences to be included in the draft code, if the latter was not to be, instead of a real code of legal norms, an idealistic set of principles with very little chance of acceptance by Governments. More than one member of the Commission had, after all, pointed out that few, if any, States could face undaunted a test according to such principles. Finally, he shared Mr. Riphagen's view (1759th meeting) that the problems of piracy, hijacking and counterfeiting could be effectively dealt with through national courts, the exercise of whose jurisdiction could be harmonized by international co-operation in respect of extradition.

16. The second part of the question of scope, namely that of the scope of the draft code *ratione personae*, was a very difficult one whose answer was closely connected with the question of the establishment of an international criminal court and with the question of the form the draft code would ultimately take. For reasons he would discuss later in connection with the issue of implementation, he considered that it would be inadvisable, if not dangerous, to make the code applicable to individuals without, at the same time, establishing an international criminal court. That would also be true if the code was to take the form of a declaration of principles adopted by a unanimous vote of the General Assembly or by consensus, as suggested by Mr. Evensen (1760th meeting). In such a case, the code should probably be made applicable only to States. Assuming, however, that the ultimate form of the draft code would not be decided until a more advanced stage, it seemed to him that three considerations pointed to the conclusion that the subjects of the draft code should be individuals and not States, provided, of course, that an international criminal court was established and notwithstanding the fact that, as many members of the Commission had pointed out, only States or groups of States appeared to be capable of committing the offences listed in the 1954 draft code. In other words, an individual could not commit those offences alone.

17. The arguments for restricting the application of the draft code to individuals were that it should be brought into line with article 19 of part 1 of the draft articles on State responsibility; that the code would probably have a greater deterrent effect on individuals than on States; and that, if the draft code was ever to be implemented, it must apply to individuals and not to States.

18. With regard to the first consideration, the Commission had stated in paragraph (59) of its commentary to article 19 that

> . . . it wishes to sound a warning against any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc. . . . . Once again, the Commission takes this opportunity of stressing that the attribution to the State of an internationally wrongful act characterized as an "international crime" is quite different from the incrimination of certain individuals-organs for actions connected with the commission of an "international crime" of the State. . . .[17]

The Commission had thus made a clear distinction between régimes of State responsibility for particularly serious wrongs and individual responsibility for offences such as war crimes and crimes against peace. Its commentary provided some insight into the two questions of the scope of the code: first, with regard to the scope *ratione materiae*, it indicated that aggravated State responsibility for acts characterized as international "crimes" covered a wider range of acts than did the topic under consideration; and, secondly, with regard to the scope *ratione personae*, it indicated that the responsibility of States for such crimes was covered by article 19, while the criminal responsibility of individuals was covered elsewhere. In his view, it would hopelessly and, perhaps even dangerously, confuse the issue to have two parallel and overlapping régimes of State responsibility for acts that amounted to breaches of international peace and security.

19. Referring to the second consideration, namely deterrence, he said that a number of members of the Commission had convincingly argued that a draft code which could not be implemented would be an empty gesture. The Special Rapporteur had, moreover, rightly pointed out in his report (A/CN.4/364, para. 45) that the "odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated". Of the two conclusions that followed from that observation, one was that, unless the Commission wanted the code to be a dead letter from the outset or to be enforceable only against defeated States, States should not be the subjects of the draft code. The second was that, since States should not be held to answer before an international criminal court except by the raw power of the victor over the vanquished, the code, if applied to them, would not significantly deter them and would amount to a toothless, aspirational document.

20. The third consideration led him to ask whether there was any sense in making States the subjects of the draft code if it could not be enforced against them. In considering whether States should be subject to the draft code, fundamental questions arose in connection with the relationship between the draft code and the system prescribed in Articles 39, 41, 42 and 103 of the Charter of the United Nations. Thus any system set up under the draft code and any régime of State responsibility would be subject to the Charter and the "jurisdiction" of the Security Council would preempt that of any international criminal tribunal with regard to the determination whether a State had committed an act of aggression and, if so, what the consequences would be. For all those reasons, it seemed to him that the subjects of the draft code should be individuals and not States.

21. Turning to the question of methodology, he said that, in his report (*ibid.*, paras. 55–57), the Special Rapporteur had argued persuasively for the formulation of a criterion for offences against the peace and security of mankind. For realistic and practical reasons, the criterion should not be too broad. The Special Rapporteur had recognized that point when he had stated that the Commission's task would be less arduous if it adopted a

[17] *Ibid.*

criterion along the following lines: "an offence against the peace and security of mankind is any offence which, by its *nature*, is covered by international law, in that it infringes a lofty principle of human civilization" (*ibid.*, para. 57). That, in his own view, well expressed the essence of what the draft code should cover, although he would add to it the two-pronged criterion he had suggested earlier in connection with the scope of the code *ratione materiae*. With the association of those two criteria the code would have the best chance of being successful because it would be broadly acceptable to States. Once a criterion had been formulated, however, account should be taken of paragraph 55 of the Special Rapporteur's report by prescribing in some detail the conditions and effects of individual criminal responsibility.

22. The question of the implementation of the draft code could not be divorced from the question of its scope. To do so would be tantamount to the enactment by a State of a criminal code without establishing a system of criminal courts or otherwise providing for the manner in which the criminal code was to be enforced. That could only lead to chaos, with the powerful meting out their own brands of justice. Contrary to what the scenario might suggest, he did not believe in the depravity of man, but in an area as sensitive and delicate as the one under consideration, why take chances? States would be much more likely to accept the draft Code of Offences against the Peace and Security of Mankind if they could be assured that it would be administered by an impartial tribunal than if any State into whose hands a hapless foreign official might fall could indict, try and punish that individual, with no possibility of review, according to its unilateral interpretations and findings—a situation which could well be more harmful to international peace and security than the alleged offence itself. Given today's unstable world situation, a draft code without a court to apply it could easily become a dangerous instrument in the hands of States, providing them with a pretext for taking unjustifiable action. What Mr. Ago, the Special Rapporteur responsible for part 1 of the draft articles on State responsibility, had stated in connection with international crimes under article 19 of these draft articles, namely that the "existence of an international crime should always be established by an international instance",[18] was all the more true in the case of offences under the draft code.

23. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his very thorough report on the draft Code of Offences against the Peace and Security of Mankind. The Special Rapporteur had traced the history of one of mankind's greatest pieces of hypocrisy. The offences covered by the 1954 draft code were not new; some, thought to have vanished forever, were now reappearing in the course of colonial wars in which mercenaries trained for crime were used. The Nürnberg trial was more the expression of *vae victis* than a desire to establish rules of law. The request for the formulation of the "Nürnberg Principles" had been an attempt to justify vengeance and, while punishing the Nazis' abominable crimes had been a necessity, other offenders were today committing equally serious crimes with impunity. In his first report, the Special Rapporteur had stated that crimes against the peace and security of mankind could be attributed to individuals and also to States or organizations (A/CN.4/364, paras. 42–46). Who was today bringing down Governments in Latin America and causing the death of thousands of people? Some invoked a moral duty to justify such acts; that "moral" duty was akin to the divine right of kings. The crimes in question perhaps went unpunished for racial reasons.

24. The Commission had received a mandate to elaborate a Code of Offences against the Peace and Security of Mankind. It could define the crimes and indicate the corresponding penalties, but could the code ever be implemented? For law to be applied in an equitable manner, all its subjects must be equal before it. The very basis of international law lay in the Charter of the United Nations, but some States remained outside the law.

25. Some members of the Commission had expressed the opinion that the draft should be confined to crimes committed by individuals. However, when committing offences, individuals could act as organs of a State. The 1954 draft recognized among the crimes against the peace and security of mankind incursions by armed bands within the territories of a State organized or encouraged or tolerated by the authorities of another State; activities calculated to foment civil strife in a State and undertaken or encouraged by the authorities of another State; the annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law; and intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind. Consequently, as of 1954, crimes against the peace and security of mankind could be attributed to States. Since the Nürnberg trial, no such crimes had been committed by small States; the latter had on the contrary been the victims of such offences. What was the use of elaborating a code, given that those who could violate it would never be punished either as individuals or as States? It was doubtless possible to elaborate a draft code within certain limits and, in particular, to define the offences. For the rest, it would be best to request instructions from the General Assembly. The draft code might have a use in the future: in case of conflict, the victors could hang the vanquished without the possibility of the rules *nullum crimen sine lege* and *nulla poena sine lege* being invoked against them.

26. Mr. FLITAN said that the code should contain a provision to the effect that any action directed against the peace and security of mankind was an offence; the obligation for States to use the peaceful means provided in the Charter for the settlement of their disputes (good offices, mediation, etc.) should also be included as a binding legal rule. Any State which failed to live up to that obligation would be committing an offence for which it would be held responsible.

[18] *Yearbook . . . 1976*, vol. I, p. 60, 1371st meeting, para. 37.

27. During the discussion, some members of the Commission had expressed the opinion that the draft code to be elaborated should apply only to individuals, like the draft code of 1954. He recalled that, during the debate in the Sixth Committee of the General Assembly, many Member States which supported the elaboration of a draft Code of Offences against the Peace and Security of Mankind had said that the 1954 draft, now almost 30 years old, had shortcomings and that account must be taken of developments since then, and particularly of the many international legal instruments adopted in the meantime (see A/CN.4/365, paras. 50–52). Some provisions of the 1954 draft code had been considered too vague or too general. In addition, as some members of the Commission had pointed out, certain acts considered as offences against the peace and security of mankind could be committed only by States—annexation, for instance. In the Sixth Committee, emphasis had been placed on the preventive and deterrent role of the code to be elaborated; it was better to prevent offences against the peace and security of mankind than to have to repress them (*ibid.*, paras. 14–18 and *passim*). To confine the scope of the future code to individuals would be to fall short of the targets set by the General Assembly, to neglect the need for the code to have a preventive and deterrent value and to ignore the development of the international community over the past 30 years. Present conditions were more favourable to the elaboration of a code than those existing in 1954; there were new States Members of the United Nations which were capable of successfully elaborating the code.

28. Finally, the world contained super-Powers, medium-level States and small States. The super-Powers could resort to force to defend their interests, but that was not true of the great majority of other States. They, the medium or small States, wanted some morality to be introduced into international life and some justice to be applied in it. In the interests of those States, the scope of the draft code should include States and other legal entities.

29. Mr. YANKOV said that it might be advisable for the Commission to decide whether the compendium of relevant international instruments (A/CN.4/368) should be examined by the Special Rapporteur alone or whether he might need the assistance of a small working group in presenting conclusions and recommendations.

30. Observing that the acts enumerated in the 1954 draft code could be committed either by States, acting through Government agencies or institutions, or by individuals, he expressed doubt whether the structure of the international community had changed so much since 1954 that States could now be called before an international tribunal to account for criminal acts. There had, of course, been changes in international relations and in international law since 1954, but they had not affected the structure or the foundations of the international community of States. Even the process of economic and political integration in various parts of the world had not altered the structure or the institutions of the international community.

31. The problem was not whether acts constituting offences against the peace and security of mankind could be attributed to States, but rather, whether the draft code could be effective if its main subjects were States, which would not accept a draft code easily. Indeed, they were already reluctant to accept the jurisdiction of the ICJ. In the existing political and legal order, the United Nations was perhaps the only global institutional system for collective preventive and enforcement measures relating to the maintenace of international peace and security. The competent organ vested with primary responsibility for adopting effective measures that might or might not involve the use of force was the Security Council. Although the procedural functioning of the Security Council did give rise to problems, it was open to discussion whether the system provided for under Chapter VII of the United Nations Charter was ineffective and needed to be replaced by another. The problem with which the Commission had to deal was thus whether the world was prepared to take a realistic view of the question of offences against the peace and security of mankind and to formulate a draft code that would be universally applicable.

32. Mr. STAVROPOULOS said that, in his view, the compendium of relevant international instruments would be much more useful if it was accompanied by an addendum indicating which States had ratified the treaties and conventions to which it referred.

33. Sir Ian SINCLAIR supported Mr. Stavropoulos's suggestion. The addendum in question should also indicate how States had voted on the General Assembly resolutions referred to in the compendium.

34. Mr. ROMANOV (Secretary of the Commission) said that the Secretariat would make the necessary arrangements to have the addendum in question prepared and circulated at the current session. As a matter of practicality, however, it would be of great assistance to the Secretariat if States themselves could provide the necessary information on their participation in the instruments referred to in part I, section A, subsections 1 and 2.

35. Sir Ian SINCLAIR suggested that, in order to simplify the Secretariat's task, the Commission might initially confine its request to instruments of which the United Nations Secretary-General was the depositary and to General Assembly resolutions.

36. Mr. DÍAZ GONZÁLEZ said that it would be most useful to have document A/CN.4/368 and the requested addendum in Spanish.

37. Mr. BARBOZA recalled that it had been decided to distribute the English version of document A/CN.4/368 first because it alone had been available; it had been understood, however, that the document would subsequently be distributed in the other languages. Failing that understanding, he would have opposed the decision concerning the English version.

38. Mr. LACLETA MUÑOZ endorsed Mr. Barboza's remarks.

39. Mr. FLITAN said that he too wished document

A/CN.4/368 and the requested addendum to be made available in the other languages.

40. The CHAIRMAN said that the compendium contained in document A/CN.4/368 would be issued in the official languages other than English and that the Secretariat would be requested to prepare an addendum indicating ratifications of international agreements and instruments and the results of votes on General Assembly resolutions.

41. Mr. THIAM (Special Rapporteur), summarizing the discussion, said that the variety of the opinions expressed was no doubt attributable to the complexity of the topic, in which strictly technical elements were often mixed with political considerations. He wished to begin by refuting two objections. The first had been made by Mr. Ogiso (1760th meeting) and Mr. Díaz González, who had questioned the timeliness of studying the topic. The General Assembly had not only requested the Commission to pursue its study of the matter, but had emphasized the importance and urgency of the task. It was therefore not for the Commission to question the task which had been entrusted to it. Of course, it could request the General Assembly to defer study of the issue on the grounds that the time was not ripe. However, he recalled in that connection that in 1950 the Commission had considered that it was worth studying the matter and had even advocated the setting up of an international court. The second objection concerned the scope of the subject, which some considered to be too wide. He had endeavoured to study all aspects of the matter in order to avoid being reproached for having highlighted some at the expense of others and for having gone too far at an exploratory stage towards taking a stand. His intention had simply been to trigger a general discussion. On the grounds that the Commission was requested to elaborate a code, he could have confined himself to proposing the enumeration of offences against the peace and security of mankind. However, in its resolution 36/106, the General Assembly had invited the Commission to "review" the draft code of 1954, taking duly into account the results achieved by the process of the progressive development of international law. In the circumstances, it would be difficult merely to tidy up the 1954 draft.

42. The three main questions on which he had sought the opinion of members of the Commission were those of the scope of the draft code, the method of codification and the implementation of the draft. The first of those questions had been discussed at great length, both *ratione materiae* and *ratione personae*. In order to decide *ratione materiae* which offences should be codified, he had provisionally classed international offences in three categories (A/CN.4/364, para. 34), according to whether they were international by nature, by the effect of a convention, or because a State had taken part in their commission. He had stressed, however, that those categories could not always be clearly delimited in international reality. Some offences which were international by their nature were the object of conventions, such as those relating to slavery, *apartheid* or forced labour, whereas most of the offences which took on an international character because a State was the perpetrator or accomplice were originally internal crimes. This classification had been established for analytical purposes, but far more precision would be required for the elaboration of the draft code.

43. Above all, the Commission should not stray from the work it had already accomplished. In that connection, article 19 of part 1 of the draft articles on State responsibility,[19] which defined international offences, should serve as a basis for the elaboration of the draft code. It was accepted that the draft code should concern only international offences—in other words, the offences referred to in that article. However, that article applied to all international offences, whereas the draft code should cover only some of them. Criteria were needed to determine which they should be. The discussion had been particularly fruitful on that point. A great many members of the Commission had recognized that the draft should concern the most serious international offences, those which threatened the peace and security of mankind. Thus the first distinguishing criterion chosen by the majority was seriousness. It was agreed that the political element, which the Commission had not ruled out in 1954, as well as problems arising from conflicts of laws and of jurisdictions, should be left aside.

44. If the Commission took that approach, it should have no great difficulty in defining the notion of an offence against the peace and security of mankind. Draft article 19 on international crimes and international delicts contained, in paragraph 2, a definition of international crimes and, in paragraph 3, listed a number of crimes which, in his opinion, should be considered offences against the peace and security of mankind. That view was justified by the fact that, in its commentary to that article,[20] the Commission specified the four categories of international crimes to which paragraph 3 referred (crimes relating to the maintenance of international peace and security, to the safeguarding of the right of self-determination of peoples, to respect for human rights and fundamental freedoms, and to the preservation of certain assets essential for the progress and survival of humanity), taking the view that they were so many degrees on the scale of seriousness of international offences. The Commission could therefore now take article 19 as its basis for considering that those international crimes against the peace and security of mankind were the offences to which the draft code should apply. Once it had drawn up the list of the relevant international conventions, declarations and political position statements, it could if necessary add to the list of offences. It would probably not have to add the crimes relating to the use of nuclear weapons, as suggested by Mr. Flitan (1759th meeting), since they were already implicitly covered by article 19. If the Commission resorted to the criterion of seriousness, it would be following the method used in domestic law, where it was the degree of gravity of

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

[20] *Ibid.*, pp. 120–121, paras. (67)–(71).

offences which could entail, beyond the obligation to remedy them, personal punishment or infamous punishment. It would, no doubt, have to refine that criterion and to determine in particular the threshold between one degree of seriousness and another.

45. The question of the implementation of the draft code *ratione personae* was far more controversial. Some members of the Commission had spoken against the criminal responsibility of States, while many others had considered that draft article 19 did not explicitly rule out such responsibility. In view of its rather unrealistic nature, the problem could have been passed over in silence. However, he considered that the Commission might one day have been reproached for taking a different attitude from that it had adopted when drafting article 19. In that connection, it should be noted that part 1 of the draft articles on State responsibility essentially focused on the responsibility of the State. A distinction had been made in the degree of responsibility, bearing in mind what was already a long-standing doctrine, with which Soviet doctrine was not unassociated. In draft article 19, there was a clear association between the words "State" and "crime". In the commentary to that article,[21] the Commission stressed that an act of a State might not engage the responsibility of the organs of that State and that likewise the acts of an organ of the State might not engage the responsibility of the State itself. The Commission had thus distinguished between individual and State responsibility. In the circumstances, he considered it essential to raise the question of the subjects of law to be taken into consideration in the draft code. If the Commission wished to bring its notion of general responsibility into line with its notion of the criminal responsibility of the State, it had to take account of draft article 19. As Mr. Reuter had pointed out (1757th meeting), perhaps two régimes of responsibility would be established. In that connection, it would be interesting to hear the opinion of the Special Rapporteur responsible for part 2 of the topic of State responsibility.

46. The fact that the problem had been stated did not mean that it was not important to refrain from developing theories, however much they might be warranted in law or in fact. It might be asked whether it was desirable, in practical terms, to take into consideration crimes which could only be attributed to States, to which Mr. Flitan had referred (1759th meeting). A political decision would be required on that matter, and it would be interesting to learn the opinion of the political bodies which had entrusted the study of the topic to the Commission. It was not impossible to impose sanctions on a State: the Security Council and the General Assembly were empowered to recommend or take measures against States which violated international law. However, in the case under consideration it would be a question not of measures taken by political organs, but of penalties imposed by a jurisdictional body. Was the international community prepared to accept that penalties should thus be imposed on States? The Commission could not ignore that question, even if it replied in the negative. The Nürnberg Tribunal had not been unanimous in opting for the responsibility of individuals rather than that of States. What seemed bold today might be normal tomorrow. As Mr. Jagota had suggested (1760th meeting), the Commission could state the principle of the criminal responsibility of States without for the time being providing for sanctions.

47. With regard to the method of codification, there seemed to be wide agreement that certain general principles must be stated. However, Mr. Ushakov (1758th meeting) and Mr. Boutros Ghali (1757th meeting) had spoken against such a course. In that connection, it should be noted that the difficulties encountered by the Nürnberg Tribunal had stemmed in part from the fact that certain general principles had not been proclaimed. Consequently, he considered that principles or concepts such as the non-applicability of statutory limitations to war crimes or complicity should be recognized. As for the method itself, it seemed widely accepted that it should be both inductive and deductive.

48. With regard to the implementation of the draft code, Mr. Ushakov had stressed that the Commission had not been requested by the General Assembly to deal with the matter. Some members of the Commission had said that the Commission should tackle the question, whereas many others had held it preferable to refer to the General Assembly on that point. He considered that there was a political willingness to study the problem, as the General Assembly had first consulted the Commission on the matter in 1948 and had then established two successive committees (Committees of 17) for that purpose, in 1950 and in 1952.[22] It remained to be determined whether the question of the elaboration of the draft code and that of its implementation should be entrusted to separate bodies. Hitherto that method had had the drawback that the progress of work in one body had served as a pretext for delaying the work of the other. There was also the question of which body should examine the issue of penalties, a matter so thorny that the Commission had withdrawn the article devoted to it[23] from its draft code of 1954 pending the outcome of the work of the Committee of 17. In any event, it would not be bad for the Commission to tackle or at least to raise the question. It would not do for it to find itself in the same situation as in 1954, with its new draft code left in abeyance until the results of the work of another body were known. The question of the implementation of the draft code was certainly political, but once the political will of the General Assembly to study it was established, it was the technical side which came to the fore, so that the matter would rather fall within the sphere of competence of the Commission.

49. The CHAIRMAN thanked the Special Rapporteur for his summing up of the discussion and recalled that the

[21] *Ibid.*, p. 118, para. 59.

[22] See 1755th meeting, footnote 17.

[23] See 1758th meeting, footnote 19.

Commission was to resume consideration of the draft code towards the end of the session, before taking a decision on its preliminary report on the topic to the General Assembly.

50. Mr. MALEK, referring to Mr. Yankov's suggestion, said that he personally thought it might be desirable to set up a small informal working group of about five members, chaired by the Special Rapporteur, to prepare a compendium of the instruments covered by document A/CN.4/368. That compendium could be submitted to the Commission at the end of the current session or the beginning of the next session.

51. Mr. BARBOZA supported that idea, but stressed that the Commission must submit to the General Assembly, as part of its sessional report, a preliminary report, whether prepared by the proposed working group or by the Special Rapporteur, on the scope and structure of the draft code.

52. Sir Ian SINCLAIR said that it was not clear to him what the mandate of the suggested working group would be. Moreover, he subscribed to the remarks by Mr. Barboza. He suggested that it should be left to the Special Rapporteur to engage in whatever consultations he felt appropriate before submitting to the Commission a report on the basis of which the Commission could resume its discussion towards the end of the present session. He was not at all convinced that a working group would be useful at the present stage.

53. Mr. CALERO RODRIGUES agreed that it should be left to the Special Rapporteur to decide whether to undertake formal or informal consultations or to propose the establishment of a small working group.

54. Mr. YANKOV said that his suggestion had actually been a question to the Special Rapporteur concerning the best way of making use as source material of the valuable Secretariat compendium of relevant international instruments (A/CN.4/368). The purpose of such action would, of course, be to respond to the instructions of the General Assembly, which had asked the Commission to report on the problems of scope and method with regard to the topic of the draft code. He agreed with previous speakers that it should be left to the Special Rapporteur to decide how to go about preparing his preliminary report for the next stages of the Commission's discussion of the topic and, in particular, whether he needed the assistance of a small working group or preferred to engage in purely informal consultations with members of the Commission. It went without saying that document A/CN.4/368 would serve as a valuable further source of information to the Special Rapporteur and the Commission.

55. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to leave it to the Special Rapporteur to propose, if he so wished, the setting up of a working group to assist him.

It was so agreed.

The meeting rose at 6.05 p.m.

1762nd MEETING

Tuesday, 17 May 1983, at 10 a.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. Stravropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (A/CN.4/357,[1] A/CN.4/363 and Add.1,[2] A/CN.4/371,[3] A/CN.4/L.352, sect. D, ILC(XXXV)/Conf.Room Doc.1)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4]

1. The CHAIRMAN invited the Commission to consider item 2 of the agenda concerning jurisdictional immunities of States and their property and called upon the Special Rapporteur to introduce his fifth report on the topic (A/CN.4/363 and Add.1) and, in particular, draft articles 13, 14 and 15, which read as follows:

Article 13. Contracts of employment

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a "contract of employment" of a national or resident of that other State for work to be performed there.

2. Paragraph 1 does not apply if:

(*a*) the proceedings relate to failure to employ an individual or dismissal of an employee;

(*b*) the employee is a national of the employing State at the time the proceedings are brought;

(*c*) the employee was neither a national nor a resident of the State of the forum at the time of employment; or

(*d*) the employee has otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

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

[3] *Idem.*

[4] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 99–100; (*b*) art. 2: *ibid.*, pp. 95–96, footnote 224; revised text (para. 1 (*a*)): *ibid.*, p. 100; (*c*) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (*d*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1980*, vol. II (Part Two), p. 142; (*e*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*: (*f*) art. 10, revised: *ibid.*, p. 95. footnote 218.

Part III of the draft: (*g*) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.