Document:-
A/CN.4/SR.1822

Summary record of the 1822nd 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

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1822nd MEETING

Thursday, 17 May 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, 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. JAGOTA, continuing the statement he had begun at the previous meeting, said that, in his second report (A/CN.4/377), the Special Rapporteur had divided the offences covered by the 1954 draft code into three categories: (*a*) offences against the sovereignty and territorial integrity of States; (*b*) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (*c*) crimes against humanity. That categorization had not existed in the 1954 list of offences, but its origin could be traced to the Charter of the Nürnberg Tribunal. No classification of that kind had been attempted for the offences classified since 1954. Although he had no objection to that method of work, he thought that in due course the Commission would have to prepare a single list of offences and that, to that end, a number of items would have to be merged.

2. The first category of offences covered by the 1954 draft, namely offences against the sovereignty and territorial integrity of States, would have to be reviewed in the light of the Definition of Aggression.[4] For the purposes of the code, the Commission did not need to be as comprehensive as the General Assembly had been in that Definition; it would be sufficient to retain the provisions of article 1.

3. The second category of offences, those violating the prohibitions and limitations on armaments, raised the question of the position of the nationals of a State which was not a party to an arms limitation treaty. At a later stage, the Commission might also consider the relationship between the draft code and the special conventions on arms limitations and whether a plurality of régimes would exist in that respect. In the context of the elaboration of the draft code, the conventions on arms limitations merely provided the Commission with evidence of positive law. Also in the second category, offences violating the laws and customs of war needed to be brought up to date in the light of recent developments, including the prohibition of bacteriological warfare, the use of certain weapons in outer space and the military use of environmental modification techniques. Mention should also be made of the 1980 Convention prohibiting the use of certain conventional weapons,[5] such as booby traps.

4. With regard to the third category, namely crimes against humanity, he noted that, although the Special Rapporteur's starting-point had, of course, been the 1954 draft, he had had to make that list more comprehensive by referring expressly to genocide and taking account of the condemnation, since 1954, of *apartheid*, terrorism of various kinds and human rights violations.

5. The Special Rapporteur had adopted a straightforward approach with regard to genocide and *apartheid* and had proposed sound criteria for determining which human rights violations should be covered by the draft code. A human rights violation constituted an offence against the peace and security of mankind when it affected a person not as an individual, but rather as a member of a given nation, ethnic group or political or religious grouping; the criterion of seriousness also came into play in that connection.

6. As for terrorism, international law had developed along three lines as a result of the adoption of conventions relating to unlawful acts against the safety of aircraft and passengers; crimes against internationally protected persons, including diplomatic agents; and the broad subject of the taking of hostages. To determine whether those three types of offence should be included in the draft code, account had to be taken of the scope of the topic under consideration and of the gravity of the offences in question, which had to endanger the peace and security of mankind.

7. Offences which, according to those criteria, fell outside the scope of the draft code would still be crimes under international law. The fact that they were not covered by the draft code would not affect the application of such instruments as the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[6] The principle of universal jurisdiction would still be applicable.

8. With regard to offences classified since 1954, the first was colonialism, whose inclusion in the draft code he wholeheartedly supported, although he recognized that some drafting changes might be necessary. Article

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

[5] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and Protocols thereto (United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), pp. 113 *et seq.*).

[6] See 1819th meeting, footnote 5.

19 of part 1 of the draft articles on State responsibility[7] classified "the establishment or maintenance by force of colonial domination" as an international crime. The term "colonial domination" was perfectly clear and did not need to be defined, although the wording used in the above-mentioned article 19 might be refined and particular reference might be made to the denial of the right to self-determination, which constituted an offence against the solidarity of mankind.

9. Turning to mercenarism, a general definition of which was contained in article 1 of the 1977 OAU Convention on the subject,[8] he said that the real issue was not the supply of and demand for services, but rather the object and purpose for which the individuals concerned were used. Mercenaries were recruited to oppose self-determination, to intervene in the internal affairs of a State or to threaten a State's internal stability. The crime of mercenarism came squarely within the scope of the draft code and the Special Rapporteur had proposed sound criteria in that respect. If necessary, the question would have to be reviewed in the light of any definition that might emerge from the work being carried out in the United Nations on mercenarism. In a sense, the subject was not new; it could properly be said to fall within the scope of article 2, paragraph (4), of the 1954 draft code, dealing with "armed bands".

10. The Special Rapporteur had mentioned the threat to the environment arising out of the use of prohibited weapons. That problem would, of course, be covered by the provision relating to those weapons, but it had to be decided whether threats to the environment in general should be covered by a broader provision. To that end, he suggested that the applicable criteria should be the seriousness of the threat, the international character of the damage, the wrongfulness of the act and the fact that it endangered the peace and security of mankind. The relevant provision should perhaps also give examples.

11. He could, moreover, not agree with the argument concerning the deterrent effect of nuclear weapons or with the Special Rapporteur's decision to exclude the use of such weapons from the draft code on the grounds, as indicated in the report (*ibid.*, para. 53), that its inclusion would be desirable but not realistic. It had also been pointed out that there were no provisions of positive law—in other words, in international conventions—which prohibited nuclear weapons. If that were true, his view would be that it was incumbent upon the Commission to be of service to the international community by contributing to the development of international law in the matter. There were, however, several international instruments that expressly condemned the use of nuclear weapons, the most recent being the Declaration on the Prevention of Nuclear Catastrophe,[9] which described the first use of nuclear weapons as the gravest crime against humanity, for which both States and statesmen would be held accountable.

12. The General Assembly had invited the Commission to prepare the draft code in the light of the progressive development of international law. In that connection, he referred to article 15 of the Commission's statute, which stated that the expression "progressive development of international law" meant the preparation of draft conventions on subjects which had "not yet been regulated by international law". The fact that no convention had yet been concluded on a particular subject did not, therefore, constitute valid grounds for excluding that subject from a draft if the Commission was otherwise convinced of its usefulness. In view of the capacity for mass destruction of nuclear weapons and their terrible long-term effects, which endangered life itself, he was convinced that the Commission should make every effort to prohibit the use—and not only the first use—of those weapons. The question of the prohibition of the manufacture and stockpiling of nuclear weapons could be decided on at a later stage by the Governments concerned. Lastly, he suggested that the draft code should contain a provision stating that "The use of nuclear weapons is a crime against humanity". That draft rule might be placed in square brackets to show that the Commission was divided on the question.

13. The Special Rapporteur had not included economic aggression in the list of offences he had proposed. That question, which related mainly to the problem of natural resources and their development by a State which did not have the necessary technology and capital for the purpose, was to some extent covered by article 2, paragraph (9), of the 1954 draft, dealing with intervention. He nevertheless thought that, even if that provision were retained, a separate paragraph dealing with economic aggression would still be needed.

14. He had no comments to make on section A (offences covered by the 1954 draft) of the list of offences proposed by the Special Rapporteur (*ibid.*, para. 79), although he would suggest that some rearrangement might be necessary. In section B, dealing with violations of international law recognized since 1954, he suggested that items 12, 14, 15 and 17 should be placed in square brackets. The Commission would have to determine whether those items came within the scope of the draft code and, if so, under what terms. A provision should also be included on the question of nuclear weapons.

15. With regard to the question of the application of the code *ratione personae* and that of an international criminal jurisdiction, his view was that the Commission would lose nothing by awaiting the decisions of the General Assembly. Decisions on those questions would have to be taken in due course, but they were not essential at the present stage of the Commission's work. It was, moreover, worth nothing that the international conventions on the prevention and punishment of the crimes of genocide and *apartheid* did not contain any provisions on sanctions and jurisdiction.

16. Mr. KOROMA said that the elaboration of a draft code of offences against the peace and security of mankind was a delicate and complicated task, but one which continued to be timely and relevant. One of the main

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[7] See 1816th meeting, footnote 12.

[8] *Ibid.*, footnote 15.

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

reasons for the complexity of the topic was that it involved both international law and criminal law, which was part of internal law. Since the structure and sources of international law and criminal law were different, the treatment of the topic gave rise to a great many problems. The topic touched on values shared by all, affected the collective conscience of mankind and was of universal, non-regional interest, so that the desired results could not be achieved by examining it from a purely regional point of view, although different bodies had admittedly approached it in different ways. By entrusting the study of the topic to the Commission, the General Assembly had paid a tribute to the Commission's objectivity and had shown its confidence in the Commission's capacity to discuss the subject without passion.

17. He agreed with the minimalist approach or, in other words, with the idea of including in the draft only what the international community would be prepared to accept. He nevertheless considered that the main desiderata with regard to the topic were: (*a*) to prevent and punish aggressive war; (*b*) to prosecute offences against the peace and security of mankind whenever aggression had taken place; (*c*) to protect human rights and prevent massive human rights violations, which shocked the conscience of mankind; and (*d*) to ensure that, if war did break out, it was conducted humanely and without unnecessary suffering to both the civilian population and the combatants. All those criteria were in keeping with the purposes and principles of the Charter of the United Nations, namely the maintenance of international peace and security and the promotion and protection of human rights and fundamental freedoms.

18. With regard to the elaboration of the list of offences against the peace and security of mankind, the criterion of extreme seriousness proposed by the Special Rapporteur constituted a valid test. The concept of extreme gravity was, of course, known in internal criminal law, particularly when it classified offences as felonies or as misdemeanours. In international law, the concept of "offences of extreme seriousness" covered crimes against peace, war crimes and crimes against humanity which threatened international public order and involved the greatest danger. The magnitude of the offences in question was another relevant factor. Thus, under the Definition of Aggression,[10] not every use of force qualified as an act of aggression. A certain dimension was necessary apart from the requirement of gravity. The offence in question also had to be contrary to certain international interests; it had to jeopardize the interests of certain States or a group of States to be included in the draft code. Common values and universal interests had to be at stake in order to bring about general agreement on the need to prosecute the offence.

19. On the basis of those criteria, the Special Rapporteur had appropriately taken the list contained in the 1954 draft code as a starting-point. The Commission now had to consolidate and update all the offences to which those criteria applied and which were recognized by customary international law, by multilateral and bilateral treaties and by General Assembly declarations and resolutions. It also had to group as many of those offences as possible under one heading.

20. On the basis of Article 2, paragraph 4, of the United Nations Charter, which prohibited the threat or use of force against the territorial integrity or political independence of any State, the Definition of Aggression specified the types of conduct that were prohibited by international law. For the purposes of the draft code, those provisions would have to be made more specific.

21. Crimes against humanity, as defined in the Nürnberg Principles,[11] had, for example, prefigured the Convention on the Prevention and Punishment of the Crime of Genocide.[12] The fact that some States had not ratified conventions of that type in no way detracted from the principles embodied therein.

22. As for the offences recognized by the international community since 1954, there appeared to be general agreement that forcible colonialism, which violated the right to self-determination, constituted an offence against the peace and security of mankind and should be regarded as an international crime. He recalled that the Declaration on the Granting of Independence to Colonial Countries and Peoples[13] had been adopted by the General Assembly in 1960 without a single negative vote and with only a few abstentions. In that connection, it should be stressed that the future code was not intended to be retroactive. His own country, like many other former colonies, maintained cordial relations with its former administering Power. A provision condemning colonialism would not constitute an indictment against any former administering Power. It would apply only to those States which had persisted in forcible colonialism; there were some unrepentant colonial Powers which should have to explain their conduct to the international community.

23. Some members of the Commission had suggested that there was no need for any new provision on *apartheid* since the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[14] was adequate. *Apartheid* was, however, one of the most insidious forms of institutionalized racism and it was lacking in any pretence to equality under the law. It was built into the South African system and way of life, involving as it did the oppression by the South African Government of an overwhelming majority of citizens solely on the grounds of their ethnic origin. It was an affront to human dignity, a brutal political system under which even children who demonstrated against unequal educational opportunities could be shot and killed, as had happened at Soweto. Between 1979 and 1983, it had involved the uprooting of 3.5 million persons, who had been sent to "tribal homelands" they had never even seen. It was the policy of the *apartheid* régime to carry out armed attacks against neighbouring States, thereby

[10] See footnote 4 above.

[11] See 1820th meeting, footnote 7.

[12] See 1816th meeting, footnote 17.

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

[14] See 1820th meeting, footnote 8.

threatening international peace and security. As a Member of the British Parliament had recently stated, *apartheid* was an intolerable affront not only to the coloured races of Africa and to the rest of the world, but to any basic concept of humanity. It was, moreover, linked to the underlying philosophy that permeated war crimes, genocide and crimes against humanity. *Apartheid* was thus a prime candidate for inclusion in the list of offences against the peace and security of mankind: first, because it involved massive violations of human rights which shocked the collective conscience and, secondly, because its continued existence posed a threat to international peace and security. Shared human values dictated that the International Convention on the Suppression and Punishment of the Crime of *Apartheid* should be observed. For all those reasons, he supported the Special Rapporteur's proposal (A/CN.4/377, para. 50) that *apartheid* should be included in the list of offences to be punishable under the future code.

24. Mercenarism should also be included in that list. Mercenaries were contemptuous of human values and did not even respect the rules of war. They caused terrible carnage among the civilian population of the areas in which they operated. Accordingly, mercenarism qualified, both under the heading of war crimes and under that of crimes against humanity, for inclusion in the proposed list.

25. The Special Rapporteur had pointed out (*ibid.*, para. 53) that the prohibition of the manufacture and use of nuclear weapons had not been dealt with at all in positive law, whereas the unlawful use of infinitely less fearsome weapons had been prohibited by international conventions. If the use of explosive and expandable bullets, asphyxiating gases and bacteriological agents was banned, it followed that the use of the most destructive of all weapons should be regarded as an offence against the peace and security of mankind. The inclusion of such an offence might, however, prevent the members of the Commission from adopting and submitting to the General Assembly a list of offences on which they could all agree. He therefore considered that, until a consensus could be reached, that offence should be omitted from the list.

26. The prohibition of economic aggression was implicit in Article 2 of the Charter of the United Nations and had also been provided for in a number of United Nations declarations, such as the Charter of Economic Rights and Duties of States.[15] In view of its controversial nature and in line with the minimalist approach, however, economic aggression should, for the time being, be omitted from the list of offences.

27. As to the question of the content of the draft *ratione personae*, theory and practice seemed to support the view that both States and individuals should be held accountable for prohibited conduct. There were certain crimes that could be committed only by a State and for which only the State concerned should be held responsible; but when individuals had, for example, committed genocide or crimes against humanity, they too should be held directly responsible and a plea that they had been acting on behalf of the State should not exonerate them or, indeed, the State. Historically, States had been found guilty of and punished for crimes against peace and humanity. The draft code should therefore provide for both individual and State responsibility, where appropriate.

28. With regard to methodology, some members had suggested that the Special Rapporteur should first formulate principles for the identification of offences against the peace and security of mankind. However, in view of the dual nature of the topic, which involved both international law and criminal law, he would favour an empirical approach whereby conduct which had been identified and proscribed would be declared contrary to international law. That approach, which had also been recommended by the Special Rapporteur, did not rule out the possibility of formulating principles of criminal law at a later stage.

29. The viability of the topic would, in his view, depend largely on the Commission's ability to produce realistic proposals. For the time being, however, the Commission should concentrate on drawing up a list of offences which would be acceptable to all its members, in accordance with the mandate entrusted to it by the General Assembly.

30. Mr. NJENGA congratulated the Special Rapporteur on the high quality of his report (A/CN.4/377) on a very intricate subject. The elaboration of a list of offences against the peace and security of mankind would be no easy task, particularly since a suitable criterion had yet to be established. In that connection, he noted that, in paragraph 48 of the report of the Commission on its thirty-fifth session, it had been agreed that the draft code would relate only to crimes of "especial seriousness" and that such seriousness could be measured either by the extent of the calamity in question, or by its horrific character, or by both together. In his view, a criterion based on the "seriousness" or "horrific" nature of the act committed was too subjective, particularly since the need for an international criminal jurisdiction continued to be questioned by some. The criterion of an offence's international dimension, suggested by the Special Rapporteur (*ibid.*, para. 8), did not really solve the problem since the international community was far from having reached agreement on the universal values referred to. It was clear from the cynical way in which the major Powers interpreted the notion of the sovereignty and territorial integrity of small States, as well as from their naked aggression against those whose policies they regarded as inimical, that the international community was returning to the law of the jungle, where might was right.

31. In his view, a way should be found of placing the test of the seriousness or the horrific nature of the act committed on a more solid foundation and, in that connection it seemed to him that article 19, paragraph 2, of part 1 of the draft articles on State responsibility[16] would provide a better criterion. The fact that an act of aggres-

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

[16] See 1816th meeting, footnote 12.

sion resulted in the death of only a few individuals and did not have any horrific or serious consequences, such as when a "dictatorship" was overthrown and "democracy" was restored, should not exonerate the perpetrators from the consequences of committing a criminal offence against the peace and security of mankind. The seriousness or horrific character of the criminal act should be determined not by the quantum, but by the nature of the act.

32. Referring to the first of the three categories into which the Special Rapporteur had divided the offences covered by the 1954 draft (offences against the sovereignty and territorial integrity of States), he said he agreed that all the offences listed were supported by a very broad conventional base and that, at least in substance, they must be included in the future code. That did not, of course, preclude the reformulation of certain notions which might have no place in a criminal code.

33. In defining aggression, account must, moreover, be taken of the Definition of Aggression. [17] Notions such as the threat and preparation of aggression were, however, too nebulous to be incorporated in a code that provided for the possibility of criminal sanctions and other legal consequences. Otherwise, the salient elements of the 1954 draft code and, in particular, the offences covered by article 2, paragraphs (4), (5), (6) and (8), deserved the place they had been given in the list proposed by the Special Rapporteur (*ibid.*, para. 79).

34. At the same time, he could not agree to the way in which article 2, paragraph (9), of the 1954 draft had been eased out of the proposed list of offences, since that paragraph referred to the intervention by a State in the affairs of another State "in order to force its will and thereby obtain advantages of any kind". All the offences in question involved that one inadmissible aim and it was precisely that situation that the code of offences should take into account. Southern Africa was at present the victim of the most pernicious form of economic aggression, which the racist South African régime was carrying out against neighbouring independent States in order to subvert their policies in the interests of its heinous designs. The land-locked countries of the region which dared to resist that régime were gradually being strangled by being deprived of transit facilities. Their economic infrastructure had been systematically sabotaged by that same régime, which had resorted to the use of mercenaries. The predictable end result would hardly have been different in the case of outright military aggression. He could not therefore agree with the Special Rapporteur, who had stated (*ibid.*, para. 80) that the term "economic aggression" was more suited to political than to legal parlance. What was at issue was the very principle of the survival of those States as sovereign entities and, even though it would be difficult to define economic aggression, that was no justification for shirking responsibility in the face of such a grave offence against the peace and security of mankind.

35. As to the second category of offences covered by the 1954 draft code (offences violating the prohibitions and limitations on armaments or the laws and customs of war), he said that it was important to avoid doing anything that might interfere with the 1949 Geneva Conventions and the Protocols thereto, [18] which were applicable world-wide. The prohibitions and limitations on armaments were a relic of the Second World War—a restriction imposed by the victors on the vanquished—and were of little relevance at the present time. Existing treaties between the super-Powers on the limitation of nuclear weapons were, moreover, so full of loopholes that it would be pointless to make any violation of them an offence against the peace and security of mankind.

36. With regard to the third category of offences covered by the 1954 draft code (crimes against humanity), he said he agreed on the whole with the Special Rapporteur's analysis. In particular, not every violation of human rights committed by a State within its own jurisdiction could be regarded as an offence against the peace and security of mankind. As the Special Rapporteur had also noted, however (*ibid.*, para. 34), a State could not always hide behind its internal jurisdiction when it engaged in massive violations of the human rights of its own citizens. Recent tragic events in various parts of Africa had brought the African States face to face with that reality and had led to the adoption by OAU in 1981 of the African Charter on Human and Peoples' Rights. [19] When that Charter came into force, no State would again be able to shelter behind the cloak of its sovereignty while engaging in massive violations of the human rights of its people.

37. Turning to the offences classified since 1954, he said that the resolutions, declarations and conventions referred to by the Special Rapporteur (*ibid.*, para. 44) would serve as an excellent basis for the elaboration of the list of offences to be included in the draft code. He also endorsed the Special Rapporteur's minimum content approach. The first of those offences was colonialism. With the adoption in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, [20] the condemnation of colonialism had entered the realm of *jus cogens* and there could be no doubt that colonialism was an offence against the peace and security of mankind. He had therefore been surprised to hear Sir Ian Sinclair (1820th meeting) refer to a variant of colonialism as a form of government with the consent of the governed. That was a contradiction in terms. He was also unable to agree with Mr. Calero Rodrigues (*ibid.*) that the notion of the denial of a people's right to self-determination should be substituted for the concept of colonialism, since such a substitution would make for confusion and defeat the purpose of the draft code. It would also be in keeping with the wishes of those who were intent on destroying the territorial integrity of States and would encourage secessionist movements claiming that they had been denied their right to self-determination. Mr. Calero Rodrigues might therefore wish to reconsider his suggestion.

[17] See footnote 4 above.

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

[19] Adopted at the 18th Assembly of Heads of State and Government of OAU, held at Nairobi, 24-28 June 1981 (CAB/LEG/67/3/Rev.5).

[20] See footnote 13 above.

38. He had been dismayed to hear Sir Ian Sinclair say that *apartheid* should not be included in the proposed list of offences. In view of the provisions of article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,[21] Sir Ian could surely not be unaware of the horrors of a system which, by law, subjugated one race for the benefit of another minority race and for the benefit of Western capitalists. Nor could he be unaware of the forcible removal of millions of indigenous inhabitants to barren, overcrowded wastelands described as "homelands". The fact that many Western countries had not voted in favour of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or in favour of many other resolutions on the subject attested to the vast profits that those countries and their multinational companies reaped from a system designed to reduce the black man to near slavery and to make him a source of cheap labour. If the Commission failed to include *apartheid* in the list of offences against the peace and security of mankind, it would deserve to become the laughing-stock of the international community.

39. He could also not see how any such list could fail to include the use of atomic weapons. After all, the whole purpose of the exercise was to preserve the human species, and the use of nuclear weapons would have precisely the opposite effect. He therefore disagreed entirely with the view expressed in the report under consideration (A/CN.4/377, para. 52) according to which such weapons, by their deterrent effect, safeguarded peace and security. Sooner or later, the wholesale stockpiling of nuclear weapons and the frantic arms race would lead to catastrophe. The least the Commission could do was to declare that the first use of such weapons was an offence against the peace and security of mankind.

40. Mercenarism, particularly as practised in Africa, likewise deserved to be added to the list, in carefully delineated terms. It did not involve hired soldiers, such as the British Gurkhas or the French legionnaires, but soldiers of fortune, who were hired to kill and to maim, and their colonial, racist and imperialist paymasters, who were seeking to suppress the struggle for national liberation. It was against that background that mercenarism had been defined in article 1, paragraph 2, of the OAU Convention for the Elimination of Mercenarism in Africa.[22] In view of the horror and destruction, not to mention the destabilization, caused by acts of mercenarism, particularly in Africa, the most careful attention should be paid to the possibility of including mercenarism in the proposed list.

41. He fully agreed with the considerations which had led the Special Rapporteur rightly to reject the maximum content approach (*ibid.*, para. 77), which would have had the effect of including in the list offences such as counterfeiting of money, forgery of passports, the dissemination of false news, and others (*ibid.*, para. 70). However, he had difficulty in accepting the offences listed under items 12, 14, 15 and 17 of the list proposed by the Special Rapporteur (*ibid.*, para. 79). Although he did not mean to minimize the serious nature of those offences, he did not think that they had reached the threshold of gravity required for inclusion in the list of offences against the peace and security of mankind. Those offences were, moreover, already covered by conventions and, if a State organized or encouraged such offences, article 19 of part 1 of the draft articles on State responsibility would apply.

42. He fully supported Sir Ian Sinclair's proposal (1820th meeting) that the list should include piracy and slavery, which were still rife in the world. In that connection, he informed members of the Commission that, on 15 May 1984, the BBC had reported the arrest, in March 1984, of the captain of a Greek-registered ship who had ordered 11 Kenyan stowaways to be thrown into the Indian Ocean in a shark-infested area: there were no known survivors. Mankind had to be protected from atrocities such as those committed against the "boat people". The Commission must now give the Special Rapporteur a firm mandate to prepare an introduction to the draft code, as well as draft articles on those offences which commanded a general consensus.

43. Mr. CALERO RODRIGUES said he realized that his suggestion that colonialism should be referred to in terms of its content, namely the denial of the right to self-determination, might give rise to ambiguity or abuse, since the concept of self-determination was open to different interpretations. As he saw it, however, the correct interpretation was that, once the right to self-determination had been exercised, it became irrelevant from the point of view of international law, since, as soon as a State had exercised that right, it became independent and its internal problems were no longer covered by that concept. If that interpretation was accepted, he did not think that the right to self-determination could be used to the detriment of the independence of States. On the other hand, if the term "colonialism" was adopted, it would unduly confine a criminal act to its historical content. That was the idea he had wished to put forward for the Commission's consideration.

44. Mr. DÍAZ GONZÁLEZ, referring to the question of colonialism, said he agreed with the comments made by Mr. Njenga and, in part, with those made by Mr. Calero Rodrigues. Although colonialism was, of course, an anachronism in that practically all the States which had been subjected to a classical colonial régime had achieved independence, it did continue to exist either in the form of the denial to an indigenous people of its right to self-determination or in the form of the occupation of a territory by a colonial State, as in the typical cases of Hong Kong, the military bases at Guantánamo in Cuba, the Panama Canal, the Malvinas and Gibraltar. It followed that decolonization involved either the granting of a people's right to self-determination or the restitution of occupied territory to the State which had been deprived of it. Colonialism had been and continued to be a threat to the peace and security of mankind and it must therefore be included in the future Code of Offences against the Peace and Security of Mankind, provided that it was very precisely defined.

[21] See 1820th meeting, footnote 8.

[22] See 1816th meeting, footnote 15.

45. Sir Ian SINCLAIR explained that what he had wished to point out in his earlier statement (1820th meeting) was that the term "colonialism" was used as a label to cover a wide variety of situations. It was therefore necessary to be quite clear about what was to be included in the list. The term "colonialism" should not be used to denote an offence against the peace and security of mankind.

46. Mr. LACLETA MUÑOZ said he was in favour of the inclusion of colonialism in the future Code of Offences against the Peace and Security of Mankind. That concept had to be carefully defined because, as Mr. Díaz González had pointed out, there was a wide variety of colonial situations. In any event, and contrary to what Mr. Calero Rodrigues had stated, that concept did not mean only the denial of the right to self-determination.

The meeting rose at 1 p.m.

1823rd MEETING

Friday, 18 May 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. Diaz Gonzalez, Mr. Francis, Mr. Jagota, 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. McCAFFREY said that a logical starting-point for the formulation of criteria for the identification of offences against the peace and security of mankind might be to seek to identify the interests to be protected by the draft code. It had rightly been observed that international law in the matter had two branches: the criminal aspects of international law and the international aspects of internal criminal law. The first branch consisted of "internationally defined proscriptions", a term introduced by Professor Cherif Bassiouni in his book entitled *International Criminal Law: A Draft International Criminal Code.*[4] That concept apparently involved certain universally shared values and expectations whose maintenance required the adoption of minimum standards of behaviour by the members of the international community. Any breach of those standards constituted interference by the actor with interests whose preservation was essential to minimum world order. On that basis, offences against the peace and security of mankind were *prima facie* offences that posed the most serious threat to minimum world order. In that connection, there were two factors to be weighed: the quality of the interest in question, in terms of its importance to minimum world order; and the degree or quantity of the interference.

2. Accordingly, one of the Commission's first tasks should be to identify the main categories of interests whose protection or preservation was neccessary to minimum world order. Two categories of interests had emerged from the two sections of the Special Rapporteur's list of offences (A/CN.4/377, para. 79): security interests and humanitarian interests.

3. Security interests were exemplified by many of the offences against the sovereignty and territorial integrity of States listed in the 1954 draft code. In the light of the provisions of Article 2, paragraph 4, of the Charter of the United Nations, even isolated interference in such interests would amount to an offence under the draft code. The question whether an act sufficiently disturbed minimum world order to amount to an offence against the peace and security of mankind could, however, also be decided on the basis either of the degree of interference or of a precise definition of the interests at stake. The latter approach would seem to be more in keeping with the maxim *nullum crimen sine lege.* The Commission should therefore examine more closely the empirical data bearing on whether the international community considered that threats of and preparation for aggression posed such a serious danger to minimum world order as to rise to the level of offences against the peace and security of mankind.

4. Humanitarian interests were those that reflected the community's interest in protecting the integrity of humankind, a term he used to refer to humanity as a whole, as well as to groups and individuals whom the community of nations had an interest in protecting against certain acts. It might be useful to consider whether such acts, when directed against a group, constituted a more serious infringement of an interest than acts against individuals. In that connection, a distinction had to be drawn between conduct serious enough to amount to an international crime and conduct posing such a threat to world order as to amount to an offence against the peace and security of mankind. There was, for instance, substantial authority for the proposition that a consistent pattern of gross violations of individual human rights, as well as systematic racial discrimination, amounted to an international crime and could also rise to the level of an offence under the draft code. The Commission might wish to consider to what extent that held true.

5. One possible criterion for identifying offences was the nature of the object of the act or practice in question, whether a State, a community, an individual or a group of individuals. An act committed against an individual might be less likely to constitute an offence under the

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[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] Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, p. 22.