Document:-

A/CN.4/SR.1818

Summary record of the 1818th 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

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).

conduct constituting offences against the peace and security of the collectivity. In view of the lack of guidance and the general, abstract and highly subjective nature of the criterion chosen, the only way the Commission could solve the problems it might face was to follow an empirical approach. The general criterion should be linked to the relevant conventions and declarations, which were the political expression of the parameters of prohibited conduct partaking of the nature of offences. For each offence, the Commission should determine the issues to be examined from the viewpoint of the criminal responsibility of States and of individuals. The final political decision would, of course, be left to States.

6. There was no denying the fact that the 1954 draft code, discussed in chapter I of the report, should be the starting-point for the Commission's current work. It must, however, be borne in mind that the particular circumstances which had prompted its elaboration had been those of the Second World War. Times had changed since then and the provisions of the 1954 draft code therefore had to be adapted and refined in the light of present-day circumstances and developments since 1954. The Special Rapporteur's analysis of the distinctions between crimes against humanity and violations of human rights (*ibid.*, paras. 31-42) was of particular interest. The Special Rapporteur had in particular raised the question whether the category of offences grouped under the term "crimes against humanity" was governed by a régime distinct from the general régime of the protection of human rights (*ibid.*, para. 31). As far as human rights and the régime governing them were concerned, there was often a tendency to lose sight of differences in levels of social and economic development, cultural background and outlook; but in a heterogeneous world community, over-generalizations of that kind were dangerous to say the least. The Special Rapporteur's opinion in that connection (*ibid.*, paras. 37 and 40) was to be commended.

7. With regard to chapter II of the report, dealing with offences classified since 1954, he said he agreed with the basic thrust of the minimum content approach. It was, however, not yet clear whether the Special Rapporteur would include definitions of the offences to be listed in the draft code or whether he would simply refer to offences covered in existing conventions. In the latter case, it was clear that some of the offences to be included would still have to be defined in terms that were universally acceptable. A case in point was that of mercenarism, on which a United Nations *Ad Hoc* Committee was still trying, not without considerable controversy, to prepare a convention. It was to be hoped that the successful completion of the *Ad Hoc* Committee's work would eliminate any difficulties that might arise.

8. With regard to nuclear weapons, the Special Rapporteur had been right to state (*ibid.*, para. 53) that "the Commission must choose between what is desirable and what is possible and maintain a reasonably realistic stance". As to the argument concerning the deterrent effect of nuclear weapons, two points were in order. The first was that, in all likelihood, what would be sought was a prohibition on the first use of nuclear weapons, and such a prohibition would not destroy the deterrent effect of such weapons. The second was that, if the deterrence argument were taken to its logical conclusion, it would amount to a complete negation of non-proliferation, which would mean that some States were allowed to deter their potential enemies, and others were not.

9. That question, like all the other questions involved in the topic under consideration, was inevitably a political one. As Mr. Ni had pointed out (1817th meeting), lawyers could not remain silent on the question of the legality or illegality of nuclear weapons. As Mr. Reuter had said, however (*ibid.*), the members of the Commission could, as lawyers, only express their personal opinions on that question and they must do so, even if their convictions were to be rejected by political bodies.

10. In the absence of a clear definition of the term "economic aggression", he was inclined to agree with the view expressed by the Special Rapporteur (A/CN.4/377, para. 80) that that expression was more suited to political parlance.

11. Mr. SUCHARITKUL said he fully agreed with the arguments put forward by the Special Rapporteur in his excellent report (A/CN.4/377). The need to draw up a list of offences against the peace and security of mankind had already been amply demonstrated and the Commission now had to move forward by taking the 1954 draft code as a starting-point. Some of the offences covered by the 1954 draft had, of course, become somewhat out of place because, as part of its study of State responsibility, the Commission had formulated a number of basic principles, such as the one relating to circumstances precluding the wrongfulness of an act that would otherwise be wrongful. Article 19 of part 1 of the draft articles on State responsibility was, in fact, a framework article that had to be supplemented. For the time being, the legal consequences of the international crimes referred to in that provision had not been clearly defined, but the Commission's discussions at its previous session had shown that the present study related only to crimes under international law, as opposed to ordinary international crimes, extra-national, transnational or transboundary crimes, and organized crimes that were internationally recognized or punishable. There appeared to be agreement that, for a crime to be classified as an offence against the peace and security of mankind, it had to be a crime under international law. In traditional international law, that requirement had, moreover, long governed the crime of piracy on the high seas.

12. The extreme seriousness of the international crimes which constituted offences against the peace and security of mankind was another characteristic to which the Special Rapporteur had drawn particular attention. The seriousness of a crime depended on circumstances and, in particular, on the number of victims or the amount of destruction it caused. On the basis of those two characteristics, the Commission should be able to move forward and leave aside political problems, as well as basic principles, such as those relating to attempted crimes, complicity, conspiracy or justified acts.

13. The Commission must, however, try to find other characteristics and criteria to identify offences against

the peace and security of mankind. To that end, the wording of the topic under consideration might be instructive. Although he himself would not go as far as to contrast offences against peace and offences against security, as Mr. McCaffrey had suggested (1817th meeting), he did think that a distinction might be drawn between the three concepts of peace, security and mankind. The concept of the international community dated back to the beginnings of international law, to the time of Grotius, when it had been confined to the European States, if not to the Mediterranean coastal States. Although Thailand had already exchanged diplomatic missions with France and the Netherlands as early as the seventeenth century, it had not been until the first Peace Conference held at The Hague in 1899 that it had become part of the international community along with China, Japan and Persia. Only at the second Peace Conference, also held at The Hague in 1907, had 16 Latin-American countries become part of the international community. Even in 1945, the authors of the Charter of the United Nations had referred to international peace and security, rather than to the peace and security of mankind. The concept of mankind was thus relatively new; previously, it had been mentioned only in connection with piracy on the high seas, since pirates had been regarded as enemies of mankind. Humanitarian law was an even more recent concept. There was thus quite a marked difference between the original concept of the "international community" and that of "mankind". Many United Nations resolutions and, in particular, General Assembly resolution 1514 (XV) of 14 December 1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, nevertheless indicated that those two concepts should be brought closer together and that the international community should, one day, encompass all human beings. It was on that basis that the Commission should try to identify the elements making it possible to classify certain crimes under international law as offences against the peace and security of mankind.

14. It should first be noted that, unlike a crime under internal law, a crime under international law was the result of a violation directed not against an individual, but against a State. Offences against the peace and security of mankind were committed not only against a particular State and, in some cases, against one or more private individuals, but rather against the international community as a whole. An offence of that kind could therefore be committed by a State or by a nation acting on behalf of a State, but also by a group or organization of private individuals, if the offence was so serious that it warranted classification as an offence against the peace and security of mankind. The repercussions of the offence against peace or security must, moreover, be felt world-wide, not only locally. The Commission therefore had to start by studying the most serious international crimes, namely those which endangered the peace and security of mankind as a whole.

15. To that end, the Special Rapporteur had identified three categories of offences (A/CN.4/377, para. 15). The first were offences against the sovereignty and territorial integrity of States. Any offence of that kind, even if it was committed against only one State, might endanger the peace and security of mankind. As for aggression and its offshoots, he was of the opinion that reference should be made to the Definition of Aggression adopted in 1974.[4] He was, moreover, not sure whether acts regarded as offshoots of aggression would not be covered by the general principles to be included in the draft code. In the second category, the Special Rapporteur had included offences violating the prohibitions and limitations on armaments or the laws and customs of war. Although that category must be retained, some of the offences it included were outdated and had to be considered in the light of recent instruments such as the Additional Protocols to the 1949 Geneva Conventions.[5] It was open to question whether the crimes in the third category, namely crimes against humanity, existed as such and whether they did necessarily endanger the peace and security of mankind.

16. He agreed with the Special Rapporteur that the Commission should confine itself to determining the minimum content of the draft code. There was no doubt that colonialism was covered by *jus cogens* and that it endangered the peace and security of mankind, particularly since it was an obstacle to the birth of new States. He also shared the Special Rapporteur's doubts with regard to *apartheid*, the use of nuclear weapons, serious violations of human rights and economic aggression. In the case of mercenarism, the crucial factor was its purpose. If its aim was to prevent the birth of a State, to destroy a national liberation movement or to perpetuate a colonial régime, it was more in the nature of participation in an act of aggression or in maintaining colonialism. Mercenarism in itself could not be regarded as an offence against the peace and security of mankind when its aim was a legitimate one. Siam had had such an aim when it had started to recruit Portuguese and Japanese mercenaries in the seventeenth century.

17. Mr. MAHIOU said he would confine his comments to some of the problems raised by the Special Rapporteur in the extremely clear and straightforward report under consideration (A/CN.4/377). The topic could be approached in two ways. The Commission could either start by enunciating general principles and then go on to identify and classify the offences to be included in the draft code; or it could, as the Special Rapporteur had suggested, first try to reach agreement on the offences that endangered the peace and security of mankind. The second method would be more appropriate because, if general principles were defined first, it might be more difficult to identify offences against the peace and security of mankind. For example, the statute of limitations could not apply in the same way to all offences in that category, whether they were attributable to private individuals or to States. The non-applicability of the statute of limitations was easier to accept in the first case, since the responsibility of private individuals was limited in time. In the second case, the non-applicability of the statute of limitations would mean that future generations would have to pay for the wrongful acts of a Govern-

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

[5] See 1816th meeting, footnote 13.

ment. The Special Rapporteur's approach was therefore more realistic.

18. The 1954 draft code would be a good starting-point for the Commission's work, even though it had some drawbacks both in terms of substance and in terms of form, as several members has pointed out.

19. The Special Rapporteur was obviously of the opinion that the future draft should have a minimum content. He had not given a very convincing description of the maximum content and had not failed to point out that what the General Assembly had in mind was a code relating only to offences against the peace and security of mankind. Although he himself thought that the Special Rapporteur was right, he emphasized the need to identify the criteria that would make it possible to elaborate the list of offences to be considered.

20. Although the criterion of extreme seriousness applied to all offences against the peace and security of mankind, it could probably not be used to classify each of those offences individually. The Commission would have to find features that were common to "families" of offences. On the basis of such a general criterion, it would have to find criteria that applied to each family or criteria by which each offence could be classified separately. It would have to determine at what point a violation of human rights came within the higher category of a crime against humanity. From the legal point of view, it could not be said that every violation of human rights was a crime against humanity. For a crime against humanity to exist, perhaps a number of human rights violations had to have been committed. It was, in any event, quite obvious that some violations of human rights could constitute crimes against humanity and that they would have to be taken into account in the draft code. It would, however, be necessary to determine the most suitable criteria for identifying them.

21. It would probably be necessary to proceed from the simple to the complicated in order to determine which offences should be taken into account. In that connection, the offences listed in the report (*ibid.*, para. 79) would serve as a good basis for discussion. Most of them were without any doubt offences against the peace and security of mankind, although some of them would require further clarification. The Commission would probably have to shorten that list and further refine the proposed criteria, since mere threats or preparations could be regarded as constituting such offences only if certain conditions were met. The Commission would, for example, have to determine when interference by a State in the internal or external affairs of another State or acts causing serious damage to the environment actually constituted offences against the peace and security of mankind.

22. Two other subjects warranted particular attention because of their political repercussions. The Commission must, for example, adopt the right approach to the issue of nuclear weapons. In his report (*ibid.*, para. 52), the Special Rapporteur had introduced that issue by drawing attention to the ambiguous nature of nuclear weapons, which were a problem case both from the doctrinal and from the legal and political points of view. Nuclear weapons could be regarded as both the best and the worst possible thing for mankind. For a small country, they might be an effective means of deterring a great Power which had only conventional weapons. Should the use of such weapons as weapons of aggression be prohibited and their use as weapons of deterrence or protection be tolerated? In his view, account had to be taken primarily of the devastating consequences of the use of such weapons, a point which the Special Rapporteur had not overlooked. The Commission could not pass over that problem in silence; it had to draw the attention of States to the legal issues involved and find a means of restricting or prohibiting the use of nuclear weapons.

23. Economic aggression, which covered a wide variety of activities, also had political implications. It was open to question at what point acts of economic hostility became crimes and, in particular, offences against the peace and security of mankind. For economic aggression to exist, there had to be a number of acts designed to destabilize a State and to cause social and economic disturbances or serious unrest amounting to interference in the internal affairs of a State. The problem had been raised in article 2, paragraph (9), of the 1954 draft code, but it would require further consideration. The Commission would have to request the point of view of Governments on that issue, as well as on others.

24. Despite the difficulties to which the topic under consideration gave rise, he saw no reason for pessimism. In his view, the report under consideration would be an excellent basis for further work on the subject-matter dealt with in article 19 of part 1 of the draft articles on State responsibility.

25. Mr. DÍAZ GONZÁLEZ said that he too wished to commend the Special Rapporteur for his clear and concise report (A/CN.4/377), which was acceptable both in form and in substance. With regard to the proposed approach, he agreed with the Special Rapporteur that the Commission must go beyond the much too general criterion of seriousness, which was difficult to assess—if, indeed, agreement could ever be reached on which body would assess it—and base itself on the principle that any offence against the peace and security of mankind was an international crime, whereas every international crime was not an offence against the peace and security of mankind.

26. As to the offences to be included in the future code, he endorsed the list proposed by the Special Rapporteur (*ibid.*, para. 79), who nevertheless had some doubts about two offences, namely the use of atomic weapons and economic aggression. Although it was quite true that the first offence gave rise to a problem of considerable importance that was not only legal, but also moral and political in nature, the Commission must state its view on that problem because the law was not a purely speculative undertaking: it was supposed to govern a particular society and hence take full account of the circumstances in which that society lived.

27. He did not agree with the comments made by the Special Rapporteur concerning the lack of precision and

the political nature of the concept of economic aggression (*ibid.*, para. 80). All the offences listed in the report under consideration were of a political nature and had political repercussions, and the concept of economic aggression had been quite clearly defined by the General Assembly, particularly in the Charter of Economic Rights and Duties of States[6] and in the resolutions it had adopted on the protection of the environment and of non-renewable resources. Economic aggression was a new form of aggression to which the Powers which had hegemonistic and imperialist designs, and which had been deprived by international law of their right to colonial aggression, often resorted in order to bend small States to their political will. Those Powers had even gone so far as to establish international organizations which, on the pretext of aiding the economically weaker countries, were in fact used as means to expert pressure. It was thus obvious that the concept of economic aggression, like that of cultural aggression, was well enough developed to be classified as an offence against the peace and security of mankind, in the same way as aggression proper, particularly since political independence could not exist without economic and technological independence. The Commission would, accordingly, only have to adapt article 2, paragraph (9), of the 1954 draft to the realities of the modern world.

28. In conclusion, he said he was also of the opinion that colonialism had to be included in the future draft Code of Offences against the Peace and Security of Mankind.

The meeting rose at 11.40 a.m.

[6] General Assembly resolution 3281 (XXIX) of 12 December 1974.

1819th MEETING

Monday, 14 May 1984, at 3.05 p.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, 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]

[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).

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN said that the start of the second week of the Commission's session coincided with a triple anniversary: the 2608th anniversary of the birth of the Indian Prince Siddhartha, the Buddha; the anniversary of his attainment of Nirvana 80 years later; and the anniversary, 35 years after his birth, of his discovery of the four noble truths, namely suffering, the causes of suffering, the elimination of suffering and the key to the elimination of suffering. That fact had a certain relevance to the topic under discussion inasmuch as the first of the five Pancha Sila, or basic principles, was to refrain from taking life.

2. Mr. USHAKOV said that, although he was a free thinker, he respected all religions and, on the occasion of the anniversaries to which the Chairman had just referred, he wished to congratulate the members of the Commission who were of the Buddhist faith.

3. He was very disappointed with the progress of the Commission's work on the draft Code of Offences against the Peace and Security of Mankind. Not only was the work still at the preliminary stage, but the Special Rapporteur had deemed it advisable, for the time being, to limit the topic to less controversial matters until more specific replies had been received from the General Assembly and Governments to the questions which had been raised by the Commission and which were, in his own opinion, fanciful and beside the point.

4. The Commission had, for example, requested the General Assembly's views on the subjects of law to which international criminal responsibility could be attributed or, in other words, on the question whether the international criminal responsibility of States existed. It could be asked whether that question arose only in connection with the draft code under consideration, which was, in his view, a code of offences entailing the individual criminal responsibility of certain persons, or whether it also arose in connection with the topic of the international responsibility of States, on which the Commission might also await the replies to see whether the criminal responsibility of States existed and how it should be dealt with in the context of the corresponding draft. The unknown factor was the "criminal responsibility of States", as opposed to the responsibility of private individuals, which was well established and, in the case of the most serious ordinary crimes, entailed the death penalty or detention.

5. Until hypothetical replies had been given to the Commission's questions, the Special Rapporteur had presented a report (A/CN.4/377) that dealt only with the content of the topic *ratione materiae* and thus contained only a list of offences against the peace and security of mankind. What were those offences? Offences by States or offences by individuals? The question remained unanswered because the content of the topic *ratione materiae* could not be dissociated from the content *ratione personae*. The Special Rapporteur was of the opinion that international crimes had been defined, but that was not at all true. Article 19 of part 1 of the draft articles on