Document:-

A/CN.4/SR.1816

Summary record of the 1816th 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:-

1984, vol. I

at the current session. It would perhaps be advisable to take up that question fairly rapidly.

13. The CHAIRMAN agreed that the Commission should find time to consider the matter on the basis of the recommendations made in the Planning Group and the Enlarged Bureau.

14. Mr. NI said he could agree to the Enlarged Bureau's recommendations but noted that no reference had been made to item 9 (Programme, procedures and working methods of the Commission, and its documentation), which had not been discussed in plenary for some time. In reply to a letter dated 19 July 1983 from the Chairman of the Committee on Conferences relating to the shortening of sessions or a biennal cycle of sessions, the Commission's outgoing Chairman had stated that the question would be discussed at the current session. [1] Important matters regarding the economy and efficiency of the United Nations were involved and he would therefore like to know whether time would be allocated to deal with the item in plenary as well as in the Planning Group.

15. The CHAIRMAN suggested that it should be left to the Planning Group to make the necessary recommendations in the light of the comments made by Mr. Ni and Mr. Al-Qaysi.

16. Mr. CALERO RODRIGUES, also expressing his agreement with the Enlarged Bureau's recommendations, stressed that the Planning Group and the Drafting Committee should be allowed sufficient time to do their work: both those bodies needed far more time than they had had in the past. It would also be useful if some thought could be given to the possibility of making available to the Commission, in writing, the comments of any members who could not be present at the Commission's sessions.

17. Mr. KOROMA suggested that the Enlarged Bureau might wish to consider whether draft articles should be referred to the Drafting Committee before agreement on them had been reached in plenary.

18. Mr. REUTER said he welcomed the suggestion by Mr. Calero Rodrigues, since the only way the Commission could gain time was to make much more regular use of such a procedure. It had been suggested many times, should be discussed by the Planning Group and was, indeed, a procedure followed by many learned associations.

19. Mr. LACLETA MUÑOZ said that the Commission's programme and methods of work should remain flexible. In the light of his experience at the previous session as Chairman of the Drafting Committee, he proposed that the Chairman of the Commission should, after each meeting, take soundings in order to find out the number of speakers for the following meeting. If there were not enough, they could be listed for a later meeting and the time thus gained could be allotted to the Drafting Committee. Such a procedure would overcome the backlog of work and be in no way prejudicial to the progress of the work of the Commission itself.

20. The CHAIRMAN suggested that the Commission should adopt the Enlarged Bureau's recommendations regarding the timetable for the session.

It was so agreed.

The meeting rose at 1.15 p.m.

1816th MEETING

Wednesday, 9 May 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364, [1] A/CN.4/368 and Add.1, A/CN.4/377, [2] A/CN.4/L.369, sect. B)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/377). The consideration of this topic had as its basis the draft code adopted by the Commission at its sixth session in 1954, [3] which read as follows:

Article 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

Article 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

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[1] A/AC.172/96/Add.1, annex.

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

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] *Yearbook ... 1984*, vol. II, pp. 151-152, document A/2693, para. 54.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The 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.

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

(13) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

2. Mr. THIAM (Special Rapporteur), introducing his second report (A/CN.4/377), said that, at its previous session, the Commission had discussed at length the general problems of codifying offences against the peace and security of mankind. The question of the draft's content *ratione materiae* had not created any problems, but the same was not true of the content *ratione personae*, particularly the possibility of attributing international criminal responsibility to a State, and also whether the Commission's mandate was to prepare the statute of an international criminal jurisdiction. The Commission had decided to request instructions from the General Assembly on those two points.[4] Resolution 38/138, adopted on 19 December 1983 by the General Assembly following its consideration of the Commission's report on the work of the previous session, gave no specific replies and simply recommended that the Commission, "taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly... should continue its work on all the topics in its current programme".

3. The questions the Commission had submitted to the General Assembly had a political aspect and the Commission's work would be hampered until the necessary political will was clearly expressed. As a rule, he had sought to draw a distinction between what was desirable and what was possible. Two tendencies, not always reconcilable, had emerged during the Commission's discussion of the topic in 1983. An idealistic tendency to go as far as possible and draw all the consequences from the principles enunciated had emerged alongside a tendency that endeavoured to take account of realities. He would attempt to ensure that the Commission's work moved ahead and avoided the pitfalls.

4. The aim of the second report was to enable the Commission to define the topic's scope *ratione materiae*. The draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 would have to be reviewed and, if necessary, offences added to the list contained therein. It should be noted that it was difficult to identify among international offences the ones that constituted offences against the peace and security of mankind. As a starting-point, the Commission might adopt the approach that every offence against the peace and security of mankind was an international offence; but not every international offence was necessarily an offence against the peace and security of mankind. The Commission must therefore be careful not to include all international offences in the draft and to elaborate a draft international criminal code.

5. That approach, however, was not enough, and at its previous session the Commission had adopted the criterion of extreme seriousness in order to take a further step towards identifying offences against the peace and security of mankind.[5] Only international offences that were of extreme seriousness would be taken into consideration. The problem was that the criterion of extreme seriousness was highly subjective, but it was not unique

[4] *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69.

[5] *Ibid.*, p. 16, paras. 64-65.

to the topic, because the same criterion was used in internal law to classify offences. The seriousness of offences against the peace and security of mankind was evaluated by the fact that they affected peoples, nations, ethnic groups, States, values, beliefs, civilizations or the common heritage of mankind. Crimes in that category were, moreover, characterized by the scope of their destructive and disastrous effects. The criterion of seriousness therefore had to be used in classifying offences against the peace and security of mankind, but the seriousness was quite special in view of its international dimension. That criterion would be a starting-point, but the extent to which it could be applied would have to be determined by studying the relevant international instruments.

6. The report was divided into two parts dealing, respectively, with offences covered by the 1954 draft code and offences classified after 1954. Article 2 of the 1954 draft defined the topic's scope *ratione materiae* and each paragraph dealt with a separate offence. The article merely enumerated the acts which were regarded as offences against the peace and security of mankind, without indicating any general criterion for defining offences in that category. Before any attempt was made to identify guiding principles, the offences listed in the 1954 code could be combined into three categories: (*a*) offences against the sovereignty and territorial integrity of States; (*b*) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (*c*) crimes against humanity.

7. The offences in the first category, which were enumerated in paragraphs 1-6 and 8-9 of article 2 of the 1954 draft, consisted basically of aggression and its offshoots. In addition to aggression itself, the definition of which had been formulated only in 1974, [6] the 1954 draft listed a number of offences which could be regarded as acts of aggression: any threat of aggression, preparations for aggression and the organization or encouragement of the organization of armed bands for incursions into the territory of another State. The 1954 code also referred to civil strife, the undertaking, encouragement or toleration of activities calculated to foment civil strife in another State, terrorism, annexation and intervention in the internal or external affairs of another State by means of coercive measures of an economic or political character. In 1954 the classification of all those acts as offences against the peace and security of mankind had already found its justification in *jus cogens* or in the Charter of the United Nations, so that it should not take up a great deal of the Commission's time, except perhaps from the standpoint of the wording.

8. With regard to offences violating the prohibitions and limitations on armaments or the laws and customs of war, article 2, paragraph 7, of the 1954 draft code referred to violations of treaties designed to ensure international peace and security by means of such prohibitions or limitations. Paragraph 12 also mentioned acts in violation of the laws and customs of war. In 1954 condemnation of acts of that kind had also been justified by various international instruments, ranging from the St. Petersburg Declaration of 11 December 1868 [7] to the Geneva Protocol of 17 June 1925. [8] The question of nuclear weapons, often discussed in the General Assembly, had still not been settled. Logically, it would be inconceivable to prohibit the use of weapons of mass destruction without mentioning nuclear weapons. The United Nations had, moreover, adopted a resolution which made it a crime for a State to use nuclear weapons first. [9] Since nuclear weapons were deterrents intended to prevent war, some people concluded that a ban on them would run counter to the very concept of deterrence. Hence they were weapons of mass destruction that should not be prohibited, but they should not be used.

9. Crimes against humanity included genocide, dealt with in article 2, paragraph 10, of the 1954 draft code, and the inhuman acts listed in paragraph 11 of that article. The Commission had considered it appropriate to distinguish between genocide and other inhuman acts "committed against any civilian population on social, political, racial, religious or cultural grounds". The terms used in 1954 reflected the influence exerted at the time by the Charter of the Nürnberg International Military Tribunal,[10] in which offences against the peace and security of mankind had been regarded as being bound up with a state of war. It was for that reason that emphasis had been placed on protection of the civilian population. The problems raised by offences of that kind lay in the fact that it was difficult to distinguish them from other violations of human rights. Not all violations of human rights fell within the purview of international law, whereas crimes against humanity did, and were at the top of the scale among all international offences. In that connection, it should be noted that many violations of human rights fell within the scope of internal law and came under the jurisdiction of internal civil or criminal courts. Crimes against humanity also differed from violations of human rights in that they involved attacks on groups, races, religious beliefs and opinions and were often politically motivated. In addition, such crimes were often particularly horrifying. Consequently, it could not be said, as some writers claimed, that any violation of human rights fell within the scope of international law. Violations of human rights committed within a State could be regarded as crimes against humanity only if they were extremely serious and an affront to the conscience of mankind.

10. The second part of the report dealt with developments after 1954. It had to be determined whether new offences could be regarded as offences against the peace and security of mankind. Since 1954, a number of international instruments, such as conventions, declarations and resolutions, had condemned practices and acts which

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

[7] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (*British and Foreign State Papers*, 1867-1868, vol. LVIII (1873), p. 16).

[8] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

[9] General Assembly resolution 36/100 of 9 December 1981.

[10] United Nations, *Treaty Series*, vol. 82, p. 284.

had previously been regarded as lawful. Many of them could have been condemned long ago, because they were contrary to *jus cogens*. In the light of positive law, as set forth in the relevant instruments, he had reached the conclusion that certain acts could now be classified as offences against the peace and security of mankind. The list of instruments given in his second report (*ibid.*, para. 44) was not exhaustive, but it should enable the Commission to determine which offences should be included in the future draft code. In that respect, the Commission could envisage either a minimum content or a maximum content.

11. In terms of the minimum content, the draft would have to include a number of the offences listed. Colonialism could have been regarded as a crime under international law even in 1954, but not until 1960 had the United Nations adopted a declaration outlawing colonialism.[11] It would be noted that colonialism was regarded as an international crime under article 19 of part 1 of the draft articles on State responsibility prepared by the Commission. [12]

12. *Apartheid* had been condemned in countless General Assembly resolutions. The list contained in the report under consideration (*ibid.*, para. 44 (3), footnote) should also include resolution 3068 (XXVIII) of 30 November 1973, by which the General Assembly had adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. All those resolutions left no doubt about the fact that *apartheid* was regarded as an international crime by the international community as a whole.

13. The existence of treaties relating to protection of the environment and the fact that article 19 of part 1 of the draft articles on State responsibility considered serious disturbances of the environment as international crimes militated in favour of the inclusion of such offences in the draft code.

14. The taking of hostages, an increasingly common practice, was becoming a means to exert pressure on States and even, in some cases, an instrument of government policy. The practice had emerged during the Second World War, but strictly against the background of belligerence. It was now applied even when no state of war existed and, in some instances, was coupled with violations of the protection of diplomats. The time had therefore come to decide whether acts of violence against persons enjoying international protection should not also be covered by the code.

15. The problem of mercenarism, which was of great concern to young States, had arisen in 1977 during the elaboration of the Additional Protocols [13] to the 1949 Geneva Conventions. [14] At that time, mercenaries had not been considered as combatants and had been recognized as having only the basic guarantees granted to all human beings. Mercenaries, who were now recruited to fight against national liberation movements or to destabilize young States, were motivated primarily by money and were linked to the entity or group for which they were fighting only by a contract of service. The problem of mercenarism had been discussed in the General Assembly and in regional institutions such as OAU, which had adopted at Libreville, on 30 June 1977, the Convention for the Elimination of Mercenarism in Africa,[15] which stated that mercenarism was "a crime against peace and security in Africa". It could with equal ease be regarded as a crime against all of mankind.

16. As to the maximum content of the draft, the dividing line between offences against the peace and security of mankind and other international crimes could change, depending on current trends and sensitivities. For example, Vespasien Pella had wanted offences against the peace and security of mankind to include such acts as the counterfeiting of money, forgery of passports or documents, the abusive exercise of police powers on the high seas, the dissemination of false or distorted news or forged documents and insulting behaviour towards a foreign State (see A/CN.4/377, para. 70). Pella had been of the opinion that the concept of an offence against the peace and security of mankind must be as broad as possible. However, if the Commission adopted such a position, it would be straying from the objective set by the United Nations. The General Assembly had not requested the Commission to elaborate an international criminal code, but to prepare a code of offences against the peace and security of mankind. In so doing, it had wanted to emphasize the fact that such offences were a particular category of international crimes and were of a particularly odious nature. If the content were broadened, the code would become inconsequential.

17. Accordingly, the content of the code should be kept to the minimum. It would first be necessary to deal with the offences listed in 1954, subject to drafting amendments. They were: aggression, preparation for aggression and threat of aggression; the organization of armed bands for incursions into the territory of another State; civil strife, organized, undertaken or encouraged by a State in the territory of another State; violations of the prohibitions and limitations on armaments, on military training or on fortifications; the annexation of the territory of a State by another State; interference in the internal or external affairs of a State by another State; war crimes; genocide; crimes against humanity; and terrorism. Some violations of international law recognized by the international community since 1954 might be added, including colonialism; *apartheid*; the taking of hostages; mercenarism; the threat or use of violence against internationally protected persons; a serious disturbance of the public order of the receiving country by an internationally protected diplomat when such dis-

[11] Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960).

[12] For the text of draft article 19 (International crimes and international delicts) and the commentary thereto, see *Yearbook ... 1976*, vol. II (Part Two), pp. 95 *et seq.*

[13] Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

[14] Geneva Conventions of 12 August 1949 for the protection of war victims (United Nations, *Treaty Series*, vol. 75).

[15] OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

turbance was backed or encouraged by a State; the taking of hostages organized or encouraged by a State; and acts causing serious damage to the environment.

18. Many young States wanted economic aggression to be recognized as an offence, but in the definition which had now been worked out with great difficulty, aggression was regarded as involving military action, and it would be dangerous to extend it to the economic sphere. Naturally, everyone condemned the exploitation of weaker countries by powerful countries, but the connotation of "economic aggression" seemed to be more political than economic. The offending acts were indeed quite clear, but another term should be found to designate them.

19. He had refrained from presenting any draft articles, since his main concern was to discover which offences the Commission intended to rank as offences against the peace and security of mankind. Similarly, he had left aside the questions of principle that formed the general part with which every criminal code began.

20. The CHAIRMAN thanked the Special Rapporteur for his clear and well-structured introduction to the second report, one of the strong points of which was concision. It would serve as a very good basis for discussion and led to hope that draft articles could be prepared before the end of the current term of office of members of the Commission.

21. Mr. MALEK said that the second report of the Special Rapporteur (A/CN.4/377), was, like the first report (A/CN.4/364), excellent both in substance and in form. In particular, the Special Rapporteur had made a very reasonable choice of the specific points to be examined on a priority basis and had dealt with them in a remarkably succinct and clear manner.

22. He himself had received a copy of the second report only by miracle, a few days before leaving his country to take part in the present session. It was Lebanon's unfortunate lot to be experiencing the war of others on its own soil. For many years, it had often been cut off from the rest of the world, precisely because of odious acts that came under various legal headings and were exactly the same as many of the acts mentioned by the Special Rapporteur as constituting offences against the peace and security of mankind. The list of the crimes Lebanon had suffered from for the past 10 years was all too long. First and foremost was the crime of aggression, in most of its forms, as described in General Assembly resolution 3314 (XXIX) on the Definition of Aggression. But the list also included the organization, undertaking or encouragement by a State of activities calculated to foment civil strife in the territory of another State; the occupation of the territory of a State by another State; interference by the authorities of a State in the internal or external affairs of another State; crimes against humanity, including attempted genocide and conspiracy to commit genocide with intent to destroy, in whole or in part, a particular religious group; and the undertaking or encouragement by the authorities of a State of terrorist activities in another State or the toleration by the authorities of a State of activities in preparation for terrorist acts in another State.

23. Yet there appeared to be no reference to such criminal acts in the outline of the new draft code proposed by the Special Rapporteur in the conclusion to his report, whereas the 1954 draft code did in fact refer to them. That was doubtless an oversight, since international terrorism was now being devised and perpetrated in such a way that it had become a serious threat, if not a terrible scourge, for all countries, including the great Powers, to which terrorism dictated the external and internal policies they were to follow if their interests throughout the world were to remain unharmed.

24. Nor did the report refer to other acts which had been mentioned in the 1954 draft: conspiracy to commit any of the offences defined as offences against the peace and security of mankind, direct incitement, complicity and attempts to commit any of the offences defined as offences against the peace and security of mankind, which were as much criminal acts as the offences themselves. For example, conspiracy by a State or a group of States to break up, divide, dismember or even completely destroy another State by fomenting civil strife and encouraging various religious groups to kill one another was both a crime against the peace and security of mankind and, in some cases, the crime of genocide.

25. He was not a historian describing the factors in the Lebanese tragedy or a witness in a case duly brought before a competent criminal court. Hence he could not venture to point a finger at the perpetrators of the countless offences against the peace and security of mankind that had been committed against Lebanon for so many years. He nevertheless felt duty-bound, as a citizen of that martyred country and a member of the Commission, to draw the Commission's attention to a situation which, although it represented a real danger for the entire world, did not appear to be enough of an affront to the conscience of the world for rules to be elaborated in order to forestall other similar situations. In the face of an international crime, of an offence against the peace and security of mankind, new properly developed obligations of solidarity were needed to replace the present chaotic and anarchical procedures, procedures which, rather than discouraging or preventing the crime, wittingly or unwittingly channelled it in the opposite direction. He reserved the right to comment further in that connection during the consideration of part 2 of the draft articles on State responsibility.

26. The report under consideration was basically a list of offences that were or might be classified as offences against the peace and security of mankind. Chapter I of the report contained a list of the offences covered by the 1954 draft code and chapter II dealt with acts which had been condemned in conventions, declarations and resolutions adopted after 1954 and might be included in the future code as being or constituting offences against the peace and security of mankind. He had no comments to make on chapter II, which listed the international instruments reproduced in the compendium prepared by the Secretariat (A/CN.4/368 and Add. 1). The list did not appear to follow any particular order.

27. The same was not true of chapter I in which the offences covered by the 1954 draft were divided into

three separate categories: (*a*) offences against the sovereignty and territorial integrity of States; (*b*) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (*c*) crimes against humanity, also called crimes of *lèse-humanité*. It was difficult to understand the criterion for that classification. For the purposes of classification by a particular criterion, the distinction that could be drawn between the various offences was in many cases an artificial one that did not stand up under close analysis. Why, for example, were war crimes and crimes against humanity not classified under the same heading? Crimes against humanity, like war crimes, could be committed in time of war or during an armed conflict. In both cases, the victims were always human beings, whether as members of a religious, ethnic, racial or other particular group, as prisoners of war or as wounded or sick members of the armed forces in the field or at sea. That was the meaning of the 1949 Geneva Conventions for the protection of war victims, [16] who were always human beings, just as human beings were the victims of crimes against humanity and had to be protected. In both cases, the offences in question were committed against human beings by violations of human rights. It was perhaps in a chapter with such a title that war crimes, crimes against humanity, genocide and *apartheid* should be classified. In any event, further consideration should be given to the question of the classification of the offences to be covered in the code, something that would be quite difficult to resolve despite its seeming simplicity.

28. He had no comments to make on the list of offences against the sovereignty and territorial integrity of States covered in the 1954 draft code and would merely point out, once again, that it mentioned international terrorism, which was one of the most hateful crimes and had to be included in the new draft code. As the Special Rapporteur noted in his report (A/CN.4/377, para. 19), the list of offences in that category was supported by a very broad conventional base and could not be called into question today.

29. The section of the report dealing with crimes against humanity reproduced the text of paragraphs (10) and (11) of article 2 of the 1954 draft code (*ibid.*, para. 28)—the article which listed the various acts classified as offences against the peace and security of mankind. Paragraph (10) defined genocide, without actually mentioning it, on the basis of the definition of that crime contained in the Convention on the Prevention and Punishment of the Crime of Genocide,[17] while paragraph (11) defined crimes against humanity in general, without actually naming that category of crimes. For the sake of greater precision, it might be advisable, with the definition of typical offences, such as crimes against humanity and the crime of genocide, to use the designation given to them in the relevant instruments of international law.

30. In referring to the acts listed in paragraphs (10) and (11) of the above-mentioned article 2 as constituting the crime of genocide, on the one hand, and a crime against humanity, on the other, the Special Rapporteur noted (*ibid.*, para. 29) that "all these acts constitute genocide". In fact, all those acts constituted crimes against humanity. A crime against humanity was not necessarily a crime of genocide. Yet the reverse was true: genocide was necessarily a crime against humanity with characteristics and dimensions of its own. It was, moreover, a concept that the Special Rapporteur faithfully employed by grouping all the acts in question in a separate section entitled "Crimes against humanity". The Special Rapporteur also drew attention (*ibid.*) to the prevailing opinion that "genocide is a crime against humanity and is covered by that category of offences". The Special Rapporteur then pointed out (*ibid.*, para. 30) that "article 19 of part 1 of the draft articles on State responsibility highlights genocide by including it in the list of serious violations of international law". That was precisely the criticism that could be and actually was made of article 19, which appeared to preclude crimes against humanity, of which genocide was only one particular or particularly serious case. Article 19 made no reference to that kind of crime which, in view of the constituent elements, might in some cases be the same as or similar to the crime of genocide in its objective.

31. As a specific example, again taken from the tragic and cruel situation in his country, in Lebanon the "civilian population"—a term employed in the definition of crimes against humanity—was composed of many religious groups that lived together and alongside one another in nearly every town and village throughout the land. According to the definition of the crime of genocide, any act committed with intent "to destroy, in whole or in part" any of those groups was a crime of genocide. According to the definition of a crime against humanity, any act committed for the purposes of "extermination" of any "civilian population" was a crime against humanity: it was not genocide. Nevertheless, such an act could be and sometimes was committed against a group in a number of towns or villages, just as the victims could be and sometimes were all the elements of a group composing the population in more than one village. No crime could ever be as horrible and cruel; a crime—and this was a very important point—prepared, organized and encouraged by the authorities of foreign States.

32. A similar crime against humanity with a special dimension was conspiracy, also prepared, organized and encouraged by the authorities of foreign States, with the intent not actually "to destroy" a religious group, in whole or in part—which would make it genocide—but to use every type of coercion and force the members of that group into mass emigration, into the most inhuman kind of "deportation"—within the meaning of a crime against humanity, not within the meaning of the crime of genocide—for inordinately egotistical political reasons. What was taking place in Lebanon was not a civil war, even if the situation was often presented as such by the international community so that it could evade its obligations. He reserved the right to revert to that point during the consideration of part 2 of the draft articles on State responsibility.

[16] See footnote 14 above.

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

33. In analysing the concept of crimes against humanity, the Special Rapporteur had sought to highlight their most distinctive basic feature, within the overall context of violations of human rights. He had, quite rightly, pinpointed it in the motive for the act. He drew a distinction (*ibid.*, para. 32) between a violation of human rights and a crime against humanity: in the first case, the individual as such was affected, while in the second case the individual was affected merely because of his religion, race or culture. In other words, the feature of a crime against humanity, whether it took the form of "murder", "extermination", "enslavement", "deportation" or "persecutions" committed against parts of "the civilian population", was basically the motive or the fact that the victims belonged to a particular religion, race or culture. Legal writers were unquestionably unanimous on that point, namely on the fact that it was the motive, a motive of that kind, that formed the essence of a crime against humanity.

34. A crime, however serious, that affected the individual as such and not as a member of a religious, racial or cultural group was certainly not a crime against *humanity*. It could in some cases simply take the form of an international crime and, accordingly, be governed by international law. That was why he experienced difficulty in understanding the meaning and scope of some passages in the report, such as the following: "*Mass* violations of human rights by a State within its own sphere of sovereignty are no different, in essence, from crimes of *lèse-humanité* committed by a State against the nationals of another State" (*ibid.*, para. 34); "... beyond a certain point, violations of a human right are in substance tantamount to crimes against humanity" (*ibid.*, para. 37); "If the violation [of human rights] goes beyond a certain point, it falls within the category of international crimes and, depending on its seriousness, it may be at the top of the scale, in other words it may be a crime against humanity. There is strictly speaking no difference of nature between the two concepts, only a difference of degree. Once they exceed a certain degree of seriousness, violations of human rights are indistinguishable from 'crimes against humanity' " (*ibid.*, para. 40). It should again be emphasized that the seriousness of a violation of a human right could make the violation a crime under international law, but not necessarily a crime against humanity.

35. Again, it had to be borne in mind that the status of the author of the crime also played a decisive role in the legal classification of the crime. According to the definition of a crime against humanity contained in the 1954 draft, the act must have been committed by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities in order for it to be classified as a crime of that kind. That condition had not been laid down in the corresponding definition contained in the Charter of the Nürnberg Tribunal. [18] It had been added by the Commission, as the Commission had explained in its commentary to article 2, paragraph (11), of the 1954 draft, "in order not to characterize any inhuman act committed by a private individual as an international crime".[19] It would be helpful to know what the Commission thought now. In that connection, it should be noted that genocide could be regarded as such if it had been committed by private individuals, although, in view of its dimensions, it could in fact be committed only by the authorities of a State or with the toleration of such authorities. The Commission's commentary to subparagraph (*c*) of Principle VI of the "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal"[20] also seemed to indicate that the Commission tended to be of the opinion that crimes against humanity could continue to be classified as such if they were committed by a State against its own population.

36. He reserved the right to comment at a later stage on chapter II of the report, which dealt with offences classified since 1954. At this stage he would merely endorse the list of acts in chapter III of the report (*ibid.*, para. 79). Nevertheless, it might be necessary to add other acts, such as the unlawful seizure of aircraft and unlawful acts against the safety of civil aviation. The Special Rapporteur's comments on the criterion of extreme seriousness (*ibid.*, paras. 8 and 12)—a highly subjective criterion which was bound up with the state of the international conscience at a given moment, since there was no objective dividing line between the most serious and the less serious and, even if such a dividing line did exist, it would shift with changes in international opinion—were entirely relevant. They reflected an undeniable state of affairs that could explain why the unlawful seizure of aircraft and unlawful acts against the safety of civil aviation had been excluded from the list of offences the Special Rapporteur was proposing to include in the future draft code. Members of the Commission would remember how outraged international public opinion had been by such acts at the time when the Convention for the Suppression of Unlawful Seizure of Aircraft [21] and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [22] were being elaborated and when crimes against the safety of international civil aviation had been taking place with alarming frequency. He was convinced that, at that time, there would never have been the slightest hesitation to classify such acts as offences against the peace and security of mankind. It nevertheless remained to be seen whether the "state of the international conscience at a given moment" should be regarded as the decisive element or determining factor in all cases, since the seriousness of a criminal act was often determined by the nature of the act itself.

37. Mr. THIAM (Special Rapporteur) said that, although he would not for the time being comment on the substance of the observations by Mr. Malek, he would point out, in order to channel the discussion, that the general part would of course deal with some aspects of the questions of conspiracy, direct incitement, complicity or attempts to commit criminal offences. With regard to

[18] See footnote 10 above.

[19] *Yearbook ... 1954*, vol. II, p. 150, document A/2693, para. 50.

[20] *Yearbook ... 1950*, vol. II, p. 377, document A/1316, paras. 120-124.

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

[22] *Idem, Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 143.

Mr. Malek's comment concerning the first sentence of paragraph 29 of the report, the word "genocide" was an error of transcription and should be replaced by the words "crimes against humanity".

38. Mr. RAZAFINDRALAMBO said that the Special Rapporteur was to be commended for his second report's clarity and concision, which had also been the features of the first report. The Special Rapporteur began the report (A/CN.4/377, paras. 2-6) with a reminder that, at its previous session, the Commission had decided to submit to the General Assembly two controversial questions, on the subject's content *ratione personae*, and on the implementation of the code. The Special Rapporteur then moved on immediately to the question of the scope *ratione materiae*, proposing to formulate a list of offences against the peace and security of mankind. The Special Rapporteur had thus confined his task, for the time being, to preparing the list of offences that might be included in the code and had decided to revert to the two above-mentioned questions, which had been left pending, after the General Assembly and Governments had provided replies. However, in view of their preliminary nature, it would have been preferable not to leave aside general questions at the current stage. In particular, it was advisable to include in the draft an introductory part enunciating the general principles of international criminal law and the criteria to be used to classify offences against the peace and security of mankind. In the absence of any opposition in the Commission on grounds of principle and in the light of the favourable reactions of many delegations in the Sixth Committee of the General Assembly, he considered that priority should be given to considering the principles to be included in a preliminary part and to reaching consensus on that point, so as to avoid any doubts about the Commission's position.

39. Admittedly, in article 2, paragraph (13), and article 4 of the 1954 draft code, the Commission had already formulated a number of general legal concepts, but those provisions in no sense constituted an exhaustive list of the general principles of general criminal law applicable in international law. Was it enough, as the Special Rapporteur had stated in his first report (A/CN.4/364, para. 49), to say that some general principles of criminal law were an integral part of public international law? The general principles in question would still have to be clarified. The Commission itself had found it necessary to deal in part 1 of the draft articles on State responsibility with state of necessity (art. 33) and self-defence (art. 34)[23] as circumstances precluding wrongfulness, although the latter concept had already been dealt with in Article 51 of the Charter of the United Nations. But those were justifications which, in the 1954 draft, had either been mentioned too specifically (article 2, paragraphs (1) and (3), referred only to self-defence against aggression) or been totally overlooked (there was no reference to state of necessity). It was none the less important to specify the instances in which a state of necessity could be invoked as an excuse for conduct contrary to international law and to describe its effects: a state of necessity did not remove the unlawful nature of an act and could only exonerate the author from punishment.

40. There were other principles whose application to criminal law was not always recognized by every legal system, such as the principle of the non-retroactivity of criminal laws, which the common-law system did not apply, or the principle of the non-applicability of statutory limitations to war crimes and crimes against humanity, which was expressly embodied in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[24] An examination of the international instruments relating to war crimes and offences against the peace and security of mankind, as well as of international practice and the practice of States, could also lead to a generally recognized definition of such crimes and to the general criteria on which they were based. Indeed, the Special Rapporteur himself had done just that by expressing the view that the seriousness of an offence against the peace and security of mankind was evaluated in terms of the breach of universal values affecting "peoples, races, nations, cultures, civilizations and mankind" (A/CN.4/377, para. 8). In his own view, account had to be taken of such criteria in determining the minimum and maximum content of the list of offences classified after 1954. Those same criteria might also justify, in the eyes of the international community, the choice ultimately proposed for the content. For that reason, a general definition of an offence against the peace and security of mankind had to be included in an introduction to the draft code.

41. With regard to the list of offences drawn up by the Special Rapporteur (*ibid.*, para. 79), a judicious distinction was drawn between offences covered by the 1954 draft and offences covered by later instruments. The division of the offences listed in the 1954 draft into three categories (*ibid.*, para. 15) was also particularly relevant. In that connection, the offences violating the prohibitions and limitations on armaments should be radically amended because, as formulated in article 2, paragraph (7), of the 1954 draft, they were plainly outdated. It was also essential to determine the extent to which the pretext of national defence could be validly invoked in order to prevent application of the international disarmament instruments in force. In addition, a special provision should be devoted to prohibitions, through bilateral or multilateral treaties, on the use of weapons of mass destruction and chemical, biological and atomic weapons.

42. As to crimes against humanity, the Special Rapporteur had rightly raised the question of the specificity of human rights in the general context of such crimes, rightly pointing out, however (*ibid.*, para. 34), that violations of such rights beyond a certain point might, as Mr. Malek had observed, fall into the category of crimes against humanity. The same criteria as those used to classify crimes against humanity should be used to determine that point. In that regard, violations of the right to life, as well as murders or assassinations by groups, whether or not they were acting on behalf of the lawful

[23] *Yearbook ... 1980*, vol. II (Part Two), pp. 34 *et seq.*

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

authorities, might, like genocide, constitute an example of a qualitative or quantitative shift to the category of crimes against humanity.

43. He agreed with the Special Rapporteur's minimum list of offences classified after 1954. Colonialism and *apartheid*, to take only two examples, would be unanimously regarded as crimes, but mercenarism might give rise to some objections, as illustrated by the difficulties encountered in the Sixth Committee of the General Assembly in connection with the elaboration of an international convention against the recruitment, use, financing and training of mercenaries. It should not be forgotten that General Assembly resolution 3103 (XXVIII) of 12 December 1973, which qualified the use of mercenaries as a criminal act, had been adopted by an overwhelming majority, yet 13 of the most important countries had voted against it. However, as stressed in article 1, paragraph 3, of the Convention for the Elimination of Mercenarism in Africa, adopted by OAU in 1977,[25] the crime of mercenarism was "a crime against peace and security in Africa", a rule that had repeatedly been observed in the practice of African courts.

44. Should the minimum list proposed by the Special Rapporteur be extended? In that connection, the Special Rapporteur had referred to the proposals made by Vespasien Pella in his work on the codification of international criminal law. In the present state of international law and international practice and in the light of the criteria mentioned earlier, it would be difficult to regard the five acts listed by Pella and cited by the Special Rapporteur (*ibid.*, para. 70) as offences against the peace and security of mankind, particularly since some of them were usually nothing more than internal offences covered by national criminal codes. However, economic aggression, which was characterized by the flagrant interference of one State in the internal affairs of another State in breach of the principle of the sovereignty of peoples over their natural resources and wealth, might be serious enough to be classified as an offence against peace. That was not a purely academic possibility, for in resolutions 2184 (XXI) and 2202 (XXI) of 12 and 16 December 1966, the General Assembly had expressly regarded violations of the economic and political rights of indigenous peoples as crimes against humanity. Unless, as the Special Rapporteur had proposed, a more appropriate term could be found, economic aggression might if necessary be included in a revision of article 2, paragraph (9), of the 1954 draft, which considered it an offence for the authorities of a State to intervene in the internal or external affairs of another State by means of coercive measures of an economic character.

45. Lastly, in view of the renewed outbreak of acts of piracy, accompanied by serious acts of violence and murders, consideration should also be given to the possibility of deeming such acts to be crimes against humanity.

The meeting rose at 1 p.m.

[25] See footnote 15 above.

1817th MEETING

Thursday, 10 May 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, 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.4/368 and Add.1, A/CN.4/377, [3] A/CN.4/L.369, sect. B)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. REUTER said he welcomed the moderation and good sense displayed by the Special Rapporteur in pinpointing the questions, texts and problems to which the Commission should confine itself, more particularly since the topic could lend itself to flights of fancy and not necessarily to moderation. He agreed, not without regret and only after considerable reluctance, that the Commission should refrain from tackling the general problem of violations of human rights. Needless to say, in today's world, a violation of human rights—even a right of the individual—came under international law when it was characterized, but it did not constitute a threat to the peace and security of mankind. Accordingly, the Commission should examine only intentionally collective violations of human rights that were an actual threat to the peace and security of mankind.

2. On the important question of methodology, after careful reflection he was of the opinion that the Special Rapporteur's proposal that the various offences to be covered by the draft should be considered one after the other was, in the final analysis, the best possible course, both at the present stage and later on. The elaboration of a draft code would take a long time and it must meet the requirements of Governments, which nowadays were more concerned about the utility of works of codification. The problems would thus have to be examined carefully and comprehensively. By not replying to the two questions submitted to it, the General Assembly had very wisely left it to the Commission to shed light on the matter, to take up the problems itself, to pin-point its task and, first of all, to define what constituted an international crime. Naturally, the General Assembly knew,

[1] For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

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

[3] Reproduced in *Yearbook ... 1984*, vol. II (Part One).