Document:-
A/CN.4/SR.1817

Summary record of the 1817th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

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).

as did all members of the Commission, what an international crime was in the moral sense and in the emotional sense—and emotion was a sound and valid criterion. Yet the members of the Commission were, first and foremost, jurists. Hence, to define an international crime meant, first of all, determining the legal consequences of conduct that would be deemed to constitute an international crime.

3. The Commission had already tackled that aspect of the question by formulating article 19 of part 1 of the draft articles on State responsibility, but that article was simply a frame that still had to be filled. The Commission could start by specifying the régime governing international crimes. Two problems were resolved in the draft articles on State responsibility proposed by Mr. Riphagen, articles which established that certain crimes were imprescriptible and that international crimes were directed against all States and thus entailed rights and obligations for all States. But many of the issues still had to be resolved. To that end, when it was not possible, as in systems of internal law, to determine all of the consequences of the concept of a crime, the Commission could also study each international crime, find out in each case what was established in the conventions and resolutions and, in the absence of any specific provisions, determine what it could itself propose. It was an empirical method whereby the Commission could more easily delimit the subject-matter. After such an overview, the Commission would see whether it was in a position to formulate a number of general rules of international law on international crimes.

4. In his second report (A/CN.4/377, para. 44), the Special Rapporteur listed a number of relevant legal instruments and the Commission should, in principle, examine all of them. After verifying the ones that genuinely related to the special crimes constituted by offences against the peace and security of mankind, the Commission should move on from the offences that were most clearly defined because they formed the subject of a widely ratified convention, and those that were fairly clearly defined because they formed the subject of a General Assembly resolution adopted by a large majority, to the offences that were more open to question and less clear-cut. Only then could it take a position. It could, for example, start with genocide and aggression. Nevertheless, he had reservations regarding a number of "potential" offences. For instance, the non-physical, yet social, cultural and moral destruction of minorities was deplorable, but it was quite difficult to deal with because it involved too many tragedies and too many States that were torn apart for the sake of survival. In any event, that should not act as the point of departure. Again, the use of nuclear weapons eluded law, and to some extent even *jus cogens*, because of the very nature of such weapons. In that connection, members were aware of arduous endeavours undertaken by ICRC and by experts in that field since 1977.

5. For each kind of international crime, the Commission would have to determine the questions to be considered and decide first of all whether it was to examine the problem of criminal responsibility of the State or criminal responsibility of the individual, or indeed both types of responsibility. A number of comments were called for in that regard. The Special Rapporteur had cited three cases (*ibid.*, paras. 54 *et seq.*) and it was obvious that, in the taking of hostages, some acts were committed by States and others were not. The same was true of mercenarism, for some mercenaries were demonstrably agents of the State, whereas others acted for economic or ideological groups. Again, terrorism by individuals existed alongside terrorism by the State. Accordingly, the Commission, in examining crimes committed in each of those instances, would have to examine both the crime as committed by the individual and the crime as committed by the State. In his opinion, in public international law there could be no comprehensive régime for criminal responsibility on the part of the State because of a problem that was absolutely insoluble: namely the problem of punishment. It was difficult to see how a general, impersonal rule could be formulated to determine in advance the nature and scope of the punishment to be inflicted on a State committing a crime. Each time it would involve one single case and hence a political matter, for as Professor Tunkin had pointed out, criminal responsibility of a State was political responsibility.

6. On the other hand, a partial régime for criminal responsibility on the part of the State did exist, in that it was possible to establish the offence that constituted a crime and the conditions under which the crime was attributed to the State and its organs. In any event, even if the Commission decided to consider only crimes by individuals, in order to define them it would be compelled to take a position regarding crimes by the State. For instance, if it sought to establish rules for the punishment of natural persons responsible for a war of aggression—which was an act by a State—it would first have to establish the crime of the State, and only then could it establish the criteria for the punishment of State agents recognized as guilty, in the organs of the State, of being instruments of the crime committed by the State. Hence the Commission would have to examine matters case by case, for it would be unable to lay down general rules. It was easy for some acts constituting crimes by a State to be attributed to a natural person and to punish, for example, a soldier who had cut off the hands of a prisoner of war. It was not so easy in the case of other crimes, such as the use of nuclear weapons—if indeed that were recognized as a crime. One of the two people who had dropped the only two nuclear bombs used so far in wartime had not known what he was doing; after he had found out, he had retired to a monastery.

7. Still other matters would have to be considered. Reference had been made to the imprescriptibility of crimes, something that was admissible in the case of individuals since it was limited by natural death. However, he was reluctant to accept it in the case of crimes committed by a State, which was enduring, because imprescriptibility would constitute a legal obstacle. He would none the less rally to the view of the majority. The principle of the non-retroactivity of criminal laws, mentioned by Mr. Razafindralambo (1816th meeting), was acceptable if the crime in question was genuinely new. However, for a

crime defined in a convention or elsewhere, could not the law be made retroactive so as to bring support to a moral doctrine that had been flouted? Certainly the Commission could look into that matter, but in the knowledge that the problem would vary depending on the crime. There again, the Commission would not be able to lay down too general a rule. It would also have to say whether it was ready to endorse the death penalty, when the trend under criminal law in a number of countries was to abolish it. Other technical problems also arose, such as provocation, attempted crime, complicity and acts of justification.

8. The Commission would have to proceed very cautiously on the question of creating an international criminal jurisdiction. From the outset, it should avoid subordinating everything to the establishment of a system of international criminal jurisdiction, and should bear in mind that no such thing had ever existed, for even the Nürnberg Tribunal had been no more than the joint court of several States. On the other hand, the Commission could consider the question of creating an international organ, even one with powers that were only very weak, such as establishing optional reports on the facts, and could go further at a later stage in its work. It should therefore make a choice, for each crime, and determine whether the crime came within the jurisdiction of an international organ or a national court. In the latter case, the Commission would have to resolve the problem of the formulation of rules if the competent courts were national courts, for example in such matters as the obligation to enforce punishment and extradition.

9. Lastly, the Commission could not, for offences against the peace and security of mankind, which would always have a political aspect to them, establish penal rules as strict as was possible in the case of national rules. Nevertheless, it must at least formulate rules that were fairly precise.

10. Mr. CALERO RODRIGUES said he was always somewhat sceptical about the topic under discussion. It was as if one were to build a house knowing it could never be made habitable. One might have the necessary theoretical and practical foundations, one could construct the walls—prepare a list of offences—one could put in doors and windows—establish penalties—but one could never give it a roof, because no solution would be found to the problem of a jurisdiction. Nevertheless, the second report of the Special Rapporteur (A/CN.4/377) was the kind that facilitated the Commission's work: it was concise, contained no non-essentials and allowed for consideration of the issues in a specific manner.

11. He agreed with the statement by the Special Rapporteur (*ibid.*, para. 4) that the Commission should confine itself to less controversial questions until more precise replies were received from Governments. He also recognized, as the Special Rapporteur stated (*ibid.*, para. 5), that the right approach would be to reconsider the 1954 draft code and expand the list of offences therein as appropriate, not so much in light of the need to arrive at a minimum agreement as to implement General Assembly resolution 38/132 of 19 December 1983, in which the Commission was requested to elaborate "as a first step, an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report".

12. The Special Rapporteur pointed out in his second report (*ibid.*, para. 6) that his purpose was to formulate a list of offences today considered as offences against the peace and security of mankind, in other words to bring up to date the list prepared by the Commission in 1954. Although that would provide a good starting-point, it would only partly fulfil the Commission's mandate under General Assembly resolution 38/132. The Commission might, of course, feel it was preferable at the present stage not to embark upon the introduction but to start with the less difficult matter of preparing a list of offences, in which case it should explain its reason to the General Assembly by developing what was said in the last paragraph of the Special Rapporteur's report (*ibid.*, para. 83).

13. Furthermore, in paragraph 69 of its report on its thirty-fifth session[4] the Commission had taken the view that the international offences to be covered by the code should be determined by reference to a "general criterion", an idea put forward by the Special Rapporteur in his first report (A/CN.4/364), paras. 51-52). The Special Rapporteur had said then that such a criterion would have the advantage of serving to link the list of offences to a common denominator and so make it clear that the list would be provisional and not exhaustive. In the second report, that concept of a common denominator, which the Special Rapporteur had seemed to consider essential, had apparently been reduced to the single criterion of seriousness. However, seriousness, though undoubtedly important, could not be regarded as the sole criterion and an attempt should therefore be made to achieve greater precision in that regard, preferably by reference to the peace and security of mankind, as in the title of the code, so as to distinguish crimes against the peace and security of mankind from other international crimes. In making that comment, he fully realized that an apparent link with the peace and security of mankind could be found in certain generic definitions of international crimes, such as the definitions by Georges Scelle and Vespasien Pella and, of course, in article 19 of part 1 of the draft articles on State responsibility.[5]

14. As to the list of offences in the 1954 draft code, the Special Rapporteur concluded in his second report (A/CN.4/377, para. 41) that, subject to the wording of the articles, that list should be maintained. It was possible to agree with that conclusion, provided any modification of the wording was not just cosmetic, for it had not been the Commission's intention that the 1954 draft should be final.

15. The Special Rapporteur had divided the offences listed in the 1954 draft code into three categories (*ibid.*, para. 15), presumably for the sake of presentation alone

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

[5] See 1816th metting, footnote 12.

and not in order to maintain the division in the list to be established. The first of the three categories related to offences against the sovereignty and territorial integrity of States (article 2 of the 1954 draft), and in that connection he agreed in principle with the Special Rapporteur's affirmation (*ibid.*, para. 19) that the list of offences was supported by a very broad conventional base and could not be called into question today.

16. The first offence covered by article 2 of the 1954 draft, aggression, left no room for doubt. However, the second offence, threat of aggression, involved perhaps too subjective a criterion; for instance, at what point would such a threat be deemed to arise? The same applied to the third offence in that category, namely preparation of the employment of armed force. Did such preparation in fact differ from threat of aggression? At what point did preparing armed force cease to be mere preparation and become preparation to employ it? Indeed, it could be argued that the ultimate purpose of such preparation was to employ armed force. Hence those first three offences should be modified and even combined into a single offence along the lines of the Definition of Aggression. [6]

17. The fourth and fifth offences, which involved the same problem, dealt respectively with organizing, tolerating or participating in armed bands, and with undertaking or tolerating organized activities to foment civil strife in another State. Was permitting the organization of an armed band to be a crime from the outset? At what point should the State be held responsible for tolerating the organization of an armed band? When did a group of individuals become an armed band? The same could be said for organizing and fomenting civil strife, for in both cases it was difficult to establish an offence before it had been committed. It must not be forgotten that the draft code was not a resolution or declaration in which loose wording was possible, and sometimes even necessary, if agreement was to be reached; it was a legal instrument that would give rise to specific legal consequences in that responsibility for the crimes in question would be attributed to individuals.

18. The sixth offence was terrorism, which was central to the code in the modern world, since States believed that only international co-operation and possibly penal provisions could help to combat it. Annexation of territory, the seventh offence covered, was plainly a crime; but the wording of the eighth offence, "intervention ... in the internal or external affairs of another State, by means of coercive measures of an economic or political character", was inadequate. At what point did intervention actually occur? When did economic measures become coercive? He trusted that the Special Rapporteur would find a more convincing formula.

19. The second category of offences, covered by paragraphs (7) and (12) of article 2 of the 1954 draft, related to violations of the prohibitions and limitations on armaments or of the laws and customs of war. As to the first of the two offences in that category, he took the view that, if a State was bound by treaty to some form of disarmament, failure to comply with its obligations under the treaty could be regarded as an offence against the peace and security of mankind. The wording, however, was somewhat old-fashioned and a more general formula would be preferable. The second offence, "acts in violation of the laws or customs of war", must be deemed a crime, but he wondered whether every violation—even of a minor technical nature—of the 1949 Geneva Conventions and the Protocols thereto, [7] should also be regarded as a crime. The Conventions themselves made some distinction on that score and it would therefore be advisable to be more precise.

20. The third category of offences involved crimes against humanity, which were covered by paragraphs (10) and (11) of article 2 of the 1954 draft, and dealt in effect with the concept of genocide. In his second report (*ibid.*, para. 31), the Special Rapporteur discussed the wider problem of crimes against humanity in the context of human rights in general, which implied that certain new crimes might be added to the third category. He would revert to that question later in the debate.

21. Mr. NI said that the Special Rapporteur, with a sound sense of judgment, had selected as a point of departure the compilation of a catalogue of the offences to be included in the draft code in the light of the development of international law on the subject since 1954. The controversial questions of the content *ratione personae* and of the feasibility of preparing a statute for an international criminal jurisdiction could await more mature consideration and clearer guidance from Governments and the General Assembly.

22. That did not mean, however, that the offences—and particularly new offences not covered by the 1954 draft—were entirely divorced from the concept of violations committed by States. Indeed, there were situations in which the offence could be committed only by a State, with the result that inclusion of that offence in the catalogue implied that States should be considered as subjects of violations of international law. The list of offences was therefore clearly tentative, a situation which left the Special Rapporteur the latitude not to submit draft articles at the present stage.

23. The question now before the Commission was that of the content *ratione materiae* or, in other words, of what constituted an offence against the peace and security of mankind. Extreme seriousness should serve as a criterion in that respect, but the question then arose of how the abstract term "seriousness" was to be understood and evaluated. An offence against the peace and security of mankind differed from other offences because of its impact, since it affected not only individuals but also the fundamental interests of certain groups and institutions, thereby threatening the basic rights and interests of all mankind. Offences against the peace and security of mankind could be distinguished from human rights violations in that the victims of the latter were usually individuals and thus the internal law of a State was involved. Yet when human rights violations reached

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

[7] See 1816th meeting, footnotes 13 and 14.

a certain magnitude and frequency, they could become offences against the peace and security of mankind. One example in that respect was provided by the draft convention against torture and other cruel, inhuman or degrading treatment or punishment, now under consideration in the Commission on Human Rights.

24. In his second report (A/CN.4/377, para. 15), the Special Rapporteur's division of the offences covered by the 1954 draft code into three main categories was generally acceptable and his analysis of the distinguishing characteristics of an offence against the peace and security of mankind, despite its brevity, was admirably lucid and precise. However, the Special Rapporteur called into question the condemnation of the use of nuclear weapons because of the suggestion in some quarters that prohibition of such use would run counter to the strategic concept of deterrence (*ibid.*, para. 27). It was said (*ibid.*, para 52) that atomic weapons, despite their capability for mass destruction, were supposed to afford protection, in other words to safeguard peace and security. The Special Rapporteur had therefore asked the Commission to take a decision in that regard and to establish whether special reference should be made in the draft code to the use of such weapons.

25. However, it was doubtful whether the deterrent effect of nuclear weapons could provide genuine peace and security for mankind. Admittedly, the question was being considered in disarmament forums, but lawyers could not remain indifferent to the legality or illegality of the use—at least the first use—of such weapons of mass destruction. It served no useful purpose to ask whether they were intended to provide protection. If such weapons allegedly possessed a kind of "deterrent effect", one might well ask: "who deters whom?". The constant struggle for supremacy in "power of deterrence" would only lead to an intensification of the arms race and the production of weapons of mass destruction which endangered the peace and security of mankind. He appreciated the complexities of the problem, but wished to express his gratitude to the Special Rapporteur for raising it in connection with the work on the draft code.

26. As to the offences classified since 1954, the Special Rapporteur's list of relevant instruments, although not exhaustive, was most helpful. The list of new offences given in the report (*ibid.*, para. 79, sect. B) was rightly headed by the heinous crimes of colonialism and *apartheid*. As to the others, items 12 (the taking of hostages) and 16 (the taking of hostages organized or encouraged by a State) should be merged, since the latter constituted a particular case of the former; besides, inclusion of item 16 in the list would prejudge the question as to whether States should be held liable for crimes in international law.

27. In the matter of mercenarism (item 13), it should be stressed that, in practice, mercenaries were used by colonial and racist régimes against national resistance movements, as was apparent from General Assembly resolution 3103 (XXVIII) of 12 December 1973, and from the Convention for the Elimination of Mercenarism in Africa adopted by OAU in 1977.[8] The serious threat posed by mercenarism was not, however, confined to Africa and the inclusion of item 13 thus met the requirements of the modern era.

28. In the case of item 14 (the threat or use of violence against internationally protected persons), the title should be reworded so as to give an indication of the seriousness and brutality of violations. It did not seem justifiable to include in a list of offences against the peace and security of mankind all individual cases of violence against diplomats.

29. He experienced similar doubts regarding item 15 (serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person). The Special Rapporteur emphasized in his report (*ibid.*, para. 57) the duty of internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations to respect the laws and regulations of the host State. Yet disregard for local laws could not be considered as an offence against the peace and security of mankind. The concept of a threat to public order was, moreover, a relative one, and the question of interference in the internal affairs of the receiving State was in fact already included in the list of offences covered by the 1954 draft: by article 2, paragraph (9), concerning intervention by a State in the affairs of another State.

30. He entirely agreed with the Special Rapporteur's decision to exclude from the list of offences such acts as the counterfeiting of banknotes and the forgery of passports (*ibid.*, para. 78). The issue of "economic aggression" was worth studying in depth, bearing in mind that political independence was purely theoretical in the absence of economic independence. The Special Rapporteur was right, however, in saying that it was not easy to determine what constituted economic aggression (*ibid.*, para. 80). Perhaps economic aggression began with foreign interference and domination in economic matters, but the question of when such interference and domination amounted to aggression remained largely uncertain.

31. Mr. McCAFFREY said he shared the scepticism expressed by Mr. Calero Rodrigues regarding the viability of the present topic and admired the Special Rapporteur's courage and earnest efforts to advance the consideration of such a sensitive and difficult subject. Without dwelling too much on the substance of the report (A/CN.4/377), he wished at the present stage to give a preliminary indication of his reasons for finding it difficult to accept. In the first place, the Commission might well be putting the cart before the horse by drawing up a list of offences against the peace and security of mankind before it had elaborated a sufficiently precise criterion—or rather set of criteria—for identifying those offences.

32. At a time when the Commission had not yet developed analytical tools for compiling a list of offences, he would, for his part, refrain from commenting on most of the items on the Special Rapporteur's proposed list (*ibid.*, para. 79). Many of them were political in tone and amounted essentially to labels. The problem was, of

[8] *Ibid.*, footnote 15.

course, an inherited one and definitely not the fault of the Special Rapporteur. If, however, a particular act or practice was proposed for inclusion in the code because it had been the subject of certain resolutions, declarations or conventions, then a thorough analysis of the position as to the voting and ratification of those instruments, as well as their historical background and current significance, was imperative. Only in that way was it possible to determine whether they represented nothing more than aspiration or whether, to use the language of the commentary to article 19 of part 1 of the draft articles on State responsibility, they were supported by "all the essential components of the international community".[9] Furthermore, the vagueness and generality of most of the proposed items would make it nearly impossible for a tribunal to determine whether a violation had taken place. The items would be very difficult to evaluate in the abstract without an assessment of the context in which they operated. As already pointed out by a previous speaker, a set of general introductory provisions was essential in that connection.

33. That consideration brought him back to his earlier point, namely that the Commission might find itself putting the cart before the horse. His reasons were both procedural and substantive. From the procedural point of view, it should be remembered that the General Assembly, in paragraph 1 of resolution 38/132 of 19 December 1983, had invited the Commission to continue its work on the elaboration of the draft code by elaborating "as a first step" an introduction as well as a list of offences. In paragraph 2 of the resolution, the Secretary-General had been requested to seek the views of Member States and intergovernmental organizations regarding the questions raised in paragraph 69 of the report of the Commission on its thirty-fifth session.

34. A number of conclusions could be drawn from that resolution. To begin with, the "first step" in the Commission's work must be the formulation of a set of introductory provisions. Such an approach was indeed only logical, and also a substantive reason for deferring any attempt to formulate a list of offences until the general part—which constituted the foundation of any code—had been elaborated.

35. His second conclusion was that it would be premature to embark upon the elaboration of a list of offences before receiving and analysing the replies to the Secretary-General's inquiry mentioned in paragraph 2 of General Assembly resolution 38/132. Clearly the content of any list would be significantly affected by the answers to such questions as whether States as well as individuals should be subjects of the code, and whether the draft should be accompanied by the establishment of an international criminal court. It was extremely doubtful whether all countries would recognize the same kind of universal jurisdiction in respect of all the items on the Special Rapporteur's proposed list as States had historically recognized in connection with piracy.

36. For those procedural and substantive reasons, the Commission should proceed with all the caution that the present delicate topic required, and first formulate a set of introductory provisions as the necessary foundation for the edifice it proposed to build. He further suggested that, before attempting to build that edifice, the Commission should draft a set of criteria for identifying offences against the peace and security of mankind. In that regard, he fully associated himself with the remarks made by Mr. Reuter at the present meeting.

37. Formulations such as "the most serious of the most serious offences" were of doubtful value, constituting, as they did, little more than slogans. In that connection, he welcomed the clear analysis by Mr. Calero Rodrigues. It was essential to determine what actually constituted an offence against the peace and security of mankind before the Commission could hope to decide whether, and to what extent, certain human rights violations constituted violations of the code. Indeed, that point had to be clarified even for the purpose of evaluating the items already listed in the 1954 draft code. To give an example, was an embargo an "activity calculated to foment civil strife"? A similar problem arose with regard to radio broadcasts, whether by a private entity protected by freedom of expression or by a State-run broadcasting authority. The meaning of "intervention . . . in the . . . external affairs of [a] State" was also unclear.

38. He shared the doubts expressed by Mr. Calero Rodrigues regarding such concepts as the threat of aggression and preparation for the employment of armed force and endorsed his comments on the important difference between the formulation of a code of offences against the peace and security of mankind and the drafting of a resolution or even a declaration. The difference was vital in that the provisions of the code were intended to have precise legal—and indeed penal—consequences. It was therefore essential to be precise in identifying and defining the offences in question.

39. In conclusion, he urged the Commission to attempt, as a first step, to elaborate an introduction and, as the next step, to formulate more precise criteria for the identification of offences against the peace and security of mankind.

Drafting Committee

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should consist of the following members: Mr. Mahiou (Chairman), Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair and Mr. Ushakov, together with Mr. Evensen, *ex officio* member in his capacity as Rapporteur of the Commission. As in previous years, any other members of the Commission could attend the Committee's meetings if they so wished.

It was so agreed.

[9] *Yearbook ... 1976*, vol. II (Part Two), p. 119, paragraph (61) of the commentary.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the Planning Group of the Enlarged Bureau should consist of the following members: Mr. Sucharitkul (Chairman), Mr. Al-Qaysi, Mr. Díaz González, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Stavropoulos, Mr. Thiam and Mr. Ushakov, together with Mr. Evensen, *ex officio* member in his capacity as Rapporteur of the Commission. The special rapporteurs were invited to attend the Group's meetings, where appropriate, and any other members of the Commission could attend if they so wished.

It was so agreed.

The meeting rose at 12.40 p.m.

1818th MEETING

Friday, 11 May 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, 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. AL-QAYSI said that, although some aspects of the topic under consideration might appear to be illusory, the Commission should not be unduly sceptical about its viability and should remember that, in its resolution 38/132 of 19 December 1983, the General Assembly had recalled its belief that the elaboration of the draft code could contribute to strengthening international peace and security. As a body of independent experts, the Commission had to follow the General Assembly's instructions and, while remaining alive to political realities, it had to strive to reach solutions that were applicable in practice, leaving it to Governments to make political assessments of those solutions. Only when sufficient efforts had been made in the Commission and political judgments of the results achieved had been reached by the competent bodies could the question of viability be decided.

2. As the Special Rapporteur had pointed out, the sole aim of his second report was to have the Commission determine the list of acts classified as offences against the peace and security of mankind and hence delimit the subject *ratione materiae* (A/CN.4/377, para. 6). He agreed with the Special Rapporteur that it would have been pointless for him to submit draft articles prejudging the existence of offences that had not yet been recognized as such by the Commission. The Special Rapporteur had, moreover, not had any other choice. The debates in the Sixth Committee of the General Assembly had not dispelled uncertainty with regard to the content of the topic *ratione materiae* (see A/CN.4/L.369, paras. 55-95) and the General Assembly had not provided guidance on the questions submitted to it by the Commission. Until more precise replies were received from the General Assembly and from Governments; the Special Rapporteur was right to concentrate on less controversial questions.

3. His own view was that the words "as a first step" in paragraph 1 of General Assembly resolution 38/132 applied both to the elaboration of a list of offences and to the elaboration of an introduction, in contradistinction to the controversial issues mentioned in paragraph 2 on which the views of Governments and intergovernmental organizations had been requested. The reference to paragraph 69 of the Commission's report on its thirty-fifth session in both paragraph 1 and paragraph 2 of that resolution confirmed that interpretation. The views requested might, however, not be forthcoming for some time, thereby creating difficulties for the Commission because of the interrelationship between the contents of the topic *ratione materiae* and *ratione personae* and between those elements and the question of implementation.

4. The criterion of "extreme seriousness" adopted by the Commission to characterize offences against the peace and security of mankind was admittedly an abstract and highly subjective notion that was, as the Special Rapporteur had indicated, "bound up with the state of the international conscience at a given moment" (A/CN.4/377, para. 8). That was, however, also true of concepts such as "the peace and security of mankind" and "international public order". Mankind, nations and order did not exist in a vacuum, but only in relation to the international community and to States, in other words in relation to political entities. The political tone of the offences to be included in the draft code was thus perfectly understandable.

5. The cardinal point was, however, what conduct the political entities collectively considered to be prohibited

---

[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).