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Summary record of the 1823rd 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

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

[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.

code than an act committed against a State, since there was less likelihood of a grave disturbance of world order. Some State interests were, however, less important to the maintenance of minimum world order than certain individual interests.

6. That was where a second possible criterion, namely the importance of the right violated or the interest interfered with, might come into play. In that case, the test was whether interference with the State, group or individual interest in question threatened minimum world order. The rights or interests of three different types of objects of crimes were at stake. First, States, whose interests could range from security interests to interest in, for example, the integrity of currency or the integrity of official documents of nationality. In the latter two cases, the interests of the international community in maintaining minimum public order were probably not at stake. Secondly, groups, whether national, ethnic, racial or religious, which might be threatened with destruction or systematic persecution. And, thirdly, individuals, who might be the victims of a consistent pattern of gross violations of human rights or, in other words, of violations which were particularly shocking because of the importance of the right violated or because of their gravity and which might be a good candidate for inclusion in the code.

7. A third possible criterion was the gravity of the violation or interference and, in that case as well, there was a sliding scale: the more important the right or interest, the less frequent or aggravated the violations would have to be to threaten minimum world order. On the other hand, an unjustified summary execution, no matter how barbarous, would probably not threaten world public order so as to constitute an offence against the peace and security of mankind.

8. A fourth criterion might be the objective or purpose of the act in question. For instance, was the act justified or excused as an act committed in self-defence? Was the act committed for private or official ends, and what was the nature of those ends? Mercenaries, for example, could serve legitimate as well as illegitimate ends.

9. A fifth criterion, but one that might, in some instances, relate only to mitigation of punishment, was the circumstances in which the alleged violation had been committed.

10. A sixth criterion was the extent to which *mens rea*, or criminal intent, was present. The questions to be considered in connection with *mens rea* were: Was the act intentional? Was the interference in question the result of an omission, such as failure to monitor a certain activity? Was the interference a foreseeable consequence of, or substantially certain to follow from, the act or omission in question? To what extent was the alleged perpetrator actively involved? Since different degrees of culpability were usually taken into account in the penalty phase of a criminal prosecution, those questions highlighted the need to provide for penalties in the draft code: it would, in his view, be impossible to formulate a catalogue of offences without knowing more about the scope of the draft code *ratione personae* and how it was to be implemented.

11. A final criterion was whether or not the act in question would be recognized as an offence against the peace and security of mankind by the international community as a whole.

12. If, as he assumed, there was to be universal jurisdiction for the offences to be covered by the code, prosecution and punishment would be left to any State that seized an offender. A question that might be worth pursuing for purely practical reasons was whether all States would agree that the act in question posed such a serious threat to international peace and security that it could be punished by any State that seized the offender.

13. As to nuclear weapons, he said that, like other speakers, he thought that the Commission must see things the way they were, not the way it would like them to be. Such highly controversial matters had to be considered in the context of the disarmament effort as a whole.

14. In general, he would enter a plea for a lawyer-like approach to the identification of offences and the use of terminology. Some of the items in the list proposed by the Special Rapporteur—such as colonialism, *apartheid* and mercenarism—were more political or emotional labels than legal terms. Those labels could cover both permissible and impermissible conduct and, instead of using them, the Commission should identify the act or practice that was to be prohibited. The term "colonialism" might, for example, be replaced by the words "subjection of a people against its will to alien domination", possibly followed by the words "and consequent denial of its right to self-determination". The term *apartheid*, which had the serious drawback of referring to the unconscionable practices of only one country, should be replaced by a reference to the actual acts and practices that were considered to pose a grave threat to the peace and security of mankind, as set forth, for example, in the definition contained in article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.[5] As far as mercenaries were concerned, he agreed that the main consideration should be the object and purpose of their use, in accordance with the three categories of acts referred to in the OAU Convention for the Elimination of Mercenarism in Africa.[6]

15. Mr. AL-QAYSI, referring first to the nuclear weapons issue, said that, as he saw it, the relevant paragraphs of the second report (A/CN.4/377, paras. 26-27 and 52-53) did not convey any definite opinion on the Special Rapporteur's part: on the contrary, those paragraphs reflected the various points of view regarding nuclear weapons and left it to the members of the Commission to express their opinions on whether the use of such weapons should be considered an offence under the code. Perhaps the problem was one of translation. Divergent as members' views were, it was clear that their respective positions could only be strengthened by impeccable reasoning that would depend on the basic premise adopted, namely whether the Commission was thinking in terms of disarmament or of the disastrous consequences to which the use of nuclear weapons would

[5] See 1820th meeting, footnote 8.

[6] See 1816th meeting, footnote 15.

lead. In his own view, the only course open to the Commission was to await the reaction of the Sixth Committee of the General Assembly to the Commission's debate. He would be very hesitant about putting a question to the General Assembly on the matter, as had been suggested.

16. He would like to know exactly what type of definitions were going to be included in the list of offences when it came to questions that had already been defined in other international conventions or to concepts that had not been defined. Criteria of the kind referred to by Mr. McCaffrey would, of course, be useful, but even they would not make for the necessary precision. A measure of eclecticism in the matter was indicated.

17. He also wondered how the Commission was going to formulate criteria for the determination of the concept of "the international community as a whole". Was it going to adopt the criterion of the essential elements of the internatinal community and, if so, what were the criteria for determining those essential elements? How was the Commission planning to proceed? On the basis of the voting records of the Member States of the United Nations on the relevant instruments? On the basis of the number of parties that had acceded to a particular legislative instrument? In his view, there was still a need for precise and objective criteria and it was therefore inevitable that some element of subjectivity would creep into the determination of the concept of "the international community as a whole".

18. Lastly, with regard to methodology, he considered that the Special Rapporteur should proceed to prepare draft articles for consideration by the Commission on the basis of his report. There was no need to wait for the replies of Member States and international organizations to the two questions which the Commission had put to the General Assembly in 1983. Even if such replies were immediately forthcoming, the Commission should adopt a functional approach to determine the basis for a consensus on the offences to be included in the code. The achievement of such a consensus, which did not necessarily have to apply to all offences, would of itself encourage Member States to make their positions known on the two questions that had been raised.

19. Mr. BALANDA said he had received only one of the working documents before the opening of the current session. As the Planning Group had observed at the previous session, it would be desirable for the members of the Commission to be able to acquaint themselves with the documents and prepare themselves for their work well before the Commission's sessions began.

20. The fact that, at its thirty-eighth session, the General Assembly had not replied to the two questions submitted to it by the Commission concerning the scope of the topic *ratione personae* and, in particular, the criminal responsibility of States—and the problem of the statute of the future international tribunal had confirmed his belief that the topic under consideration deserved special attention and that it should have been dealt with as a separate item on the General Assembly's agenda, as had been the case at the thirty-sixth and thirty-seventh sessions. Had that been so, the Member States of the United Nations would have found it difficult to shirk their responsibility by evading those questions.

21. The offences referred to in the report under consideration (A/CN.4/377) had been divided into three categories: offences against peace, as covered by the 1954 draft; crimes against humanity, including genocide, certain violations of human rights and *apartheid*; and offences against the security of mankind, such as acts causing damage to the environment and mercenarism. One important problem which arose was that of the criteria the Commission should apply in selecting and defining the offences in each category. The Special Rapporteur had, on the basis of the Commission's almost unanimous majority view, adopted the criterion of "extreme seriousness", which would have to be assessed in the light of the consequences of the act in question.

22. Other important criteria mentioned by Mr. McCaffrey, namely the nature of the act itself and the nature of the right violated, should, however, also be taken into account. For example, if the offence violated a fundamental principle of *jus cogens*, it unquestionably had to be punished. In any event, the criteria selected would have to be objective, not subjective, as some members had proposed, since the provisions of criminal law were subject to strict interpretation. Whereas, in internal criminal law, it was easy to perceive the perpetrator's criminal intent in the case of an individual, it was less so in international law, especially where a State was concerned. Despite the difficulties involved in establishing the criminal responsibility of States, the draft code should also apply to States. Mr. McCaffrey had also referred to the object of the criminal act. It was, of course, important to know the circumstances in which an individual might have committed a criminal act and to take them into account; but, there again, while such circumstances were easy to determine in internal law, they were less so in international law, where establishing the international criminal responsibility of States would be an inextricably difficult problem. It was in the light of such considerations that the criterion of the degree of active participation had been proposed. All those criteria were interesting, but they were much too subjective to be adopted by the Commission as criteria for classifying offences against peace, offences against the security of mankind and crimes against humanity.

23. With regard to the question whether violations of human rights should be regarded as an international crime, he agreed with the Special Rapporteur that such violations were essentially directed against individuals, whereas an international crime did not strike at the individual as such but, rather, as a member of a particular ethnic, racial or political group. In that connection, he pointed out that, unlike the corresponding European or international instruments, the African Charter on Human and Peoples' Rights[7] dealt not only with the individual's rights, but also with his obligations towards the group to which he belonged; that reflected the patriarchal or community way of life that was so common in Africa.

[7] See 1822nd meeting, footnote 19.

24. Another question that had been raised was whether offences already covered by international instruments should be included in the draft code. Some members took the view that the reaffirmation of principles which had already been proclaimed would merely weaken them, but practice showed that that was not at all the case: the Manila Declaration of the Peaceful Settlement of International Disputes [8] and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty [9] to quote only two examples, gave effect to fundamental principles of the United Nations Charter. In his view, such a reaffirmation of fundamental principles in no way attenuated their value, but actually strengthened them. Of all the offences in question, the Commission should therefore select those which fitted precisely into the framework of the draft Code of Offences against the Peace and Security of Mankind. Such a minimalist approach offered the advantage of allowing the Commission to define the issues before it without becoming bogged down in considerations which, interesting as they no doubt were, had no relevance to the draft code.

25. He agreed with the Special Rapporteur that the future code should also include offences that had been classified since 1954. Opinions in the Commission were divided on which of those offences should appear in the code. His own view was that colonialism was still an undeniable reality and that it should therefore be included, however it might be defined.

26. The same was true of *apartheid*. Although that crime involved only one country, South Africa, it contained elements which overlapped with the acts listed in article 2, paragraph (10), of the 1954 draft code as being offences against the peace and security of mankind. The policy of *apartheid* could be categorized as "killing members of the group", in that members of the African National Congress and South African blacks in general were the targets of a policy of physical elimination; it could also be classified as "causing serious bodily or mental harm to members of the group", since the South African police used barbaric methods, especially when conducting interrogations; it could be described as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction", since "bantustanization" was designed to subject South Africa's black population to disgraceful economic and sanitary conditions; and, lastly, it could be characterized as a measure "intended to prevent births within the group", since the electric shocks applied, in particular, to the genitals of blacks made them impotent and incapable of procreation, and the separation of husbands working in cities from their wives, who were not permitted to live with them, contributed to the decline in the birth rate of South Africa's black population. The Commission should therefore not hesitate to declare that the policy of *apartheid*—even if it were designated by some other term—was a crime against humanity.

27. Although some members of the Commission did not think it advisable to discuss acts causing damage to the environment at the current stage, his own view was that the Commission should at least take account of such acts before drafting the future code, since the quality of life depended precisely upon the individual's natural environment and the security of mankind could therefore not be dissociated from environmental protection.

28. The taking of hostages did, of course, form the subject of an international convention, but the unfortunate tendency of certain States to make the taking of hostages an instrument of national policy would justify its inclusion in the future code as a means of promoting good relations among States and international co-operation.

29. With regard to acts of violence against internationally protected persons and, in particular, diplomats, he pointed out that the security of mankind depended on the security of States and Governments and that international co-operation could not effectively be established unless those who were its instruments benefited from genuine protection. It would therefore be useful to define their rights and obligations in the future code.

30. Mercenarism was regarded as a crime under the OAU Convention for the Elimination of Mercenarism in Africa. [10] Africa was, however, not the only continent to suffer from mercenary activities; all independent States were at the mercy of incursions by mercenaries. The inclusion of mercenarism in the future code was therefore justified. Although he agreed with the Special Rapporteur (*ibid.*, para. 60) that a mercenary was motivated primarily by money, he had reservations about the Special Rapporteur's second affirmation, namely that "a mercenary is not a national of, and has no ties to, the country for which he is fighting other than a contract of service with the group or entity for which he is fighting". In support of those reservations, he pointed out that the mercenaries who had twice attacked his country, Zaire, had been fighting to help their own country recover a colonial position they had believed to be lost.

31. As to the use of atomic weapons, which was not prohibited by any international instrument, he said he agreed with Mr. McCaffrey that the Commission was called upon to draft a code of offences against the peace and security of mankind, not rules governing the use of nuclear weapons. It should therefore leave aside the subterfuge of the policy of deterrence and deal only with the use of nuclear weapons as such, as Mr. Jagota had proposed (1822nd meeting). The whole of mankind was threatened with destruction by the deployment of nuclear weapons; their use should therefore be considered to constitute an offence against the peace and security of mankind.

32. Referring to the question whether international criminal responsibility could be attributed to a State, he pointed out that the OAU Convention for the Elimination of Mercenarism in Africa provided expressly for the criminal responsibility of States and for that of natural

[8] General Assembly resolution 37/10 of 15 November 1982, annex.

[9] General Assembly resolution 2131 (XX) of 21 December 1965.

[10] See 1816th meeting, footnote 15.

and legal persons. The 1954 draft also provided for the criminal responsibility of States—without, however, using that term—in that some of the acts it listed could be committed only by a State, thereby engaging its criminal responsibility. There was thus no doubt that such responsibility existed in legal theory.

33. As to future work, he said that at the next session he would like the Special Rapporteur to submit a general part that would enable the Commission to express its views on the contents of the definitions and on the non-applicability of statutory limitations to offences against the peace and security of mankind. The Commission would also have to decide whether or not the draft code should make it an obligation for States to punish or surrender criminals seized in their territory.

34. The CHAIRMAN, speaking as a member of the Commission, said it was clear from the Commission's debate that there were two main and interrelated issues: on the one hand, the classification of offences and the main criteria to be applied in that connection and, on the other, the importance of an introductory part including a definition of offences against the peace and security of mankind, together with an indication of their constituent elements and scope and of the general principles of applicable criminal law. Both of those issues involved substantive and methodological aspects which called for further detailed study and the promising exchange of views that had already taken place had pointed in the direction that the Commission's discussions should take. Those issues also involved the use of both the deductive and the inductive approaches. A general definition would, by its very nature, depend more on deduction, but it should also be supported by knowledge of the facts. The criteria would be no more than abstract formulae if they were not substantiated by an evaluation of the practical significance of specific acts in terms of the danger they posed to the fundamental interests of the international community. The Special Rapporteur had demonstrated his ability to follow that approach.

35. There were also two aspects to the question of the criteria to be adopted for the classification of offences: the qualitative aspect (the nature of the offence) and the quantitative aspects (the magnitude of the offence). So far as the latter was concerned, it was important to remember that not all international crimes were involved, but only offences against the peace and security of mankind. Those qualitative and quantitative parameters were, moreover, connected by an intrinsic link, namely the social danger, or danger to the very foundations of society, that they represented. That was a dynamic factor which could differ in significance depending on prevailing perceptions of social values. Some penal doctrines, including that of his own country, Bulgaria, used the expression "degree of social danger", which contained elements of evaluation and objective criteria. On that basis, he suggested that, in addition to the elements referred to by the Special Rapporteur, the Commission should adopt the following qualitative criteria: the importance of the interests affected by the offence; the cruelty and destruction caused; and the horrific nature of the act. It might also adopt the following quantitative criteria: the magnitude of the harmful effect; the seriousness of that effect; and gross, massive and persistent violations on a large scale. Those criteria would, in his view, also provide guidelines for a possible definition.

36. Turning to the catalogue of offences presented by the Special Rapporteur (A/CN.4/377, para. 79), he said that section A of the list was generally acceptable to him, subject to certain adjustments. With regard to aggression and the threat of and preparation for aggression (item 1 of the list), he considered that the notion of aggression as defined in 1954 should be reconsidered in the light of the Definition adopted by the General Assembly in 1974 [11] and of any other appropriate elements. As for the violation of restrictions or limitations on armaments (item 4), the list of instruments should be completed and updated to include all the General Assembly resolutions which qualified nuclear war as a crime against humanity. Since 1978, the General Assembly had adopted at least eight resolutions which reflected the state of the world conscience in the matter. They included the Declaration on the Prevention of Nuclear Catastrophe [12] and recognized, *inter alia*, that it was impossible to limit the deadly consequences of nuclear war, that the use of nuclear weapons was contrary to the human conscience and to reason, and that the use or threat of use of nuclear weapons should be outlawed. There was also a draft Convention on the Prohibition of the Use of Nuclear Weapons. [13] He therefore favoured the inclusion of the use of nuclear weapons in the list of offences. The arguments against its inclusion were well known, namely that it was a political issue of a controversial nature and that, as there was no positive law on the matter, many Governments would not agree to classify the use of nuclear weapons, which they claimed were a deterrent, as an offence against the peace and security of mankind. However, it sufficed to recall the many United Nations resolutions, including those on racial discrimination and *apartheid*, which had, when adopted, been considered premature or not to reflect the views of Governments in order to realize that the Commission should fulfil its mission of promoting the progressive development of international law and make its views known in an objective manner. The Commission's report would reflect all the proposals that had been made, including any dissenting views, and on that basis the General Assembly would arrive at a decision.

37. Referring to section B of the Special Rapporteur's proposed catalogue of offences, he said that colonialism was a well-established notion which should be elaborated, together with its constituent legal elements. The same applied to *apartheid*. He had some reservations about the inclusion in the list of the taking of hostages and the threat or use of violence against internationally protected persons. In his view, they should not be dealt with in the same way as the offences included in section A of the list unless they had been committed intentionally and had caused serious damage. He did, however,

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

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

[13] General Assembly resolution 38/73 G of 15 December 1983, annex.

think that economic aggression should be included in the list, since there was evidence that it could endanger the peace and security of mankind.

38. Lastly, the definition itself should be general enough to encompass all offences against the peace and security of mankind and, at the same time, as precise as possible so as to limit the scope of the draft code to offences against the peace and security of mankind. The next step would be to evolve general principles of criminal law which would serve as a good basis for discussion at the Commission's next sessions.

39. Mr. THIAM (Special Rapporteur), summing up the debate, said that he had not, of course, expected unanimous agreement on his report in its entirety and that he was aware of the shortcomings and gaps that had been drawn to his attention. He nevertheless wished to explain that the reason he had not mentioned General Assembly resolution 38/132 was simply that his report, dated 1 February 1984, could not logically have been expected to refer to a resolution whose text had been distributed on 23 January 1984. The text of that resolution had, moreover, not been sent to him. It might be a good idea for the Planning Group to consider the possibility of establishing more regular contacts between the Commission secretariat and the Special Rapporteurs. In any event, General Assembly resolution 38/132 would not have changed his approach in any way. What the General Assembly had invited the Commission to do in that resolution was to prepare a draft code by elaborating, as a first step, an introduction, as well as a list of offences. That was the end result which the General Assembly had in mind, but neither the Commission nor the Special Rapporteur could be tied down to any particular means of achieving that result. The General Assembly had also requested the Secretary-General to seek the views of Governments and international organizations on the questions raised by the Commission and to report on them to the General Assembly. The Assembly would then be in a position to give the Commission the necessary guidance. For the time being, it had merely requested the Commission to elaborate an introduction and a list of offences, but that did not mean that the Special Rapporteur necessarily had to start with the introduction.

40. It would, moreover, be necessary to determine exactly what an "introduction" would involve. The introduction to the study of a topic usually consisted of a statement of the problem and of its constituent elements, but what the General Assembly had had in mind might have been a statement of the general principles governing the subject-matter. If so, it should be noted that those principles had already been ennunciated in his first report (A/CN.4/364) and that, at the present stage, it would be too early to choose from among the general principles listed. A solution also had to be found to the problem of method that had dominated the debates from the start: should the first step be to state the general principles and indicate a general criterion or should it be to analyse the facts? That was the crux of the eternal argument between those in favour of the deductive method and those who advocated the inductive method. In a field as controversial as the one under consideration, it might be dangerous to begin by stating principles derived from abstract reasoning. Reality would inevitably have to be the starting-point. The majority of the members of the Commission had, moreover, opted for the inductive method. In any case, what counted was the end result and the reason he had chosen that method was that he had found it more appropriate. In the case in question, it was necessary to proceed from the particular to the general, even though, in absolute terms, it might be more elegant to start from a principle and deduce all its consequences.

41. With regard to the question whether criminal responsibility could be attributed to a State, he had, for the sake of clarity, deliberately decided to deal initially only with the responsibility of individuals. He did not, however, rule out the possibility of considering the responsibility of States at a later stage. Some members of the Commission had pointed out that certain crimes, such as *apartheid*, annexation or genocide, could be committed only by States. Yet the State was not an abstraction; behind a State were individuals acting in its name and on its behalf. It followed that any offence liable to be committed by a State could also be committed by an individual. The comments by the German Democratic Republic to which Mr. Ushakov had referred (1819th meeting) were altogether pertinent: the recognition of offences by individuals did not preclude State responsibility. Just as, in internal law, an offence by a principal could engage both his responsibility and that of his agent, so, at the international level, an individual who committed a breach of international law would be held accountable for it, although State responsibility would not be precluded for all that.

42. Pending the General Assembly's replies to the questions submitted to it by the Commission, the draft code should therefore deal with the criminal responsibility of individuals, and the question of the criminal responsibility of States, which was more complex than it might seem, should temporarily be left aside. Several members of the Commission had pointed out that the question of the imprescriptibility of crimes differed depending on whether the perpetrators were States or individuals. If sanctions were one day provided for, distinctions would also have to be made depending on whether they were to apply to States or to individuals. In that connection, he wished to make it clear that he had never said that those questions already lent themselves to codification. On the contrary, he had implied in his first report that they belonged to the realm of science fiction (A/CN.4/364, para. 45).

43. Turning to the question of the criterion of extreme seriousness, he said that any criterion was difficult to identify and that, once it had been identified, it should not be confused with a definition. Whereas a definition tended to be as precise as possible, a criterion was merely a sign which helped to distinguish an object, but not necessarily its constituent elements. The criterion of extreme seriousness was, admittedly, a subjective one, but in international and internal criminal law, there was bound to be some element of subjectivity. According to article 19 of part 1 of the draft articles on State responsibility,[14] a breach of international law was an

[14] See 1816th meeting, footnote 12.

international crime if it was "recognized" as such by the international community as a whole. There, too, a subjective element came into play. In that connection, it should be noted that a judge in a criminal court always enjoyed broad powers of appraisal; he not only weighed the facts, but also probed the conscience of individuals. In assessing the seriousness of an offence, whether in terms of attenuating or aggravating circumstances, intent or premeditation, a subjective element was always involved. Any code, even in civil law, inevitably contained some points that were not clear. It was up to the judge to interpret the code's provisions one way or the other and sometimes even to engage in law-making. If the Commission's ambition was to draft a code that would not give rise to any controversy, it was fighting a losing battle.

44. He also pointed out that the criterion of extreme seriousness varied from one country to another. When his own country had been under colonial domination, he had personally noted that the African members of a jury at an assize court were particularly severe in cases of crimes of violence, while the European members were so in cases of the misappropriation of public funds. As far as the seriousness of offences was concerned, every opinion was thus equally defensible.

45. Several members of the Commission who were anxious to achieve perfection had held that a distinction could be drawn between offences against peace, offences against the security of mankind and crimes against humanity. In his own view, it would not only be difficult, but also pointless, to draw a distinction between offences against peace and offences against the security of mankind. The concepts of the peace and the security of mankind went together. In particular, any breach of the peace, even in the form of a localized war, was in today's world a threat to the security of mankind. It was also difficult to distinguish between war crimes and crimes against humanity. For example, the use of a prohibited weapon was a war crime that could be distinguished only with great difficulty from an offence against the security of mankind. As for crimes against humanity, such as genocide and *apartheid*, their perpetration in certain parts of the world was unquestionably a threat to the peace of mankind. As one member of the Commission had pointed out, the South African Government's policy of *apartheid* endangered peace in southern Africa. His own view was therefore that, despite its apparent diversity, the concept of the peace and security of mankind formed an indivisible whole. Several authors had treated it as a concept *sui generis* which should not be split up into separate parts.

46. During the debate, he had been advised to classify the relevant international instruments—conventions, resolutions and declarations—in descending order of importance and to look into the circumstances in which they had been adopted. He was not sure that such a classification would be realistic. It was a moot point whether a convention was necessarily more important than a resolution or a declaration and whether the Declaration on the Granting of Independence to Colonial Countries and Peoples [15] did not have the same binding legal force as a convention. It was doubtful whether the subject-matter of a resolution was of less consequence to the international community than the subject-matter of a convention just because conventions were one of the recognized sources of international law.

47. His own research had shown that the relevant international instruments (see A/CN.4/368 and Add.1) had been adopted under the following circumstances: the International Covenant on Economic, Social and Cultural Rights, by 81 States; the International Covenant on Civil and Political Rights, by 78 States; the Optional Protocol to the latter Covenant, by 33 States; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, by 77 States; the Declaration on the Prevention of Nuclear Catastrophe, by 82 States; the basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, by 83 States; the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, by 109 States; The Declaration on the Granting of Independence to Colonial Countries and Peoples, by 89 States; the Declaration on the Elimination of All forms of Racial Discrimination, unanimously; the Definition of Aggression, by consensus; and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, without a vote.

48. It might seem surprising that instruments which had been so widely accepted by the international community should nevertheless give rise to problems. An examination of the attitudes of various States with regard to those instruments showed that one group of countries often cast negative votes. The question whether the draft code should be adopted in the form of a General Assembly declaration or as a convention was therefore of considerable importance. In matters relating to the codification of international law, it had to be borne in mind that there was no higher authority that could exert pressure on States. Such codification was very different from codification at the internal level. Diplomacy and negotiations accounted for a great deal at the international level and the reason certain resolutions were adopted by consensus or without a vote was that they were unlikely ever to command enough votes.

49. Referring to Mr. Malek's criticism (1816th meeting) of the classification of the offences included in the 1954 draft code, he explained that, as he had said in the oral introduction to his report (*ibid.*), the classification was meant only as a starting-point for the Commission's work. The reservations expressed by some members of the Commission with regard to the wording of the list were fully justified. Not only were such terms as "fortification" outdated, as Mr. Lacleta Muñoz (1819th meeting) had pointed out, but the use of new weapons might also have to be mentioned in the draft. Some members had also stressed the fact that certain offences implied a breach of treaties by States and that, since not all States were parties to the instruments in question, they could not all be considered to have breached them. In that connection, he emphasized the importance of custom in matters of war. Certain practices that were not condemned by any text could probably be considered contrary to general humanitarian law.

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

50. With regard to offences classified since 1954, it had been pointed out that the term "colonialism" had a political connotation and applied to ideologies or systems. His own view was that it could on no account be said that colonialism was just a thing of the past. It was because the colonial spirit still existed that terms such as "neo-colonialism" and "imperialism" were now used by certain States. The best course might be to adopt as a basis the definitions of such terms contained in the relevant international instruments. "Self-determination" was, for example, a very vague concept that could be applied as readily to peoples forming part of a national community as to established nations. That term must, of course, be retained and its meaning had to be made to correspond to that of decolonization.

51. Replying to the assertion that the term *apartheid* applied only to one particular country and that a broader term should be used, he said that, in his view, the word *apartheid* should be retained because it designated a system of government with a particular content and had nothing to do with the racial discrimination practised in some States. Moreover, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[16] enunciated moral principles of *jus cogens* that applied to all States, including those which had not adopted that instrument.

52. There was, in the modern world, no denying the importance of acts causing serious damage to the environment. Acts that were serious enough to upset the ecological balance of the universe should definitely be included in the draft code.

53. A distinction obviously had to be drawn between mercenarism and the recruitment of forces such as the Papal Guard. Generally speaking, States could organize their national defence in a variety of ways. They could introduce compulsory military service, voluntary service or a combination of the two. Mercenarism was something different. It was a practice whereby States having a regular army resorted to the use of mercenaries because, in the modern world, they must not be seen to be participating in attempts to interfere with decolonization. The problem that arose in connection with mercenarism was one of ascertaining where mercenaries were recruited and how they were paid. Mercenarism existed and was characterized by its purpose. To try to link it to decolonization, aggression or interference with a State's sovereignty would be to deny its specificity.

54. Certain intentions had been wrongly attributed to him during the discussion. He had, for example, never said that he was opposed to the inclusion of a reference to the use of nuclear weapons in the draft code. Far from making "war propaganda", he had stated in his report (A/CN.4/377, para. 52) that "the prohibition of the use of atomic weapons is based on impeccable logic" and that "it fits into the general framework of the prohibition of weapons of mass destruction, of which atomic weapons are the prototype". He had, moreover, confined himself to putting forward two points of view, that held by those who considered that the prohibition of atomic weapons would nullify their deterrent effect and that advocated by those who wanted such weapons to be formally prohibited. His conclusion had been that it was for the Commission to take a decision in that connection and to state whether a special reference should be made in the draft code to the use of atomic weapons. He had also stressed the fact that few States possessed nuclear weapons and that, if those States refused to conclude a convention prohibiting the use of such weapons, they could not be compelled to do so.

55. He emphasized the fact that he had never denied the existence of economic aggression. He had said that the term "economic aggression" had been associated with military aggression for so long that it was perhaps no longer adequate. There was, however, no doubt that the phenomenon of economic aggression did exist and that economic pressure was indeed exerted on certain States as a means of influencing their policies. A decision would have to be taken in due course on the extent to which the Commission would be able to work on the basis of the 1954 draft code in dealing with the question of economic aggression.

56. The reason he had not expressly referred to slavery was that he had assumed that the future draft would incorporate all the offences listed in the 1954 draft code, including "enslavement", as referred to in article 2, paragraph (11), of that draft. He did, however, have some doubts about piracy. In 1954, the Commission had taken the view that piracy, particularly on the high seas, could not be considered so widespread that it threatened the peace and security of mankind. The same appeared to be true of air piracy today. In his view, an international offence was all the more serious if it involved participation by a State.

57. Lastly, he said that, since diplomacy was the essential means of maintaining peace, he regarded the threat or use of violence against diplomats as an offence against the peace and security of mankind that should be included in the draft code. Recent events in Addis Ababa and London showed that there were diplomatic representations which had been converted into arsenals and which endangered public order. Such acts, which could not really be described as terrorism, should be taken into account by the Commission in its work of codification.

58. The CHAIRMAN, thanking the Special Rapporteur for so admirably summing up the discussion of the draft Code of Offences against the Peace and Security of Mankind, said he was sure that the report to be submitted at the next session would mark a great step forward in the consideration of a very important and complex topic.

59. Mr. FRANCIS requested the floor on a matter arising out of some of the comments made by the Special Rapporteur during his summing up.

60. The CHAIRMAN said that a special rapporteur's summing-up normally closed the debate on an agenda item. When the Commission came to consider its draft report on the work of the current session, the discussion of the chapter on agenda item 5 would provide an

[16] See 1820th meeting, footnote 8.

opportunity for any brief comments that members might wish to make on that item.

61. Mr. FRANCIS said that his comments, which did not relate to the actual substance of the draft code, could not wait until the draft report was considered.

62. Sir Ian SINCLAIR said that those comments might lead to statements by other members of the Commission.

63. Mr. THIAM (Special Rapporteur) said he was ready to reply to any comment that members might wish to make. In the debate on any agenda item, the Special Rapporteur was entitled to speak last.

64. The CHAIRMAN said that, at the beginning of the next meeting, some time would be devoted to agenda item 5 and hence to the comments by Mr. Francis and any other member, as well as to the Special Rapporteur's replies.

65. Mr. CALERO RODRIGUES said that the Commission would thus have an opportunity to give the Special Rapporteur instructions on how to proceed with his work. The debate thus far had not provided any guidance on that point.

The meeting rose at 1.15 p.m.

1824th MEETING

Monday, 21 May 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Sompong SUCHARITKUL

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

Draft Code of Offences against the Peace and Security of Mankind [1] (*concluded*) (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 (*concluded*)

1. The CHAIRMAN said that the Commission had concluded its discussion on the substance of the item at the previous meeting with the Special Rapporteur's summing-up, but the floor had been requested on a matter relating to the manner in which the work on the item should now proceed.

2. Mr. FRANCIS said that he would be speaking on a matter that was unrelated to the substance of agenda item 5 and arose out of the Special Rapporteur's summing-up. He had begun consultations with certain other members and was requesting a brief suspension of the meeting to enable him to complete the consultations.

3. Mr. MALEK said that, in his opinion, the Commission should provide the Special Rapporteur with some guidance regarding the continuation of his work, as Mr. Calero Rodrigues has suggested at the previous meeting. If the Commission's high scientific standards were to be maintained, it was essential to encourage and facilitate personal research by its members, but they could not at the present time gain even a general idea of the content of the Special Rapporteur's next report. For his own part, he was unable to receive the Commission's documents in time, for the reasons he had indicated at the 1816th meeting. Accordingly, he would be deeply interested to know which matters would be dealt with in the Special Rapporteur's third report. Moreover, guidance should be given in the interests not only of the members, but also of the Special Rapporteur himself.

4. The CHAIRMAN speaking as a member of the Commission, said that the future work on the topic could take three main directions: first, further elaboration of the criteria for defining offences against the peace and security of mankind; secondly, consideration of the possible contents of the introductory part of the draft, as indicated in the Special Rapporteur's second report (A/CN.4/377) and in General Assembly resolution 38/132 of 19 December 1983, such as the general principles of criminal law applicable to the subject, together with any other general provisions that the Special Rapporteur might see fit to include in the draft; thirdly, consideration of any additions, mergers or alterations to be made in the Special Rapporteur's excellent catalogue of offences (*ibid.*, para. 79). For all those suggestions, due regard would of course be paid to the views expressed, and to be expressed, by Governments, either in the Sixth Committee of the General Assembly or in written comments.

The meeting was suspended at 3.30 p.m. and resumed at 4.05 p.m.

5. Mr. FRANCIS said that he had been uneasy about any possible non-compliance with the General Assembly's instructions, which might create difficulties for the Chairman when he came to represent the Commission at the next session of the General Assembly. His informal discussions with the members from Africa and with Mr. Jagota during the recess, however, had fully allayed his concern and he was convinced that the Assembly's requests would be met with regard to both the introduction envisaged in paragraph 67 of the Commission's report on its thirty-fifth session and the list of offences.

6. Sir Ian SINCLAIR said that there could be no question of the Commission giving instructions to the Special

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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).