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Summary record of the 1803rd meeting

Topic:
Other topics

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article 19 of part 1 of the draft articles on State responsibility,[13] any acts detrimental to the protection and conservation of the environment should likewise be included. Furthermore, any list of crimes that did not take account of the threat of nuclear annihilation would be unrealistic—a threat currently exacerbated by the unjustified intensification of the nuclear arms race. All uses of nuclear weapons, but in particular their use against non-nuclear powers, should be condemned as crimes along with the use of other weapons of mass destruction, such as chemical and bacteriological weapons.

12. As for the *ratione personae* aspect of the matter, in his view the 1954 draft code was defective in that it was confined to individuals. Many of the crimes envisaged, such as aggression, annexation of territory or *apartheid*, could only be committed by States and, as was clear from article 19 of part 1 of the draft articles on State responsibility, a State could incur criminal responsibility. The Special Rapporteur stated in his report: "The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated." (A/CN.4/364, para. 45.) But a State did not necessarily have to be subjected to the same system of adjudication as an individual. For instance, machinery was available through the Security Council, although it did of course have inherent defects. A State could obviously not be imprisoned; but a whole range of other penalties, involving various forms of sanction, could be imposed upon it. Moreover, the very possibility of being condemned as a criminal State would have a deterrent effect.

13. As for the method to be adopted in examining the topic, there was merit in the suggestion that the Special Rapporteur should use the inductive approach and base his study on State practice as reflected in existing conventions and General Assembly resolutions. It was, however, of vital importance to include in the code certain general principles that would command the widest support and describe in general terms the main constituent elements of the crimes to be covered by the code. Any list of crimes should serve merely by way of example and should not be exhaustive.

14. In regard to the implementation of the code, he agreed that the Commission should prepare a draft statute for an international jurisdiction, but only when the study of the code had been completed. Whether such jurisdiction should be exercised by a national or international tribunal was a matter on which he had an open mind, although there was no reason why the two could not exist side by side. The code could impose an obligation on each State to extradite offenders or to prosecute them, even when they were not citizens of that State and even when the crime in question was not committed in its territory.

The meeting rose at 11 a.m.

[13] See footnote 9 above.

1803rd MEETING

Thursday, 14 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-fifth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter II.

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** (A/CN.4/L.355)

2. Mr. THIAM (Special Rapporteur), introducing chapter II of the draft report, on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.355), first invited members to take note of a number of changes to be made in the text. In paragraph 19 (1) the words "What is the scope of codification" should be replaced by the words "Field of application of the draft code"; paragraph 19 (2) should be amended to read: "Method of preparing the draft"; paragraph 19 (3) should be amended to read: "Question of the statute of an international criminal court." He proposed that paragraph 21, which seemed unnecessary, should be deleted, and that the word "codification" should be replaced by the word "draft" throughout the chapter. In paragraph 29, the words "crimes and delicts" should be amended to read "crimes or delicts". In paragraph 31, the words "They are inclined to think" should be amended to read "They consider", and the words "consequences involving" should be amended to read "consequences which may entail". In the second sentence of the French text of paragraph 36, the words *constituaient un crime* should be amended to read *constituaient des crimes*. In paragraph 40, the maxim *"nullum crimen sine lege"* should be deleted, since it was already implied in the principle of non-retroactivity of criminal law.

3. Like most documents of its kind, the draft chapter contained a historical section prepared by the Secretariat. The summary of the discussion which had taken place on item 4 of the agenda began on page 11. The various questions raised during the discussion were divided into three main groups: scope, method and implementation.

4. With regard to scope, the Commission had recognized that the content of the draft code could be considered *ratione materiae* or *ratione personae*. Since article 19 of part 1 of the draft articles on State responsibility[1] defined international crimes as a whole, it

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

was necessary in the present case to determine, within that category of crimes, those which affected the peace and security of mankind. The Commission had reached the conclusion that the offences concerned should be those that were considered the most serious. At the present stage, he had not ventured to attempt a definition of the qualifying term "serious".

5. The discussion had also turned on the question of whether a State could be treated as a subject of international criminal law. The majority of members had taken the view that a State should, indeed, be considered as a subject, although some members, including Mr. Reuter (1757th meeting), believed that the affirmation of that principle did not settle the question of whether it was possible to go further and accept the imposition of political sanctions on States by a judicial body. The Commission had also taken the view that it was not necessary to consider whether or not offences were politically motivated, since offences not so motivated could affect the security of mankind, for example if they affected the environment.

6. The question had also arisen as to whether there was a régime of responsibility for offences against the peace and security of mankind. It seemed difficult to deny the existence of such a régime. Only the previous week, in reply to Klaus Barbie's lawyer, who had challenged the lawfulness of his client's extradition from Bolivia, a French criminal court had declared that, because of their nature, the offences against humanity of which Klaus Barbie was accused did not come under French internal law, but under an international penal régime, and that consequently the absence of an extradition treaty between Bolivia and France was not relevant. He (Mr. Thiam) believed that it should be recognized that that type of offence came under an international system of law and order independent of States, the consequences of which should be studied.

7. With regard to method, members of the Commission had agreed that the inductive and deductive methods should be combined, once a general criterion had been adopted for identifying a criminal act liable to be regarded as an offence against the peace and security of mankind. It was also necessary to refer to the conventions on *apartheid*, genocide, slavery, etc., and to the relevant declarations and conventions on humanitarian law, in order to extract the maximum of substance and draw up an exhaustive list of offences against the peace and security of mankind.

8. Lastly, with regard to implementation, all members believed that it would be unrealistic not to include sanctions in the code and not to provide for an international criminal jurisdiction, though those questions could be examined later when the drafting of the code had been completed. What had to be decided in that respect was the precise mandate given to the Commission by the General Assembly on those two points.

9. The CHAIRMAN, thanking the Special Rapporteur for his introduction, said that because of the delicate and sensitive nature of the topic, it had been considered advisable to examine chapter II at some length. That examination, however, was without prejudice to the consideration of the draft report as a whole (including chapter II) during the last week of the session.

10. He invited the Commission to begin by examining the first substantive passage of the draft chapter, namely paragraph 19, and drew attention to the fact that the General Assembly, in its resolution 36/106, had requested the Commission to report to it "*inter alia*, on the scope and the structure of the draft Code".

11. In reply to a question by Sir Ian Sinclair, he said that it would be quite in order for members to comment on any paragraph; he would invite the Commission to examine each section paragraph by paragraph.

12. Mr. THIAM (Special Rapporteur) requested members who had proposals on specific paragraphs to submit their amendments in writing.

13. Mr. EL RASHEED MOHAMED AHMED said he wished to place on record his concern to ensure that fighting as a mercenary be included in the exhaustive list of offences against the peace and security of mankind. It should be added to the list in article 2 of the draft code adopted by the Commission in 1954 (A/CN.4/L.355, para. 8). He would speak at greater length on that subject later.

14. After a brief procedural discussion in which Mr. CALERO RODRIGUES, Sir Ian SINCLAIR and Mr. DÍAZ GONZÁLEZ took part, the CHAIRMAN noted that there was general agreement to examine chapter II subsection by subsection, on the understanding that it would be open to members to single out individual paragraphs for comment or proposal of amendments.

15. Mr. USHAKOV said that it was difficult for him to approve of paragraphs 19 to 41, because of the prevailing confusion about the task assigned to the Commission, which was caused by the content of the draft *ratione personae*. For it was inconceivable that the international crimes of States and the international crimes of individuals should be treated together. As to the content *ratione materiae*, it distinctly suggested that article 19 of part 1 of the draft articles on State responsibility would have to be revised. Furthermore, the Special Rapporteur had evoked the need to determine the legal consequences of offences against the peace and security of mankind, although that matter fell within Mr. Riphagen's field of study.

16. It was important to recognize that everyone must be responsible for his own conduct. Consequently, when a State engaged in aggression, it was not the criminal responsibility of the whole population that should be engaged, but that of the few individuals who planned and executed the operation. The question of the political motivation of an international crime did not arise in the case of States, since their conduct was bound to be political. Hence he did not approve of paragraph 24 any more than of paragraph 25. Paragraph 34 raised the question of the existence of international responsibility of individuals for internationally wrongful acts. Was the Special Rapporteur seeking a revision of article 19 of part 1 of the draft articles on State responsibility, and more particularly of paragraph 2 of that article? He did not

understand how the Special Rapporteur could speak of the criminal responsibility of States (para. 30). The criminal responsibility of individuals resulted in the death penalty or deprivation of liberty, but what was to be understood by the criminal responsibility of a State?

17. What was the general criterion mentioned in paragraph 35 in the section on methodology? Why were the crimes of States mixed with the crimes of individuals? Why include an introduction recalling the general principles of criminal law (para. 40)? Had that ever been done in other instruments? Was that which was valid for individuals necessarily valid also for States? Would the Commission also propose a statute for an international criminal court having jurisdiction over States? What penalties would be imposed on States?

18. There was sometimes a link between crimes committed by individuals and those committed by States; but, in the present instance, the Commission should be concerned only with the crimes of individuals, since the crimes of States and their legal consequences were dealt with in the draft articles on State responsibility.

19. Sir Ian SINCLAIR said that he largely agreed with Mr. Ushakov's remarks, but thought they related essentially to the subsection on content *ratione personae* (paras. 26–34).

20. As to the subsection on content *ratione materiae* (paras. 22–25), he could accept the general thrust of its contents so long as it applied to the content *ratione materiae* in isolation.

21. With regard to paragraph 22, it was inaccurate to say that the international crimes in question were "defined" in article 19 of part 1 of the draft articles on State responsibility. That article did not contain any definition, but merely an illustrative list of international crimes. He therefore proposed that the word "defined" should be replaced by the word "illustrated". Lastly, he was not satisfied with the drafting of paragraph 25, although he had no objection to its substance; he proposed that the language be adjusted so as to convey the intended meaning adequately.

22. Mr. CALERO RODRIGUES said that there should be no objection to the subsection on the content of the draft *ratione materiae*, which adequately reflected the result of the Commission's discussion. His own feeling was that all members were agreed on the paragraphs dealing with the content *ratione materiae*. It had been agreed that the draft code would not cover all international crimes, and not even all major international crimes; it would cover only the more serious international crimes, which were directly related to the peace and security of mankind.

23. With regard to the subsection on the content of the draft *ratione personae*, there was no agreement among members and, as he saw it, the Special Rapporteur had endeavoured to reflect that division of opinion. The presentation of that part of chapter II could, of course, be improved and no doubt suggestions would be forthcoming from members.

24. Mr. DÍAZ GONZÁLEZ said that on the whole he agreed with the comments made by Sir Ian Sinclair and Mr. Calero Rodrigues. He also shared the opinion of the Special Rapporteur that the Commission considered that the draft applied only to those crimes which were "directly related to the peace and security of mankind". Nevertheless, he still had some doubt about paragraph 22: was *apartheid* included among the crimes referred to in that paragraph?

25. In paragraph 24, the Special Rapporteur was right to speak of unanimity. But he (Mr. Díaz González) still wondered who was authorized to determine the seriousness of an international crime. What was meant by "the most serious"? Was aggression committed by a State using the atomic bomb more serious than aggression using napalm? Was aggression with napalm more serious than aggression by soldiers with machine-guns? The "category of the most serious international crimes" was not defined clearly enough.

26. Lastly, he thought that article 19 of part 1 of the draft articles of State responsibility did not define international crimes and delicts, but gave illustrations of them. Was the Commission going to amend that article when drafting the code? On the whole, he approved of paragraphs 22 to 25, but still had certain doubts.

27. Mr. McCAFFREY said that he was in substantial agreement with previous speakers regarding the subsection on the content of the draft *ratione materiae*. He wished to point out, however, that Mr. Ushakov's remarks concerning content *ratione personae* were inextricably bound up with content *ratione materiae*. He therefore suggested that the Commission should now examine the subsection on content *ratione materiae* in isolation, without prejudice to members' right to scrutinize the subsection on content *ratione personae*.

28. He fully agreed that the draft code should deal with only the most serious international crimes, namely those directly related to the peace and security of mankind; on that basis, he found paragraphs 22 and 23 acceptable, as reflecting the debate in the Commission. A reservation should, of course, be made on the question of the responsibility of States and of individuals for those international crimes.

29. The question of article 19 of part 1 of the draft articles on State responsibility undoubtedly raised certain problems, the reasons for which had been indicated by Mr. Ushakov. What was valid and applicable for States was in most cases not valid or applicable for individuals. In any case, article 19 was completely separate from the draft Code of Offences against the Peace and Security of Mankind.

30. As to the wording, he supported Sir Ian Sinclair's two proposals: first, to replace the word "defined" by the word "illustrated" in paragraph 22; and secondly, to redraft paragraph 25 so as to convey the intended meaning more accurately in the English text. The original French text of paragraph 25 was fairly clear.

31. Mr. FLITAN said that his task had been simplified by the previous speakers, who had not failed to reply to the points troubling Mr. Ushakov, and he hoped that the

latter would be able to support the majority opinion. But if Mr. Ushakov's view prevailed in the Sixth Committee of the General Assembly, the Special Rapporteur would have to limit the application of his draft to individuals alone. In any event, all were agreed in thinking that the draft code would apply only to offences directly related to the peace and security of mankind, in other words the most serious crimes. The Special Rapporteur had been right to speak of unanimity in paragraph 24, apart from the question of whether the draft should concern individuals as well as States and other artificial legal persons. Unlike Mr. McCaffrey, he did not think it necessary to consider the motivations which incited individuals to commit international crimes. Hence he found paragraphs 22 to 25 acceptable.

32. He proposed that two ideas should be added to the subsection dealing with the content of the draft *ratione materiae*. Several speakers, including himself (1759th meeting), had clearly stated that *apartheid* was an offence against the peace and security of mankind because of the extent of its consequences. *Apartheid* should therefore be covered by the draft code. He also proposed that it should be indicated in the report that one member had wondered whether the obligation of States to resort to the peaceful means of settling their disputes provided for in the Charter of the United Nations, such as good offices, mediation, etc., should not be included in the draft code as a mandatory legal rule. Any State which failed to fulfil that obligation would then be committing an offence for which it would be made responsible.

33. Mr. BARBOZA said that paragraphs 22 to 25 satisfactorily reproduced the most important points of the discussion. He did not entirely agree with Sir Ian Sinclair's comments on paragraph 22, since in his opinion article 19 of part 1 of the draft articles on State responsibility was not confined to illustrating international crimes. Although paragraph 3 of that article gave examples of international crimes, paragraph 2 contained descriptive elements. In order to take account of Sir Ian Sinclair's opinion, however, he proposed that, in paragraph 22 of draft chapter II, the words "as defined in article 19" be replaced by the words "as described and illustrated by article 19".

34. Furthermore, he considered that international crimes were committed by States, but engaged the responsibility of individuals, so that there was double criminal responsibility. The only international crime which engaged the responsibility of individuals alone was piracy. But for the time being there was no need to consider the distinction to be made between crimes committed by States and crimes committed by individuals.

35. In reply to a question by the Chairman, Sir Ian SINCLAIR said that he accepted Mr. Barboza's proposal to replace the words "as defined in" in the last sentence of paragraph 22 by the words "as described and illustrated by", and withdrew his own proposal (para. 21 above) to replace the word "defined" by the word "illustrated".

36. Mr. MAHIOU said that he endorsed the comments made by Mr. Calero Rodrigues. With regard to material, the draft code should cover serious crimes against the peace and security of mankind, whether those crimes were perpetrated by States or by individuals. Such crimes could, indeed, be attributed both to States and to those of their agents who planned and executed the crimes. Thus the crime of genocide, which was essentially a State crime, must necessarily be carried out by civilian or military personnel. It followed that an act constituting an international crime gave rise to double responsibility. It was therefore logical to consider, *ratione materiae*, that the draft code would include both the crimes of States and the crimes of individuals. On the other hand, it appeared that, *ratione personae*, that distinction entailed different legal consequences.

37. As to the link between the draft code and the topic of State responsibility, there was no doubt that article 19 of part 1 of the draft articles on State responsibility, on international crimes and international delicts, provided a basis for the draft Code of Offences against the Peace and Security of Mankind. However, the fact that an international crime had been described in that article did not seem to be any reason why the Commission should not now deal with crimes committed by States. It would only be developing a rule taken from the draft articles on State responsibility.

38. With regard to the difficulties experienced by Mr. Díaz González concerning the criterion of seriousness, he agreed that it was rather difficult to grasp and had a subjective aspect which, moreover, the Special Rapporteur had emphasized. That criterion could, however, serve as a starting-point, since the enumeration in paragraph 3 of article 19 already gave some idea of the concept of seriousness of international crimes. The criterion of seriousness was one among others that the Commission could use. It was only later that it would have to compare the content of draft article 19, on international crimes and international delicts, with the content of article 2 of the 1954 draft code.

39. From the drafting point of view, the third sentence of paragraph 25 of chapter II was not entirely satisfactory. Rather than saying that acts which seriously jeopardized the fundamental interests of mankind "may also be committed only for advantage", it would be better to say that they "may have complex motives". Indeed, while it was true that political interest was always present, as Mr. Ushakov had pointed out, other motives might intervene.

40. Mr. BALANDA said that, as he understood it, the Commission's annual report to the General Assembly should not state the views of each member, but the unanimous or majority view formed during the discussions. Paragraphs 20 to 25 well reflected the general opinion of members of the Commission.

41. Mr. McCAFFREY said he was disturbed at the implication of Mr. Flitan's proposal concerning *apartheid*, namely that each and every offence suggested by members should be included in any list of offences drawn up by the Commission. To the best of his knowledge that was not the Commission's usual way of proceeding. What the report should seek to reflect were the broad lines of the Commission's thinking on the

matter. It if were in fact decided to include a list of offences—which was still an open question—the content of that list should be determined later. He appealed to Mr. Flitan to withdraw his proposal, since otherwise the debate would only be prolonged and the end result would be a very confusing report.

42. With regard to Mr. Mahiou's statement, he agreed that the example of damage to the environment given in paragraph 25 was not the best one in view of the heterogeneous nature and effects of the acts. Perhaps the sentence in question could be reconsidered.

43. Mr. THIAM (Special Rapporteur) said that the role of the Special Rapporteur in the draft report was to reflect the debate and record what had been said. With regard to the content of the draft code *ratione materiae*, there had really been unanimity in the Commission, for Mr. Ushakov himself had spoken in favour of including only the most serious international crimes. The Commission should now be careful not to open a general debate, thus creating a precedent which might be troublesome in its future work.

44. Mr. USHAKOV said that the most serious international crimes were those committed by individuals. The Commission might well concern itself with the international crimes of States, but it was not required to determine their legal consequences, since that question came within the study of another topic.

45. From the point of view of the draft code, when a State crime had been committed it was necessary to determine which individuals had committed it and in what circumstances they were criminally responsible. On the other hand, the legal consequences of the crime for the State responsible belonged in another draft. It should not be concluded that the Commission must not deal with the international crimes of States; but if it tried to determine, in the draft code, what consequences international crimes might have for States, it would be entering a field which had no place in contemporary international law, namely that of the international criminal responsibility of the State.

46. It should be noted that, in the case of a crime of genocide perpetrated by a State, it was normally necessary to inquire which individuals incurred responsibility. But a crime of genocide might be committed not by a State, but by individuals. In that case, the responsibility of the State was engaged not for the crime of genocide itself, but for not having prevented that crime or for having tolerated it. As the responsibility of States and that of individuals were the subject of two different studies, it was absolutely essential not to take up the same questions in each of them, at the risk of treating them differently.

47. Mr. FLITAN said that he could agree to his view not being recorded in the report if that was the wish of the Commission. He pointed out, however, that the Commission's report on the work of its thirty-fourth session had several times recorded opinions expressed by only one or a few members of the Commission. If he had suggested stating in the report that a few members considered that the crime of *apartheid* affected the maintenance of international peace and security, it was because he thought that question should be drawn to the attention of the General Assembly, which should clarify it. Similarly, it was because of the apparent importance of the obligation of States to resort to peaceful means of settling their disputes that he had proposed mentioning that obligation in the report.

48. The CHAIRMAN, speaking as a member of the Commission, said that in his view it would not be inconsistent with article 19 of part 1 of the draft articles on State responsibility to attribute responsibility for a crime to a State in the code. He thought Mr. Flitan's point regarding *apartheid* had merit, as indeed did the opposing view. But at the present stage the Commission should confine itself to the broad issues; it could consider other possible offences against the peace and security of mankind when it came to examine the list in article 2 of the 1954 draft code.

49. Mr. McCAFFREY, expressing his appreciation of Mr. Flitan's conciliatory spirit, said that it had not been his intention to suggest that the report should not reflect the views of individual members or groups of members on matters before the Commission.

50. Mr. STAVROPOULOS observed that the difference between States and individuals was quite simple: it was not possible to execute or imprison a State, but it was possible to execute or imprison a subject who did what the State ordered. In the circumstances, he did not see where the difficulty lay.

51. The CHAIRMAN, noting that there were no further comments concerning the subsection on the content of the draft *ratione materiae*, invited comments on the subsection on the content of the draft *ratione personae*.

52. Sir Ian SINCLAIR said that, in his view, there was no doubt that the draft code should be applied to individuals, including government officials who might have been acting for and on behalf of the State; but it should be applied to such persons as individuals. Furthermore, he considered that the references in paragraphs 26 to 34 to article 19 of part 1 of the draft articles on State responsibility would only confuse the issue, since that article, though relevant, created a separate régime in regard to the legal consequences that flowed from the commission of certain internationally wrongful acts characterized as international crimes.

53. On that basis, he had the following proposals to make: (*a*) in paragraph 28 of chapter II, a footnote should be added to make it clear that the term *droit international pénal* had a special connotation in French, there being no corresponding term in English; (*b*) paragraph 29, setting out the text of article 19 of part 1 of the draft articles on State responsibility, should be deleted in its entirety; (*c*) the first sentence of paragraph 30 should be replaced by the following text:

> "It was unanimously accepted that international penal responsibility could be attributed to individuals and that the draft code should therefore cover the most serious international crimes committed by individuals."

(*d*) the text of paragraph 31 should be replaced by the following:

"Some members, on the other hand, are opposed to the concept that international criminal responsibility can be attributed to States within the framework of the draft code. They point to the incongruity and impracticality of instituting criminal proceedings against States. On any view of the matter, the immunity of States would prevent the courts of another State from exercising jurisdiction in such circumstances. Nor could it be realistically anticipated that States would accept that an international criminal court could exercise jurisdiction over States alleged to have committed international crimes. In their view, article 19 of part 1 of the draft articles on State responsibility, while no doubt relevant to a study of the topic, was concerned essentially with establishing that, for certain internationally wrongful acts designated as international crimes, there was an aggravated degree of State responsibility which could involve, as a consequence, the taking of measures in the form of sanctions against the offending State as a guarantee against repetition of the offence. The question of the responsibility of States for internationally wrongful acts designated as international crimes should, in their view, be dealt with exclusively within the framework of the draft on State responsibility."

(*e*) paragraph 32 should be deleted; (*f*) paragraph 33 should be amended to read:

"Another problem that has been raised is that of the régime applicable to offences against the peace and security of mankind. Is there a special régime for such offences?"

(*g*) the first two sentences of paragraph 34 should be replaced by the following text:

"There was a broad measure of agreement that such a special régime does in fact exist, at least if the scope of the draft is restricted to offences committed by individuals."

The meeting rose at 1 p.m.

1804th MEETING

Thursday, 14 July 1983, at 3.35 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-fifth session (*continued*)

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** **(continued)** (A/CN.4/L.355)

1. The CHAIRMAN drew attention to the informal document containing the amendments proposed by Sir Ian Sinclair to paragraphs 29 to 34 of chapter II of the draft report (A/CN.4/L. 355).

2. It was proposed that paragraph 29 should be deleted and that the first sentence of paragraph 30 should be replaced by the following text:

"It was unanimously accepted that international penal responsibility could be attributed to individuals and that the draft code should therefore cover the most serious international crimes committed by individuals."

3. Paragraph 31 would be replaced by the following new text:

"Some members, on the other hand, are opposed to the concept that international criminal responsibility can be attributed to States within the framework of the draft code. They point to the incongruity and impracticality of instituting criminal proceedings against States. On any view of the matter, the immunity of States would prevent the courts of another State from exercising jurisdiction in such circumstances. Nor could it be realistically anticipated that States would accept that an international criminal court could exercise jurisdiction over States alleged to have committed international crimes. In their view, article 19 of part 1 of the draft articles on State responsibility, while no doubt relevant to a study of the topic, was concerned essentially with establishing that, for certain internationally wrongful acts designated as international crimes, there was an aggravated degree of State responsibility which could involve, as a consequence, the taking of measures in the form of sanctions against the offending State as a guarantee against repetition of the offence. The question of the responsibility of States for internationally wrongful acts designated as international crimes should, in their view, be dealt with exclusively within the framework of the draft on State responsibility."

4. Paragraph 32 would be deleted and paragraph 33 should be amended to read:

"Another problem that has been raised is that of the régime applicable to offences against the peace and security of mankind. Is there a special régime for such offences?"

5. The first two sentences of paragraph 34 would be replaced by the following text:

"There was a broad measure of agreement that such a special régime does in fact exist, at least if the scope of the draft is restricted to offences committed by individuals."

6. Mr. BARBOZA said that, without the Spanish text, he was not prepared to accept all the proposed amendments, which seemed to reopen the debate. He needed to