Document:-

**A/CN.4/SR.1821**

**Summary record of the 1821st 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**

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.

other. That was in full accord with the United Nations Charter, which proclaimed that maintenance of peace was the first aim and went on to provide that a more peaceful world order must be established, based among other things on a regard for human values that transcended national frontiers. The categories of offences provided for in the 1954 draft code might therefore be taken up and extended to cover the new offences.

4. That led to the question of the seriousness of the offence. If there was one clear point of agreement in the Commission, it was that the Commission would not, at the present stage, endeavour to enumerate every offence that was or might be an international crime, but would aim more at a limited code of offences directly affecting the peace and security of mankind. The seriousness of the offence, however, was a very inadequate criterion. Those who had spoken on that point seemed to have been driven back, at least indirectly, to the question of the content *ratione personae* of the subject: in other words, was the Commission dealing with the conduct of States or with that of individuals?

5. He had always taken the view that it would be disastrous for the development of the law if the Commission were to confuse the question of defining State responsibility, and especially the most serious form of it, crimes of the State, with the very different question of the establishment of an international criminal jurisdiction. He had raised that point in connection with article 19 of part 1 of the draft articles on State responsibility proposed by Mr. Ago, the Special Rapporteur for part 1 of that topic; he had then suggested that, to avoid any confusion, some term other than crime should be used.[5] Mr. Ago's reply had been that international practice, particularly in the United Nations, had already attached the word "crime" to the most serious breaches of international law, and had thus determined his choice of that term. Mr. Ago had also said that unfortunately, the same legal term was sometimes used in wholly different contexts.[6] Nevertheless, those contexts had a common link in that they all concerned crimes involving the participation of leaders or Governments.

6. Much as it was desirable not to confuse the question of international responsibility with that of an international code of offences, it had to be acknowledged that when examining offences that merited inclusion in a code of offences against the peace and security of mankind the Commission was, overtly or covertly, making a judgment as to the extent to which they implicated Governments. That became clearer on examining the list of offences set forth in the Special Rapporteur's second report (A/CN.4/377, para. 79). Aggression, for instance, was bound to be committed by persons occupying senior positions in the service of States. In that connection, he recalled that the indictments at the Nürnberg and Tokyo Tribunals had described the crimes committed against peace as a conspiracy by persons exercising important functions in government service to plan, launch or wage an aggressive war. The connection between the two questions was therefore quite plain, even if the aims followed were very different. The offences mentioned under items 2 to 6 in the list proposed by the Special Rapporteur were bound to be committed by individuals wielding power and influence derived from their positions in their national Governments. Accordingly, if the Commission wished to develop the criterion of seriousness, it would have to acknowledge that the scale of the crime had a connection with the exercise of governmental authority of a sovereign State. Also, the test of government involvement, if applied to "minor" war crimes, would give a reasonably clear indication of what did or did not belong in a code of offences against the peace and security of mankind.

7. He did not mean by that to belittle any of the offences against the laws of war: indeed he was deeply convinced of their importance. However, the ordinary war crimes which were committed by individuals in conventional conflicts and which their Governments and armed forces had a duty to repress could not really be regarded as offences against the peace and security of mankind. Obviously, even among the offences which were grave breaches of the 1949 Geneva Conventions,[7] there were certain offences which, by their very nature, could not be committed without the connivance or even the encouragement of States. He had in mind, for example, forcible enlistment of prisoners of war in an enemy army. Perhaps it was at the point at which the offence became a matter of government policy that it should be considered to fall within the scope of the code of offences against the peace and security of mankind.

8. Turning to crimes against humanity, he paid tribute to the Special Rapporteur for the objectiveness and delicacy with which he had set that kind of crime against the general background of human rights. It was virtually impossible to dissociate crimes committed by individuals against international law from the history of the law of human rights. If individuals could be held accountable for their misdeeds, they themselves must have rights under the legal system which ordained their duties and their liability for punishment if they failed in those duties. It was not surprising that, in the aftermath of the Second World War, there had arisen a determination that human rights should be given a new scale of values; the Special Rapporteur had summed up that attitude (*ibid.*, para. 37) by saying that, in certain cases, violations of human rights were in substance tantamount to crimes against humanity.

9. The action taken by the United Nations system to promote respect for human rights, despite all its limitations, was one of the most far-reaching and successful aspects of its work. One of the tests evolved by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to determine whether a violation of human rights was sufficiently serious to be removed from the sphere of internal law to that of international law was that the violation was on a massive scale or that there was a

[5] *Yearbook ... 1976*, vol. I, pp. 79-80, 1375th meeting, paras. 6-8 and 14.

[6] *Ibid.*, p. 89, 1376th meeting, para. 25.

[7] See 1816th meeting, footnote 14.

consistent pattern of violation, the latter circumstance being an essential ingredient of the notion of seriousness. The Commission on Human Rights was not, of course, concerned with crimes committed by individuals, but with the international responsibility of States for events that occurred within their own borders and which, in a less sophisticated period of international law, would have been regarded as merely an internal affair of the State. Also, the expression "consistent pattern of violation" indicated that people were thinking, probably if not necessarily, of behaviour by Governments as well as behaviour by the individuals who led or influenced those Governments. It should therefore be possible to give the topic a broader dimension by saying that offences against the peace and security of mankind were nearly always those that involved the conduct of States themselves. There was no reason to ignore history and to refrain from saying that the fact that something was done in the name of the State did not excuse the individuals responsible from answering before international law. But if the list of offences was to be convincing there had to be some design and consistency behind it.

10. The taking of hostages, another new offence proposed for inclusion in the list, was of course an extremely serious phenomenon and one that required international co-operation if it was to be suppressed. But the taking of hostages, no matter how disagreeable, was not in itself a threat to the peace and security of mankind. If, however, a Government made a policy of encouraging the taking of hostages, or of internally destabilizing other sovereign States to such an extent that such conduct amounted to an intervention in their internal affairs, the matter would then be sufficiently serious to be described as an offence against the peace and security of mankind.

11. Those general remarks were made in response to the General Assembly's desire that the members of the Commission should, individually and collectively, give it what help they could, but he was not absolutely confident that the world was ready to make progress on that front. In his view, it would have been preferable for many of the questions at issue to have been considered first in the context of State responsibility, which would have meant greater logic in the development of the law. In the present circumstances, he considered that the Commission should place emphasis upon the clear doctrinal difference between questions of State responsibility and questions relating to the criminal responsibility of individuals, while recognizing that, if it was required to deal with the latter, it could not fail to associate the criterion of seriousness with the connection between individual acts and acts of States. In a world in which multinational corporations and other entities which, strictly speaking, were not subjects of international law disposed of great power—greater in some cases than that of many sovereign States—it was perfectly possible that, in the future, the need for a code of offences against the peace and security of mankind would arise because of the activities of those entities. For the moment, however, the Commission should not be blinded to the fact that the law should protect individuals and that most of the responsibility rested with Governments of sovereign States.

12. Mr. FRANCIS said that, in his view, the list of offences proposed by the Special Rapporteur (A/CN.4/377, para. 79) provided an acceptable basis for discussion. However, the offence mentioned under item 15 (Serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person) should be deleted, since incidents in which diplomats or other internationally protected persons committed such an offence were wholly exceptional. On the other hand, he was in favour of piracy and slavery being included in the list.

13. So far as the taking of hostages was concerned, although there was another instrument on the subject, as Mr. Calero Rodrigues had pointed out (1820th meeting), the inclusion of that offence in the list would serve as an added deterrent and also as an indication of how strongly mankind felt about it.

14. With regard to mercenarism, it had been said that a mercenary was a person who entered into a private contract under which he hired out his services for reward; killing for money, however, was particularly abhorrent and should be classified as an offence against the peace and security of mankind, at least as far as Africa was concerned.

15. Some members had voiced reservations about the inclusion of *apartheid* in the list of offences. He had had an opportunity to go into that matter a little more deeply in the wider context of the Namibian question and he wished to bring certain facts to the Commission's attention. First, in 1967, the South African Government had enacted the Act to prohibit terroristic activities [8] and had made it retroactive for a period of five years preceding its promulgation. Secondly, in 1969, the South African Department of Bantu Administration had ruthlessly moved and resettled 44,000 Damoras in an area of 4,800 hectares where a new homeland of Damoras was to be established. Thirdly, between 1969 and 1970, 2,000 Damoras had been driven from their homes in Usakos and a further 500 Damoras had been transferred to new homelands. Lastly, in 1969, 35,000 Namas had been arbitrarily uprooted from their homelands. In every instance the areas vacated had become areas reserved for whites. Those were but a few examples of the odious character of *apartheid*; if there was one offence that hat its rightful place in the list of offences against the peace and security of mankind it was *apartheid*.

16. Turning to the problem of nuclear weapons, he said that public opinion strongly condemned the use of those weapons, although their manufacture was lawful for some States; fortunately few States had the necessary know-how. The stockpiling of nuclear weapons was not unlawful either. Consequently, the issue before the Commission was whether it should regard the use of nuclear weapons as a crime. In his view, there was enough documentary material available to the Commission to enable it, as a body of experts, to pronounce on that issue. The

[8] *Act to prohibit terroristic activities and to amend the law relating to criminal procedure; and to provide for other incidental matters*, of 12 June 1967 (*Statutes of the Republic of South Africa, 1967*, part II, Nos. 63-105, p. 1236, No. 83).

scientific facts were well known. It was also known how difficult it was to aim nuclear weapons at precise targets. The terrible effects of nuclear weapons on human beings and on the environment therefore made their use totally unacceptable. Public opinion in the major Powers was strongly opposed to the use of nuclear weapons but it did not object to their being kept as a deterrent. He therefore supported wholeheartedly the view that the Commission should include in the draft code a provision making the use of nuclear weapons an offence against the peace and security of mankind. Such a statement would not in any way affect the deterrent influence of those weapons, to which the Special Rapporteur had referred in his report (*ibid.*, para. 52).

17. The Special Rapporteur observed (*ibid.*, para. 4) that the General Assembly, in resolution 38/138, had not answered the questions put to it by the Commission in paragraph 69 of its report on its thirty-fifth session. That paragraph actually raised three basic questions: (*a*) the question of the subjects of law to which international criminal responsibility could be attributed; (*b*) the question whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals; (*c*) the question whether such a jurisdiction should also be competent with respect to States. The position appropriately taken by the General Assembly had been to ask Governments for comments before pronouncing on those three points. As he saw it, the only essential point remaining to be clarified was whether a State ought to be made amenable to an international criminal jurisdiction. The Commission was divided on that issue and it was significant that even those members who favoured the concept of criminal responsibility for the State considered that such responsibility should be subject to a special régime, in view of the specific nature of legal entities. He himself felt there could be no doubt about the possibility of attributing criminal responsibility to States within the meaning of the Code of Offences against the Peace and Security of Mankind. On that point it was sufficient to refer to the list of offences proposed by the Special Rapporteur (*ibid.*, para. 79); several of the offences mentioned in it could only be attributed to States.

18. The Special Rapporteur had confined his second report to the question of the list of offences to be included in the code, thereby fulfilling—at least in part—the mandate given to the Commission by the General Assembly. It would in fact have been possible for the Special Rapporteur to go somewhat beyond the stage of drawing up a mere list of offences. In any event, he could not agree with the implication by the Special Rapporteur (*ibid.*, paras. 6 and 82) that the only alternative would have been the formulation of draft articles.

19. In the course of the present discussion many useful suggestions had been made on such general questions as the approach to a definition of offences against the peace and security of mankind and the criteria to be adopted, as well as on questions such as non-applicability of limitations and the subjects of law to be held criminally liable. He proposed that those suggestions should be presented in writing, so that the work on the general provisions could progress side by side with the consideration of the list of offences.

20. Mr. JAGOTA said that the Special Rapporteur's second report (A/CN.4/377) formed an excellent basis for discussion. The Special Rapporteur had adopted a combination of the deductive and inductive methods. He had used the deductive method in identifying the basic criteria and the inductive method in proposing a list of offences divided into two parts, comprising the offences covered by the 1954 draft code and certain violations of international law recognized by the international community since then. In accordance with the instructions of the General Assembly, the Special Rapporteur had reviewed the 1954 list in the light of the progress of international law since 1954.

21. The Commission's study of the draft Code of Offences against the Peace and Security of Mankind dated back to the period 1949-1954. The General Assembly, in resolution 177 (II) of 21 November 1947, had directed the Commission, on the one hand, to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and, on the other hand, to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the above-mentioned principles. The terms of that resolution thus established a link between the code and the Nürnberg Principles. There had been a difference of views in the Commission on some aspects of the code, but the sentiment had been unanimous that its preparation would be of value for the peace and security of mankind. The Commission had accordingly prepared a draft code at its third session in 1951 [9] and, following the discussions in the General Assembly, had revised it in 1954.

22. Between 1954 and 1981 there had been many developments on relevant matters, perhaps the most important of them being the adoption by consensus of the Definition of Aggression. [10] That definition had been framed in general terms but contained a non-exhaustive list of acts which qualified as acts of aggression and had been destined to serve as guidelines for the Security Council. Another important development during that period had been the elimination of colonialism, which had had the effect of trebling the membership of the United Nations. Yet another had been the great strides made in technology, with their obvious impact on peace and security. Equally important had been the work on disarmament, which aimed at avoiding another world catastrophe.

23. In that context the General Assembly had come to the conclusion that it was desirable to revise the 1954 draft code of offences and had thus, in 1981, invited the Commission to deal with the subject. In its report on its thirty-fifth session, the Commission had put a number of questions to the General Assembly. Although the Assembly had not given a categorical reply to those questions in resolution 38/132 of 19 December 1983, answers to a number of them—and they substantive

[9] See 1820th meeting, footnote 5.

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

questions—could be found in the Sixth Committee's discussions (see A/CN.4/L.369, sect. B). There had been conflicting views on some points but usually a preponderant view in each case. At all events, the fact that the General Assembly has preferred to wait for written comments by Governments did not prevent the Commission from going ahead with its work.

24. In paragraph 1 of resolution 38/132, the General Assembly had invited the Commission to prepare an introduction in conformity with paragraph 67 of its report on its thirty-fifth session, as well as a list of offences in conformity with paragraph 69 of that report. In the light of that, it would perhaps have been appropriate for the Special Rapporteur either to have included an introduction in his report or to have explained in the report his reasons for not doing so. Despite the absence of an introduction, however, it was perfectly appropriate for the Special Rapporteur and the Commission to begin considering the list of offences right away. He would merely suggest that the Commission's report on the present session should state the reasons why it had postponed consideration of the introduction requested by the General Assembly.

25. Consideration should nevertheless be given to the elements to be included in the introduction, such as provisions on the scope and structure of the whole draft. The 1954 draft code actually contained a number of articles in the nature of a general introduction and the Special Rapporteur's second report dealt with such general matters as the criteria for characterizing offences as offences against the peace and security of mankind. Moreover, the Commission should decide what was meant by the "seriousness" of an offence—which would warrant its inclusion in the code—and define the notion of "peace and security of mankind", which was the basis of the code's entire scope and structure. In that regard, it would have to be seen whether the terms "peace" and "security" should be taken jointly or separately. The introduction should also deal with exceptions, justifiable acts and mitigating factors. Since some of those general questions had been dealt with in part 1 of the draft articles on State responsibility, [11] the Commission would have to see whether and to what extent the results of its work on that topic were applicable to the present topic.

26. With regard to the application of the code *ratione personae*, no guidance was provided by the 1954 draft, which was based on the Nürnberg Principles. It was a well-known fact that the Nürnberg Tribunal had adhered exclusively to the idea of individual liability. Accordingly, in formulating the Nürnberg Principles at its second session in 1950, the Commission had taken the position that there was no such concept as the criminal liability of the State. It had stated in its commentary that crimes could only be committed by individuals and not by abstract entities such as States. [12] The 1954 list of offences had therefore been confined to the acts of individuals; even acts of State were treated in it as acts of the individuals who had performed them on behalf on the State. The records of the discussions in the Commission in 1950 clearly showed that intention of attributing acts of the State to individuals.

27. But it was necessary to take account of developments since 1954. In the Commission itself, the adoption of article 19 of part 1 of the draft articles on State responsibility, [13] which divided internationally wrongful acts into "international crimes" and "international delicts", had been an important step. The Commission should examine the legal foundation for the action which the Security Council could take pursuant to Article 42 of the United Nations Charter. Clearly, it was only if an act constituted a crime that collective military sanctions could be applied against the offending State under that Article "to maintain or restore international peace and security". Lastly, account must be taken of the various international conventions providing for the prosecution and punishment of crimes against humanity and of certain other international crimes. Many of those instruments made provision for universal jurisdiction and they usually required States either to prosecute or to extradite the offenders.

28. Turning to the list of offences proposed by the Special Rapporteur (A/CN.4/377, para. 79), he agreed that it should be limited to those international crimes which affected the peace and security of mankind. It was not the mandate of the Commission to prepare an international penal code covering all crimes under international law. The Commission would, of course, have to define the concept of "the peace and security of mankind", at the latest in the report on its next session. Only in that way would it be possible to determine what offences should be included in the code. The list of offences which the Special Rapporteur proposed to exclude (*ibid.*, chap. II, sect. C) was acceptable to him; none of those offences normally affected the peace and security of mankind. The code could, of course, cover any exceptional cases in which the offence did so.

29. On the subject of method, he agreed that the 1954 list must be revised, but with due account being taken of the considerable work that had gone into its preparation. The Special Rapporteur himself had in fact revised some of the items on the 1954 list. The wording which he used in his proposed list differed in some cases from that used in 1954. In any case the precise drafting would have to be re-examined in the light of developments which had taken place since 1954. For example, the item on aggression would have to be carefully revised in the light of the Definition of Aggression adopted by the General Assembly.

*The meeting rose at 1 p.m.*

[11] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[12] Commentary to Principle I (*Yearbook ... 1950*, vol. II, p. 374, document A/1316, para. 99).

[13] See 1816th meeting, footnote 12.