Document:-

A/CN.4/SR.1820

Summary record of the 1820th 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

weapons, but also to manufacture them. The problem of existing stocks could be discussed in other bodies.

43. As to war crimes, it had been pointed out that much depended on who was the victor and who was the vanquished. If an aggressor won a war, who would try that aggressor? That was a problem to which the Drafting Committee should pay due attention. In any event, the Commission must do everything in its power to help prevent war, so that there would be no winners or losers.

44. The work on the topic under consideration involved a number of assumptions. The first was that a stage had been reached in international relations when nations and, in particular, the great Powers were prepared to subordinate their national interests to their international obligations. Aggression and mercenarism, for example, were instruments of foreign policy. Foreign policy was, however, invariably an extension of domestic policy and it was therefore difficult for the leaders of a great Power to subject national interests to international obligations. If work on the topic under consideration succeeded, it would constitute a move towards a form of world government, since a world court with jurisdiction over very critical issues would be set up and provision would be made for implementation and sanctions. If the results of the Commission's work on the present topic were accepted, they would mean that ideological conflicts had been overcome. One of the causes of disputes in the world and of every case of war by proxy was precisely the existence of an ideological conflict between communism and capitalism.

45. With regard to the problem of mercenarism, he said that there was no intention of outlawing forces such as the French Foreign Legion or the Gurkhas of the British Army. The term "mercenarism" was intended to cover the case of men hired to overthrow Governments and destabilize nations. The situations envisaged were clearly cases of war by proxy, since mercenaries always had a paymaster; wherever mercenaries were used, there was always a foreign power behind them. Mercenarism should therefore be regarded as an international crime, not only for individuals but also for States. In that connection, he said that he could not agree with the subtle distinction proposed by Mr. Ushakov. Mercenarism was a very grave problem for the developing countries because mercenaries were being used against them, both overtly and covertly. If those who hired and paid mercenaries knew that their actions constituted crimes and that, if they were discovered, they would be condemned by world bodies, they might be more careful in their actions.

46. He agreed that there could be no question of any statutory limitation on such grave crimes as offences against the peace and security of mankind. As to the concept of the "peace and security of mankind", he disagreed with Mr. McCaffrey (1817th meeting): "peace" and "security", linked as they were by the conjunction "and", were indissolubly connected and could on no account be separated. There could be no peace without security and no security without peace. In the draft under consideration, the concept of the peace and security of mankind had to remain indivisible.

The meeting rose at 6 p.m.

1820th MEETING

Tuesday, 15 May 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, 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. 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. Sir Ian SINCLAIR noted that there had been a division of opinion in the Commission on the question of whether the Special Rapporteur had been right to devote his second report (A/CN.4/377) to a list of offences for possible inclusion in the draft code or whether he should have begun by elaborating an introduction along the lines indicated by the Commission in paragraph 67 of its report on its thirty-fifth session. In that connection, the mandate given by the General Assembly in paragraph 1 of its resolution 38/132 of 19 December 1983 was not very clear: the Commission had been invited to elaborate an introduction, "as well as a list of offences in conformity with paragraph 69 of that report". That paragraph 69 did not actually suggest that the next step must be to draw up such a list. It simply indicated that the draft code should cover "only the most serious international offences", which would be determined by reference to "a general criterion and also to the relevant conventions and declarations pertaining to the subject".

2. As the Special Rapporteur had pointed out, however (*ibid.*, para. 8), the criterion of "extreme seriousness" was a highly subjective one and would not, in itself, provide much guidance. That point could be illustrated by examples taken from internal law. Under the penal code of certain countries, adultery was a criminal offence; in other countries, it constituted grounds for divorce in civil law but did not come within the scope of criminal law. In pastoral societies, cattle theft was regarded as a particularly grave crime; other societies would treat it as a lesser offence. Moreover, a society changed with time, as did it value judgments. Two centuries earlier, sheep stealing had been regarded as a particularly grave crime in the United Kingdom and had

[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).

sometimes been punished by transportation. Today, that offence would, of course, be treated much more lightly. Certain types of conduct that had formerly been treated as criminal were nowadays no longer regarded as such.

3. The criterion of "extreme seriousness" was thus inadequate. Something more was needed to justify the inclusion of an offence in the draft Code of Offences against the Peace and Security of Mankind: the offence in question also had to be of such magnitude and intensity as to outrage the conscience of all mankind. It was necessary to find the equivalent of the concept of *hostis humani generis*, which had, in classical international law, justified the exercise of universal jurisdiction in relation to piracy under the law of nations. The key element in that respect was that the international community of States as a whole recognized the crimes in question as offences against the peace and security of mankind. A distinction had to be drawn between conduct which was offensive to the moral conscience of all right-thinking people and conduct which was so barbaric and so disruptive of even minimum international public order as to qualify the offender as *hostis humani generis*.

4. The Special Rapporteur's second report contained a depressing catalogue of the horrors that affected contemporary international society. No continent had escaped the contagion of indiscriminate violence and terror pursued for motives that could in no way justify the suffering inflicted. Mr. Malek (1816th meeting) had given a moving account of the troubles which rent his country, but the cycle of violence, terror and genocide was visible everywhere. In the face of such a litany of evils, the Commission's efforts would inevitably appear puny, but the Commission was bound to carry out the task entrusted to it by the General Assembly, even if individual members might be sceptical of the results that could be achieved.

5. Turning to the catalogue of offences, he said he agreed with the Special Rapporteur that the 1954 draft code should be taken as a starting-point, although some of its formulations would, of course, have to be modified to take account of more recent developments, such as the adoption of the Definition of Aggression. [4]

6. There appeared to be virtual unanimity that the crimes of direct and indirect aggression should be included in the draft code. The Special Rapporteur would no doubt propose a revised version of article 2, paragraphs (1)-(6) and (8), of the 1954 draft, with due regard for the wording of the generally accepted instruments that had since been adopted by the General Assembly.

7. As to the problem of intervention, which was the subject of paragraph (9) of article 2 of the 1954 draft code, he shared Mr. Calero Rodrigues' doubts (1817th meeting). The draft code adopted by the Commission at its third session in 1951 [5] had contained nothing specific on the subject, probably because the disastrous consequences of unlawful intervention had been covered by earlier paragraphs dealing with armed bands, civil strife and terrorist acts.

8. He also had serious reservations about article 2, paragraph (7), of the 1954 draft relating to violations of restrictions or limitations on armaments. The commentary to that provision [6] revealed that it was based on the view of the League of Nations Committee on Arbitration and Security that failure to observe conventional restrictions on armaments could, under many circumstances, raise a presumption of aggression. That view had reflected the experience of the 1920s and 1930s, but it was no longer valid, particularly in the light of recent disarmament treaties providing for the suspension of the treaty obligations of the States parties in exceptional circumstances, when their national security was or might be seriously jeopardized. That fact cast some doubt on the provision in question, except perhaps where the material breach was accompanied by evidence that the defaulting State was preparing to commit an act of aggression.

9. The Commission would also have to pay careful attention to the content of article 2, paragraph (12), of the 1954 draft dealing with violations of the laws or customs of war. It was doubtful whether every violation of that kind could be held to constitute an offence against the peace and security of mankind. Perhaps that characterization should be attached only to "grave breaches", a notion which was familiar in international humanitarian law.

10. Finally, the 1954 draft included crimes against humanity. In that connection, there was no doubt that the list to be drawn up should include the crime of genocide and the other crimes against humanity referred to in the "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal". [7] It must, however, be decided whether the Commission should go any further and, with regard to human rights violations, he particularly agreed with the analysis by the Special Rapporteur (A/CN.4/377, paras. 31-40). Violations of individual human rights were not all offences against the peace and security of mankind, but a pattern of gross and systematic violations of human rights did constitute a crime against humanity. Obvious examples of such crimes were the all too common recent cases of the disappearance and torture of political opponents as a result of acts by State organs or groups of private individuals.

11. Turning to chapter II of the report, dealing with offences classified since 1954, he said he agreed with the comment by the Special Rapporteur (*ibid.*, para. 80) that the meaning of the concept of "economic aggression" was not sufficiently clear; for that and other reasons, he did not think that economic aggression should be included in the list of offences to be drawn up. That was also true of "colonialism" and "mercenarism". As to the first of those terms, he endorsed the proposal that the

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

[5] *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, para. 59.

[6] *Ibid.*, p. 136.

[7] *Yearbook ... 1950*, vol. II, pp. 374 *et seq.*, document A/1316, paras. 95-127.

draft code should include a reference to the abhorrent concept of the subjection of a people to alien domination and exploitation and of the forcible denial to it of the fundamental right of self-determination. The concept and the term should, however, not be confused. Historically and technically, the term "colonialism" could mean a particular form of governmental structure, even when that structure corresponded to the wishes of the people concerned. The Commission must be very precise in its use of legal terminology and, although he was all in favour of the inclusion of the concept of colonialism in the draft code, he had reservations regarding the way the term had been used.

12. Similar considerations applied to the use of the term "mercenarism", with the additional complication that a United Nations *ad hoc* committee was now trying to formulate the text of a convention of the subject of the activities of mercenaries. Those activities were, of course, universally condemned, but it should be recognized that it was the endemic instability of some newly independent States which had created a market for the secret recruitment of mercenaries in developed States. That market was composed of disturbed individuals, but it could not be tapped without the activities of persons seeking to reverse the results of a *coup d'état* in their own countries. As to the problem of determining who was and was not a mercenary, he could accept the Special Rapporteur's conclusion (*ibid.*, para. 60) that a mercenary was motivated primarily by money. Human motives were, however, complex and it would be difficult to distinguish between an individual who accepted money, but was motivated primarily by political convictions, and an individual whose motive was primarily one of gain. Nationality could be a guide, but not in every case. He therefore had doubts about the inclusion of "mercenarism" in the draft code.

13. *Apartheid* was generally condemned as an affront to human dignity, but while branding it as a denial of fundamental human rights, the international community as a whole was divided in its assessment of whether that evil practice constituted a crime against humanity. The list of parties to the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[8] (A/CN.4/368/Add.1) revealed that no State from the Western European and Others Group had even signed, much less ratified that Convention and that only relatively few Latin-American States had done so. There had also been a consistent pattern of dissent and abstention by those same States and even by some African States on General Assembly resolutions characterizing *apartheid* as a crime against humanity.

14. The other items in the Special Rapporteur's additional list were less controversial. Consideration should certainly be given to the inclusion in the draft code of the crime of taking hostages and of acts of violence against diplomats and other internationally protected persons. Those were offences which, by their very nature, tended to disturb international peace and security. Obvious examples had been the taking of United States diplomatic and consular staff in Tehran as hostages a few years previously and the very recent case in London of the flagrant and criminal violation of diplomatic law which had involved a grave abuse of diplomatic immunities and in which a young policewoman had been killed by shots fired from diplomatic premises.

15. He would, however, caution against the inclusion in the draft code of "acts causing serious damage to the environment". That term was much too vague. For example, oil spills which damaged the environment certainly gave rise to civil liability and the persons responsible could also, in some cases, be charged with criminal negligence; but it would be going too far to characterize such damage to the environment as an offence against the peace and security of mankind.

16. Referring to the problem of nuclear weapons, he said the Commission was not called upon to enter into the political and other arguments for or against the prohibition of first use of such weapons. That question was a deeply controversial one and such a prohibition could not be considered in isolation from other disarmament measures, since it would inevitably tilt the military balance in favour of those States which enjoyed superiority in conventional armaments and manpower. He therefore suggested that the Commission should not include any specific reference to the use of nuclear weapons in the list of offences to be drawn up.

17. In addition to the offences mentioned in the Special Rapporteur's second report (*ibid.*, para. 79), he suggested that consideration should be given to the inclusion in the draft code of two others, namely piracy and slavery. Those offences were not by any means outmoded. There had been recent instances of piratical acts in the seas off Africa and South-East Asia. Piracy was, moreover, already recognized as a crime under international law in relation to which all States were entitled to exercise jurisdiction. Slavery and the slave-trade had been largely stamped out in the twentieth century as a result of international co-operation, but there were still some parts of the world where they continued to be practised.

18. In conclusion, he said he thought that the 1954 draft code could be taken as the basis for the Commission's work, although it would have to be reviewed carefully. He agreed with some of the additions proposed by the Special Rapporteur, but he thought that one or two further offences should be included in the list. It would, however, be premature at the present stage to try to draw up a list of offences against the peace and security of mankind because of the large number of variables involved. The Commission would need more objective criteria to determine what offences should be included in the list or, in other words, to select from among the many practices condemned by right-thinking people those which qualified to be treated as offences against the peace and security of mankind.

19. Mr. CALERO RODRIGUES said that, in his previous statement (1817th meeting), he had discussed chapter I, sections A and B, of the Special Rapporteur's second report (A/CN.4/377). He now wished to comment on section C, dealing with crimes against humanity.

[8] United Nations, *Treaty Series*, vol. 1015, p. 243.

The first of those crimes was genocide, which had been defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide[9] and on which there was no need to dwell at length, since that Convention itself provided, in article IV, that persons committing that crime would be punished and, in article VI, that they could be punished by any international penal tribunal that might have jurisdiction.

20. The second category of crimes against humanity was that of inhuman acts "committed against any civilian population on social, political, racial, religious or cultural grounds" by the authorities of a State or by private individuals. The list of inhuman acts given in article 2, paragraph (11), of the 1954 draft code was, however, not exhaustive. It had been taken from the Charter of the Nürnberg International Military Tribunal, annexed to the London Agreement of 8 August 1945,[10] and from the "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" adopted by the Commission at its second session in 1950.[11] Both of those texts required a particular connection for an act to be qualified as a crime against humanity. The Charter of the Nürnberg Tribunal specified that the act had to be committed in execution of or in connection with "any crime within the jurisdiction of the Tribunal".[12] The "Principles" stated that the acts in question had to be committed "in execution of or in connection with any crime against peace or any war crime".[13] That connection had been replaced in the 1954 draft by the requirement that the acts in question had to be committed "on social, political, racial, religious or cultural grounds" (art. 2, para. (11)). He did not think that there was any need for that requirement. Most of the inhuman acts referred to would indeed be committed on those grounds, but even if they were otherwise motivated, their gravity would in no way be diminished. It would also be necessary to dispel any doubts that might arise in connection with the use of the words "any civilian population", which seemed to imply that the acts in question had to be committed against a collectivity and that acts committed against private individuals were excluded. It was, moreover, difficult to see why crimes committed against military personnel should appear to be excluded as well. In his view, the list of inhuman acts should be expanded to include torture and involuntary disappearances, which had unfortunately become all too common.

21. Human rights included a wide variety of specific rights: some, such as the right to life, liberty and security of person, were individual, while others were individual rights which were enjoyed collectively and included the right to self-determination, the right of the members of a group or minority to maintain their own cultural life and trade union rights. Human rights were enjoyed essentially within a national society and were protected and guaranteed by the State. At the same time, States had recognized, in such international instruments as the United Nations Charter and the Universal Declaration of Human Rights, a general international obligation to protect human rights within their jurisdiction. Some specific obligations concerning certain rights had also been recognized by particular conventions, such as ILO conventions and those relating to discrimination. Accordingly, a State which denied human rights to a person or group of persons committed a breach of an international obligation—a breach which engaged its international responsibility. That breach would, however, not constitute a crime because the concept of an "obligation . . . essential for the protection of fundamental interests of the international community" (art. 19 of part 1 of the draft articles on State responsibility) could not be interpreted so broadly as to bring every breach of an international obligation within its scope. There was, moreover, no indication that the international community would be prepared to recognize as a crime the breach of any and every obligation in the field of human rights. It would therefore not be justified to include in the draft code a provision that would qualify breaches by a State of its international obligations concerning human rights as international offences against the peace and security of mankind.

22. His own conclusion was that the question should not be approached in a general or theoretical fashion. The Commission should examine whether there were some actions which might be described as human rights violations in international instruments and which, because of their seriousness and their implications for the peace and security of mankind, should be included in the code. That was precisely what the Special Rapporteur had done in chapter II of his second report.

23. Section A of chapter II listed no less than 23 international instruments which had been elaborated since 1954 and might be used to update the list of offences against the peace and security of mankind; section B analysed the offences which should, in the Special Rapporteur's view, be included in the list, while section C referred to offences which should not be included, such as the counterfeiting of money and the dissemination of false news.

24. He supported the Special Rapporteur's minimalist approach and would even take it one step further. The code that was being prepared was a very special instrument: it would define certain international crimes that would entail very specific and serious legal consequences. Those crimes would engage the international responsibility of the State, as well as the responsibility of private individuals, even if they had committed such crimes in the exercise of governmental authority. It necessarily followed that the code would cover only offences against the peace and security of mankind that were distinguished by the "horror and cruelty, savagery and barbarity involved", to use the Special Rapporteur's terms (A/CN.4/377, para. 77).

25. The fact that a particular act was not covered by the code did not, of course, mean that it would go unpunished. The State involved would be responsible under

[9] See 1816th meeting, footnote 17.

[10] United Nations, *Treaty Series*, vol. 82, p. 279.

[11] See footnote 7 above.

[12] Art. 6 (*c*) of the Charter (see footnote 10 above).

[13] Principle VI, subpara. (*c*): "Crimes against humanity" (see footnote 7 above).

international law and the private individual concerned would be liable under internal law. In many cases, States were being placed under an international obligation to punish certain crimes, and so-called "universal jurisdiction", which extended the right of States to bring to trial and punish individuals regardless of the place of commission of the crime or the nationality of the criminal, was being given wider application.

26. Turning to the list of offences which the Special Rapporteur proposed to include in the code (*ibid.*, para. 79), he noted that colonialism was generally recognized as being contrary to the fundamental interests of the international community; as such, it was an impediment to the peace and security of mankind, as stressed in the Declaration on the Granting of Independence to Colonial Countries and Peoples.[14] The General Assembly had repeatedly declared that the continuation of colonial rule threatened international peace and security. Although it was therefore justified to include colonialism in the list of offences, he would suggest that instead of referring to "colonialism", which was an historical concept, it would be preferable to refer to "the denial of, or interference with, the right of peoples to self-determination". Such wording would be in keeping with the wording of article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights[15] and would have the advantage of going beyond a purely historical approach and of being applicable to other possible violations of the right to self-determination that were equally harmful to the peace and security of mankind.

27. There was no doubt that the list of offences should include *apartheid*, which was a violation of the principle of the equality of all human beings proclaimed in article 1 of the Universal Declaration of Human Rights and of the principle of non-discrimination embodied in article 7 of that Declaration.

28. The taking of hostages, a practice that was all the more repulsive in that it often affected the personal security of individuals who were not involved in the dispute that had given rise to it, was the subject of the International Convention against the Taking of Hostages adopted by the General Assembly in 1979.[16] The States Parties to that Convention had agreed to make the taking of hostages punishable by law and to establish and exercise jurisdiction even when the offence in question had not been committed in their territory; they had also agreed to facilitate extradition. If that Convention were properly applied, the taking of hostages would not go unpunished and he doubted whether there was sufficient reason to classify it as an offence against the peace and security of mankind. That offence was indeed a serious one, but it was not on a par with such crimes as aggression or genocide. The liability of a State in connection with the taking of hostages would, moreover, be covered by the draft articles on State responsibility. He was therefore of the opinion that the inclusion of the taking of hostages in the draft code would not do a great deal to strengthen the international community's defences against that scourge.

29. He also had doubts with regard to acts of violence against internationally protected persons and with regard to a serious disturbance of public order by a diplomat or an internationally protected person. To deal with the first of those offences, the international community had adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[17] Their inclusion in the code would, in his view, do virtually nothing to strengthen the measures of protection and punishment provided for in that Convention and he seriously doubted whether those offences could be said to relate to the peace and security of mankind. If a provision were to be included on the subject, it would have to be less general and relate only to the few cases, such as the murder of a head of State, in which the implications for international peace were clear. As to the second type of offence, article 41 of the 1961 Vienna Convention on Diplomatic Relations did, of course, establish the duty of diplomatic agents "to respect the laws and regulations of the receiving state" and provided that the "premises of the mission must not be used in any manner incompatible with the functions of the mission". Lately, however, abuses had been committed and it had become clear that States needed protection against certain acts by internationally protected persons. Although he was not convinced that the code would be the best way of achieving that result, the problem was a real one and he would welcome any elaboration by the Special Rapporteur on his suggestion.

30. While he agreed with the general condemnation of the abhorrent practice of mercenarism, he was inclined to take the view that it could not be classified as an offence against the peace and security of mankind. The OAU Convention for the Elimination of Mercenarism in Africa[18] defined the crime of "mercenarism", established measures for the punishment of mercenaries under internal law and provided for universal jurisdiction and for extradition. That Convention was being used as a basis for the work of the United Nations *ad hoc* committee that was elaborating a more general instrument. He was therefore not at all certain that the punishment of mercenarism would be more effective if it were included as an offence in the future code. More importantly, he doubted whether the nature of acts of mercenarism would justify their inclusion in the code.

31. Turning to the question of acts causing serious damage to the environment, he pointed out that there was a great difference between damage inflicted by a country to its own environment and damage inflicted directly or indirectly to the environment of another country. The damage must, moreover, be the result of wilful action. Although intent to cause damage did not have to be present in every case, the State concerned should at least be aware that the action it undertook or permitted

[14] General Assembly resolution 1514 (XV) of 14 December 1960.

[15] General Assembly resolution 2200 A (XXI) of 16 December 1966, annex.

[16] See 1819th meeting, footnote 10.

[17] *Ibid.*, footnote 5.

[18] See 1816th meeting, footnote 15.

might have harmful effects and entail international consequences. If the Special Rapporteur could draft a provision that took those points into account, he would be prepared to consider it.

32. As an independent jurist, he would consider a general prohibition of the use of nuclear weapons as a positive development in international law. As a member of the Commission, however, he would hesitate to recommend that the Commission should venture into that field because the question of the use of nuclear weapons had, as yet, never been dealt with in positive law. In the circumstances, any suggestion by the Commission that the use of nuclear weapons constituted an offence against the peace and security of mankind was very unlikely to be accepted by most of the Governments which possessed such weapons. The Commission should, however, draw the attention of the international community to the fact that it would be highly desirable to formulate a rule of international law prohibiting the use of nuclear weapons.

33. He did think that the inclusion in the code of the offences of piracy and slavery, to which Sir Ian Sinclair had referred, was worth considering. Piracy had revived in recent years and slavery had not entirely disappeared: the Working Group on Slavery of the Commission on Human Rights had found evidence that it still existed. Accordingly, it would be no anachronism to include piracy and slavery in the code.

34. In conclusion, he suggested that the Special Rapporteur should reconsider the list of offences in the light of the current debate and of any Government comments that might be forthcoming, with a view to submitting a preliminary list of offences to the Commission in 1985. It should be possible to use that preliminary list to establish general criteria for the classification of offences. The Special Rapporteur might also consider the possibility of drafting an introduction recalling the general principles of criminal law, as indicated in paragraph 67 of the Commission's report on its thirty-fifth session. He nevertheless urged the Special Rapporteur to concentrate primarily on the preparation of the list of offences and to deal with the introduction and the general criteria only if time allowed.

35. Mr. OGISO said that the Special Rapporteur's second report (A/CN.4/377), which was concise and characterized by a spirit of moderation, made a valuable contribution to the Commission's work. The first point of a general nature that he wished to make related to the need to ensure the fair application of the Code of Offences against the Peace and Security of Mankind and to his doubts regarding the preparation by the Commission of a list of offences before either the General Assembly or Governments had given any indication of their reactions to the two questions raised by the Commission and, in particular, the question whether the Commission would be entrusted with the task of considering the establishment of an international criminal jurisdiction. If a list of offences were prepared before that question had been clarified, it was quite possible that a conqueror might, by an arbitrary selection of procedure and its own interpretation of the list, apply the code in such a way as to impose sanctions unilaterally upon the conquered. That would not be in keeping with the wishes of the General Assembly.

36. With regard to the problem of the criterion for the classification of offences raised in the second report (*ibid.*, para. 8), he said that, although the Special Rapporteur had referred to the Commission's unanimous agreement on the criterion of "extreme seriousness", his own feeling was that any agreement on that score had been more passive than positive: the criterion of extreme seriousness had been accepted simply because there had been no adequate alternative and no one had dared object to it. The matter should therefore be given further consideration to determine whether any other valid criterion could be applied. In that connection, he noted that the Special Rapporteur had stated (*ibid.*, para. 12) that the difficulty lay in separating the most serious and less serious offences and that, even if a dividing line did exist, it would shift with changes in international opinion: in other words, the adoption of the criterion of "extreme seriousness" could mean that a given act would be regarded as an offence in one situation, but not in another. Adoption of the premise that the position could differ according to which party was the conqueror and which the conquered might be contrary to the principle *nulla poena sine lege*. As the Special Rapporteur had therefore wisely observed (*ibid.*, para. 13), the Commission should not limit itself to the "excessively general criterion of seriousness". So long as there was only the one subjective definition and no specific supplementary criteria, however, the danger to which he had drawn attention would subsist. If the Commission did decide to draw up a list of offences at the present time, it should ensure that the terms used were as precise as possible in order to rule out any ambiguity.

37. Although it was essential to clarify the basic question of the criterion to be adopted, it was equally important to elaborate an introduction to the draft code, in accordance with General Assembly resolution 38/132, and he considered that the Commission should begin the elaboration of a draft introduction simultaneously with its examination of the list of offences. In view of the different opinions that were likely to be expressed, it would be useful if the Special Rapporteur could prepare two or more alternative drafts of the introduction, which might encourage the General Assembly to reply to the question the Commission had already raised.

38. As to the list of offences to be included in the draft code, he, unlike the Special Rapporteur, considered that the provisions of article 2 of the 1954 draft code required further examination both as to form and as to substance.

39. Referring to article 2, paragraph (3), of the 1954 draft, he said it would be difficult to determine, at a point prior to the "employment of armed force", whether "the preparation by the authorities of a State" of such an act for any purpose other than self-defence had in fact taken place; in practice, the inevitable result would be that, after hostilities had ended, the conqueror would unilaterally determine the existence of such "preparation".

40. The interpretation of the words "encouragement by the authorities of a State" in article 2, paragraph (5),

could differ according to the social and political system of the State concerned. In a free society, political parties and the press were free to criticize the policy of the Government of another State for the benefit of the opposition in that other State. Should criticism of the policy of a foreign Government by the normally State-controlled press of the socialist countries be regarded as "encouragement by the authorities of a State" of certain activities or would such an act come under "toleration by the authorities"? The codification of such acts without due precision could lead to confusion and unnecessary disputes.

41. Although article 2, paragraph (6), referred only to the "undertaking or encouragement by the authorities of a State of terrorist activities", terrorist activities in themselves should constitute an international crime of the most serious nature and should be classified as an offence against the peace and security of mankind. In such an event, the encouragement by a State of terrorist activities perpetrated by an individual could be regarded as an act of incitement or assistance that would be covered by the draft articles on State responsibility.

42. In article 2, paragraph (8), the words "by means of acts contrary to international law" seemed ambiguous; if the annexation in question meant annexation by force, the wording used in article 3 (*a*) of the Definition of Aggression [19] would be more suitable.

43. The wording of article 2, paragraph (9), could give rise to many different interpretations and he had particular difficulty in understanding what was meant by "intervention by the authorities of a State in the ... external affairs of another State".

44. As for offences violating the prohibitions and limitations on armaments or the laws and customs of war, the existing legal instruments covered not only basic obligations, but also technical matters, and he therefore wondered whether a violation of a technical nature would be classified as an offence. It would be necessary to define more precisely what kind of offences could constitute an offence against the peace and security of mankind. There was also the problem of participation in the relevant multilateral conventions, which had both contracting States and non-contracting States, the latter not being bound, technically speaking, by the terms of such instruments. What, therefore, would be the consequence of the different legal status of contracting States and non-contracting States when they committed the same act?

45. In that connection, the Special Rapporteur had also considered the problem of nuclear weapons, although he had not referred, in the context of disarmament, to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, [20] which had been one of the main achievements of the disarmament negotiations. Violations of that treaty might well be considered to constitute an offence against the peace and security of mankind, in which case there would again be a problem of participation in the Treaty, since important countries such as China and France were not contracting parties to it. Another point was whether violations of bilateral agreements, such as the Treaty between the United States of America and the USSR on the Limitation of Anti-Ballistic Missile Systems, [21] should also be regarded as offences against the peace and security of mankind. Those questions would have to be settled at some later stage. Since the Special Rapporteur had, moreover, noted (*ibid.*, para. 27) that there was "no text prohibiting the use of nuclear weapons for combat purposes", he himself considered that, if the use of nuclear weapons was to be made an offence against the peace and security of mankind, a convention prohibiting the use of such weapons would first have to be concluded. Such a prohibition would not, however, be effective unless the production and possession of such weapons by all States were gradually reduced and ultimately banned.

46. With regard to human rights violations, he agreed with the Special Rapporteur that they should not be confused with crimes against humanity (*ibid.*, para. 32), that "when violations of human rights attain a certain *dimension* or a certain degree of *cruelty* within a State, they offend the universal conscience and tend to fall within the province of international law" (*ibid.*, para. 34) and that "beyond a certain point, violations of a human right are in substance tantamount to crimes against humanity" (*ibid.*, para. 37). He also agreed that it was difficult to distinguish crimes against humanity from war crimes. For instance, to detain prisoners of war for the purpose of making them perform forced labour for a long period of time after the end of hostilities would be not only a war crime, but also a crime against humanity.

47. In the light of the foregoing, he considered that, if the Commission decided at present to examine the list further, the content of each offence should be carefully reviewed; many of the elements in the 1954 draft code would, however, provide a starting-point for the elaboration of a list of offences. Even more careful examination would be required in the case of acts classified as offences since 1954, particulary in view of their political character. He was not suggesting that such acts should be excluded from the list, but rather emphasizing the need to define them in precise legal terms. With regard to mercenarism, a matter that was currently under examination by a United Nations *ad hoc* committee, he would simply point out that the definition contained in General Assembly resolution 3103 (XXVIII) of 12 December 1973 and referred to by the Special Rapporteur in his report (*ibid.*, para. 61) lacked clarity. On the other hand, there seemed every reason to include *apartheid* in the list of offences, in view of the international community's conviction that *apartheid* was a crime against humanity which should be severely condemned by that community as a whole.

48. The Special Rapporteur referred to a number of acts for possible inclusion in the list (*ibid.*, para. 70).

[19] See footnote 4 above.

[20] United Nations, *Treaty Series*, vol. 480, p. 43.

[21] Signed at Moscow on 26 May 1972 (*United States Treaties and Other International Agreements, 1972*, vol. 23, part 4, p. 3435); Protocol to the Treaty signed at Moscow on 3 July 1974 (*ibid., 1976*, vol. 27, part. 2, p. 1645).

Though serious, however, those acts could not, in his view, be classified as extremely serious and he therefore agreed with the Special Rapporteur's conclusion that they should not be covered by the codification (*ibid.*, para. 78).

49. With regard to the list proposed in chapter III of the report, offences such as acts causing serious damage to the environment and the threat or use of violence against internationally protected persons called for further careful consideration: the former had never been examined in depth from the point of view of international crime, while the latter could be appropriately dealt with in the same legal framework as piracy. Lastly, he expressed his general agreement with the Special Rapporteur's views on economic aggression (*ibid.*, para. 80).

The meeting rose at 12.45 p.m.

1821st MEETING

Wednesday, 16 May 1984, at 10.25 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, 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. 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. QUENTIN-BAXTER thanked the Special Rapporteur for his report (A/CN.4/377), and said that he had made a very difficult subject seem almost straightforward. He wished at the outset to raise the question of nuclear weapons, since it was an issue that stood alone. As had rightly been said, the existence of nuclear armaments tended to defeat the whole rationale of international law, and it was therefore only appropriate for members of the Commission, as lawyers, to express their concern, as nuclear scientists and medical men had already done. Nuclear war was a spectre that dwarfed humanity; it was significant that the instruments prepared by the Conference on International Humanitarian Law held at Geneva from 1974 to 1977 [4] were generally regarded as applicable to conventional warfare only, which clearly showed that nuclear warfare yielded neither to the law nor to any other human discipline. Consequently some discussion of the topic in the report was called for, with an indication that lawyers too believed that a total ban on the manufacture and use of nuclear weapons might well be the only key to human survival. Furthermore, international law was made not only by precept and exhortation, but was essentially the result of the practice of States as identified and expounded through the endeavours of a body such as the Commission. However, the Commission had to recognize its limitations: if nuclear weapons were one day to be banished from the earth's surface, it would not be because a text on the subject had been prepared by a group of experts serving in a personal capacity, but because nations had found the will to take such a decision and the means to implement it. The Commission could only hope that day would come and bring its influence to bear on the international community by increasing the awareness of the dangers.

2. The general rule that the Commission must always relate what it did to reality was somewhat difficult to follow in the case of the topic under consideration; that was because the Commission had a limited mandate, being required to keep to the guidelines laid down by the General Assembly. If it had had a free hand, it might have reached a rather different conclusion about the timeliness of dealing with the topic and the chances of success in doing so; ideally, it would have examined the notion of an international crime more thoroughly before beginning to draw up a list. Yet he was not criticizing the Special Rapporteur for adopting the course he had followed. Since the extremely important question of who could commit an international crime had been raised and had received diametrically opposite answers, the Commission was obviously bound to set it aside for the time being, in so far as that was possible; however, in any legally oriented consideration of the contents of a list of offences against the peace and security of mankind, it would undoubtedly be driven back to that question from time to time.

3. In regard to the assistance which the Commission might give the Special Rapporteur, the process whereby each member stated what he thought should or should not be included in the list of offences had obvious limitations. The Commission could not act as a surrogate for States in matters of policy. Rather, it should analyse the situation systematically and provide States with criteria for a decision. In that connection, whereas war crimes stood in a class very much apart, the other two kinds, those against peace and those against humanity, covered every offence proposed for inclusion in the code. Broadly speaking, as the Special Rapporteur pointed out in his report, the Commission should concern itself with offences against the integrity of States on the one hand, and offences against the various human qualities on the

[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).

[4] See 1816th meeting, footnote 13.