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A/CN.4/SR.1880

Summary record of the 1880th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

resolution had been discussed at length and had later been mentioned at various conferences of heads of State and Government of OAU.

43. He believed that subversion, together with State terrorism, would become a new form of aggression or threat of aggression, with which the Commission should attempt to deal. In so far as small States and developing States did not have the means to wage conventional wars or to resort to aggression as defined in the Definition of Aggression, they would resort to precisely those indirect forms of aggression, which could lead to destabilization and external interference, and were a definite threat to peace and security.

44. The Special Rapporteur could therefore try to take up that notion of subversion, which would probably enable the Commission better to define such concepts as terrorism, mercenarism and the other forms of indirect aggression, which were becoming more and more dangerous and threatening international peace, security and stability.

The meeting rose at 12.50 p.m.

1880th MEETING

Monday, 13 May 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Welcome to Mr. Arangio-Ruiz and Mr. Roukounas

1. The CHAIRMAN congratulated Mr. Arangio-Ruiz and Mr. Roukounas on their election and, on behalf of the Commission, extended a warm welcome to them.

Organization of work of the session (*concluded*)*

[Agenda item 1]

2. The CHAIRMAN said that the Enlarged Bureau had held a meeting on Friday, 10 May 1985, at which it had decided to recommend that the Commission should adopt the following timetable:

Draft Code of Offences against the Peace and Security of Mankind (item 6)	9-24 May
State responsibility (item 3)	28 May-7 June
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 5)	10-21 June
Jurisdictional immunities of States and their property (item 4)	24 June-5 July
Relations between States and international organizations (second part of the topic) (item 9)	8-10 July
International liability for injurious consequences arising out of acts not prohibited by international law (item 8) *and*	
The law of the non-navigational uses of international watercourses (item 7)	17-19 July
Draft report of the Commission and related matters	22-26 July

Consideration of a given topic would normally start on a Monday and finish on a Friday. If necessary, however, adjustments would be made and four reserve days, 11, 12, 15 and 16 July, had been set aside for that purpose. It had been suggested that only three days should be devoted to the consideration of agenda items 7 and 8, since two new special rapporteurs had to be appointed for those topics. The three days could, however, be extended to five days if need be.

It was so agreed.

Drafting Committee

3. The CHAIRMAN said that the Enlarged Bureau had also recommended that the Drafting Committee should be composed of the following members: Mr. Calero Rodrigues (Chairman), Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair and Mr. Ushakov, together with Mr. Flitan, *ex officio* member in his capacity as Rapporteur of the Commission. All members of the Commission, however, would be welcome to attend the meetings of the Drafting Committee if they so wished.

It was so agreed.

4. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that the Drafting Committee should hold its first meeting on Tuesday, 14 May 1985, and then meet every Tuesday and Thursday afternoon during the remainder of the session. He further suggested that the Drafting Committee should first deal with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

It was so agreed.

Gilberto Amado Memorial Lecture

5. The CHAIRMAN said that the Enlarged Bureau had further recommended that the informal consultative committee on the Gilberto Amado memorial lectures should be composed of the fol-

* Resumed from the 1877th meeting.

lowing members: Mr. Calero Rodrigues, Mr. Mahiou, Mr. Razafindralambo, Mr. Reuter and Mr. Ushakov.

It was so agreed.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 4[5] (*continued*)

6. Mr. JACOVIDES, congratulating the Special Rapporteur on his excellent third report (A/CN.4/387) and brilliant introduction, said that consideration of a code of offences against the peace and security of mankind was particularly appropriate at a time when international law was honoured more in the breach than in the observance, when the usefulness, and even the relevance, of the United Nations was increasingly being questioned, and when the Commission had been the target of unjustified criticism for not remaining sufficiently within the mainstream of international law. It was essential to approach the subject with all the seriousness and sense of urgency it deserved, since substantial progress in the area would do much to allay concern by contributing to strengthening international peace and security and thus to satisfying the expectations of the General Assembly and the international community.

7. Although the problems involved were formidable, the Commission undoubtedly had the resourcefulness and will to overcome them: a good start had already been made with the third report. It was important to tread carefully, avoiding pitfalls, while keeping clearly in view the ultimate objective, namely the timely elaboration of a code and appropriate machinery for its effective implementation, as a deterrent to aggressors and any others who offended against the peace and security of mankind. He therefore agreed that it would be advisable to concentrate first upon the areas that presented the least difficulties, and was gratified to note that that was precisely the approach the Special Rapporteur had adopted.

8. He was prepared for the time being to accept the arguments of the members of the Commission who were opposed to providing in the draft code for the criminal responsibility of States and who took the view that the responsibility of States for acts classified as international crimes should instead be dealt with in the context of the draft articles on State responsibility. As a general proposition, however, and bearing in mind the element of progressive development inherent in article 19 of part 1 of the draft articles on State responsibility,[6] he still maintained that the criminal responsibility of the State must also be recognized, otherwise serious offences, such as aggression and *apartheid*, which where committed by States, would go unpunished. Furthermore, to limit the scope of the code to the criminal responsibility of individuals would diminish its value as an instrument of deterrence and would largely disregard the progressive development of the law on the subject during the preceding 30 years. Nevertheless, he could agree that the issue should remain in abeyance until it was known how much progress could be made in dealing with the responsibility of States for international crimes under the aforementioned article 19. He trusted that, in the interest of the common objective, that spirit of compromise would be reciprocated in other areas of difficulty.

9. Turning to the Special Rapporteur's third report, he noted that real progress had been made and that a number of draft articles were now before the Commission. While he was in agreement with the general thrust of the report, he considered that, although the inclusion of general principles in the code was necessary, far more work on the Nürnberg Principles was required before they could be made to fit the requirements.

10. On the question of the delimitation of scope *ratione personae*, he agreed that primary offences against peace and security, whether such offences were directed against a State or against ethnic or religious groups, were committed by individuals acting in their capacity as authorities of a State. While there might be exceptions to that general rule, there could be no doubt that one of the main purposes of the code was to highlight the responsibility of those who, when in a position of power, misused that power to commit offences against the peace and security of mankind. Hitler, for instance, when embarking on the extermination of 6 million Jews, had asked who would remember the extermination of the Armenians. It was to be hoped that, with the code in place and provisions for its effective implementation, future violators would remember—or, if not, would be reminded.

11. As to the question of definition, there was little doubt that there was a certain unity to the concept of peace and security of mankind which linked the various offences. Each offence had its separate characteristics, but all were marked by extreme seriousness, which placed them in a narrower category than international crimes within the meaning of article 19 of part 1 of the draft on State responsibility. There had, moreover, been significant developments since the Second World War, including the emergence of the individual as a subject of international criminal law, the recognition of *jus cogens* as a source of obligations of a special nature and the appearance of a new category of internationally wrongful acts for which material compensation was not sufficient and

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1879th meeting, footnote 9.

which also gave rise to penal consequences. Accordingly, he would have no difficulty in accepting either of the two alternative definitions proposed by the Special Rapporteur, although he had a slight preference for the more synoptic definition (*ibid.*, para. 65), which combined brevity with flexibility.

12. As to acts constituting an offence against the peace and security of mankind, the crimes listed in chapter II of the third report covered only part of the range, but that was a good beginning and there was of course a wealth of legal materials to be taken into account in connection with draft article 4 of the code.

13. The Special Rapporteur had drawn an interesting distinction between the concepts of "international peace and security" and "peace and security of mankind" and had rightly pointed out that, whereas the former referred to peaceful relations between States, the latter also covered acts against peoples, populations or ethnic groups (*ibid.*, paras. 71-72).

14. Aggression, which rightly headed the list of offences to be included in the draft code, had been the subject of much earlier work of codification and progressive development, culminating in the adoption of the Definition of Aggression.[7] That definition, combining as it did two schools of thought, should properly form the basis of the Commission's work, particularly in view of the history of the matter and the fact that the lack of a definition had been used as a pretext for not proceeding with the 1954 draft code. It was also important to remember that the Definition of Aggression represented a fine balance between conflicting views. Although the definition was not perfect, it would be unwise to attempt to change it in any way. I should therefore form part of the code, either being included in full as in the first alternative of section A of draft article 4 or by a cross-reference, as in the second alternative. The latter version was probably preferable since it included five other crimes apart from aggression. Further crimes, including *apartheid* and genocide, should be added in due course. The important question of international drug trafficking, raised by Mr. Reuter (1879th meeting), deserved careful consideration to see whether it could be reflected in the draft code in generally acceptable legal terms.

15. He was in basic agreement with the Special Rapporteur on the reasons for including the threat of aggression, but not the preparation of aggression, in the code. He also agreed with the reasons given for including the offence of interference in the internal or external affairs of a State. The principle of non-intervention was well established in international law and, when properly delimited to take account of *jus cogens* and restrictions on sovereignty, it could even be regarded as a peremptory norm of international law. As used by the Special Rapporteur, the term was certainly broad enough to include subversion, especially in the context of the work undertaken by OAU.

16. Terrorism, likewise rightly included in the list of offences, was a complex subject, one problem being that one man's terrorist was another man's freedom fighter. The kind of terrorism with which the draft code was concerned, however, was that which was liable to endanger international peace and security. While it might be practised either by an individual or by a group, it derived its international dimension from the fact of State participation in its conception or execution, together with the fact that it was directed against another State. There were several forms of terrorism, but for the time being the code should be concerned with State-sponsored terrorism, defined by reference to the status of the perpetrators and the victims. In the context of the draft, it was important to remember that acts of terrorism were organized from outside and found support in a foreign State which made its territory and resources available to the terrorist enterprise. It was interesting to note, in that connection, that the Special Rapporteur had observed that civil strife was the preferred weapon against weak States, whereas terrorism was more often used against well-organized States with great national unity.

17. While he had no strong views on the question of the inclusion in the code of violations of the obligations assumed under certain treaties, some thought might perhaps be given to the possibility of including such violations under some other more general category, on the basis of the same reasoning as with regard to interference in internal or external affairs.

18. Colonialism, while clearly important enough to be included in the draft code, needed to be carefully circumscribed if it was to be generally acceptable and not open to misinterpretation and abuse. Although the expression "violations of the right to self-determination" might be considered, "self-determination" had on occasion been used ambiguously. In the present context, it related to self-determination for colonial countries and peoples and was not just a convenient slogan to pave the way for secession by national minorities in already established States. That was all the more unacceptable when the national minority concerned purported to act in an area controlled by a foreign army of occupation which was there in violation of the Charter of the United Nations, the relevant treaties and the peremptory norms of international law. His own country, Cyprus, was currently experiencing the illegal effects of an attempt to abuse the principle of self-determination with a view to consolidating the international crime perpetrated against Cyprus since 1974. He therefore agreed with the expression proposed by the Special Rapporteur, namely "the forcible establishment or maintenance of colonial domination".

19. With regard to economic aggression, a case for its inclusion in the draft code could be made out on the grounds that economic aggression was a form of interference in the affairs of another State. As for mercenarism, what was involved was not the age-old practice of using foreigners to make up armies, but the use of foreigners who had no connection whatever with a national army and who had been especially recruited for the purpose of attacking a

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

country to destabilize or overthrow the established authorities.

20. It was a matter of considerable satisfaction to him that significant progress had been made in the consideration of an item with which he had been associated for many years. However frustrating it was to know that painstakingly agreed legal instruments such as the Definition of Aggression were ignored in practice, it was none the less a matter of consolation that, in the Commission at least, everything possible was being done to promote the international legal order and the rule of law in international relations.

21. Mr. CALERO RODRIGUES said that he had doubts about the possibility of achieving a truly useful and effective code, mainly on political grounds. The more he considered the replies from Governments and the debates in the General Assembly, the more he became convinced of the difficulties that would arise. From the legal point of view, however, the task was a challenging and even an exciting one. The Commission was entering new territory, working as it were on the international law of the future, a law for a community effectively ruled by law and by an adequately implemented system of clear-cut rules.

22. The Special Rapporteur's third report (A/CN.4/387) reflected the same qualities as his two earlier reports and, indeed, his own personal qualities. His horizons were broad, yet without wild flights of fancy. He was not short-sighted, but endeavoured to work steadily towards goals that were possible. The report proposed four articles which, if he understood correctly, were being put forward on a preliminary basis and were intended merely as signposts on the road which the Commission was to follow.

23. Referring first to the general part of the report, he noted that the Special Rapporteur had left aside for the time being such general principles of criminal law as *nulla poena sine lege*, imputability, extenuating circumstances and statutory limitations, so that the general part of the report was limited to an effort to define the scope of the draft code *ratione materiae* and *ratione personae*.

24. With regard to the vexed question of scope *ratione personae*, the Special Rapporteur was rightly moving towards a decision that the code should be concerned solely with the responsibility of individuals. That was a matter that had been discussed at length and frequent reference had been made to the draft articles on State responsibility and, in particular, to article 19 of part 1 of that draft. Under that article, which was not yet in its final form, States would be responsible for "delicts" and "crimes"; the legal consequences of those two categories of internationally wrongful acts of the State would be set out in part 2 of the draft articles. In a manner that was not altogether satisfactory, article 19, paragraph 2, defined international crimes in the following terms:

> 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

The reference, in the commentary to article 19, to the legal consequences of international crimes and specifically to two particularly relevant factors, namely the content of certain international obligations and the fact that their fulfilment affected the realities of life in the international community,[8] suggested that the code did not have to interfere with the provisions of the draft articles on State responsibility as far as offences against the peace and security of mankind were concerned.

25. The draft articles on State responsibility would establish a special régime of international responsibility for the State, while the code would "concurrently" make individuals (individual-organs, agents of the State) personally responsible and liable to punishment. In certain cases, offences could have been committed only by individuals as organs or agents of the State, but the possibility should not be ruled out that individuals as such or as members of non-State organizations could commit certain offences against the peace and security of mankind. Given modern technological advances, even genocide could be committed by a group of individuals independently of the action of any State, and that could occur in other cases as well. He was therefore very much in favour of the Special Rapporteur's proposed solution, as reflected in the first alternative of draft article 2, which read: "Individuals who commit an offence against the peace and security of mankind are liable to punishment." For the reasons indicated, he believed that the Commission should refer to "individuals" rather than to "State authorities"; the commentary could at an appropriate point explain that the term "individuals" would in many cases mean "State authorities".

26. As to scope *ratione materiae*, dealt with in section B of chapter I of the third report and also in draft article 3 (Definition of an offence against the peace and security of mankind), a provision to "define" such offences was not strictly necessary in the code. The code would list a number of acts which constituted offences and which would be punished as such. To be listed in the code, however, an offence had to have some connection with "the peace and security of mankind". It seemed to have been agreed that such a criterion was necessary, since the code was not going to deal with all international crimes, but only with those against the peace and security of mankind.

27. In the analysis of the question in his third report (*ibid.*, paras. 26-38), the Special Rapporteur had concluded that there was unity of notion and that it would be impossible to distinguish between crimes against the peace and crimes against the security of mankind. That conclusion was in keeping with the opinions of most learned writers. The Special Rapporteur had also noted that offences against the peace and security of mankind were marked by the "same degree of extreme seriousness" (*ibid.*, para. 38), and that seriousness was "measured according to the subject-matter of the obligation breached" (*ibid.*, para. 61), and he had gone on to say

[8] *Yearbook ... 1976*, vol. II (Part Two), pp. 103-104, commentary to article 19, para. (21).

that some interests should be placed at the top of the hierarchical list, namely international peace and security, the right of peoples to self-determination, the safeguarding of the human being and the preservation of the human environment (*ibid.*). It was on that basis that the first alternative of draft article 3 was proposed, and the list contained in subparagraphs (*a*), (*b*), (*c*) and (*d*), of the article corresponded exactly to that contained in article 19, paragraph 3, of part 1 of the draft on State responsibility. Consequently, if the definition contained in draft article 3 were accepted, the concept of offences against the peace and security of mankind would be practically the same as the concept of an international crime. The question that then arose was whether, in that case, there was any specificity in the offences in question or whether virtually all international crimes were covered.

28. There were also echoes of article 19 in the second alternative of draft article 3, whereby any internationally wrongful act "recognized as such by the international community as a whole" would be an offence against the peace and security of mankind. It might, however, prove rather difficult to ascertain whether the international community as a whole recognized an act as an offence against the peace and security of mankind and, if that definition were accepted, it would be necessary, before including an act in the code, to be sure that the international community as a whole recognized it as such an offence. Even if that were the case, it could be argued that the element of recognition by the international community as a whole was lacking and that the act in question was in fact not an offence.

29. Such a definition might, in his view, jeopardize any attempts to establish an internationally effective code, and he therefore believed it would be preferable not to include a definition in the code. It would be better to be guided by the criterion that certain acts, by reason of their seriousness and the fact that they violated interests essential to the peace and security of mankind, should be included in the list. While that was of necessity a subjective criterion, recourse could be had to existing international instruments and the opinions of those who had studied the subject, including the Commission. It would be better to apply such a criterion correctly than to accept a definition that would be a sort of Procrustean bed.

30. In his first report,[9] and particularly in his second report (A/CN.4/377, para. 79), the Special Rapporteur had examined the question of including a list of offences against the peace and security of mankind in the draft code. Draft article 4, submitted in the third report, contained such a list. In that connection, the following passage from the report of the Commission on its thirty-sixth session should be borne in mind:

> ... the acts selected would, at this stage, be in the raw state, independent of any rigorous terminology or classification. A precise terminology and typology would be worked on later, when all the material had been selected and determined.[10]

[9] *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364.

[10] *Yearbook ... 1984*, vol. II (Part Two), p. 12, para. 40.

31. Draft article 4 did not contain a complete list: it was limited to six offences set forth in sections A to F of the article. It was to be hoped that, when the draft code took final shape, each act constituting an offence would form the subject of a separate article, in the interests of clarity and in accordance with the usual legislative technique in criminal law.

32. The proposed list covered two categories of offences: first, violations of obligations aimed at safeguarding international peace and security, and, secondly, violations of obligations aimed at safeguarding the right of peoples to self-determination. In that presentation, the Special Rapporteur had followed the categorization proposed in paragraph 3 (*a*) and (*b*) of article 19. At the risk of appearing unduly conservative, he himself preferred to abide by the old division of crimes into three categories: crimes against peace, crimes against humanity and war crimes. That remark made in passing, however, did not affect the consideration of the offences listed by the Special Rapporteur.

33. The first offence, set forth in section A, was that of aggression, and no one would disagree that it should be included, and indeed be placed at the top of the list. Two alternatives were proposed. The first merely repeated the Definition of Aggression adopted by the General Assembly in 1974. The second, which he personally favoured, simply stated: "The commission [by the authorities of a State] of an act of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974." In his third report (A/CN.4/387, para. 66), the Special Rapporteur admitted that the second definition had "the advantage of being brief and concise", but also noted that "it does not sufficiently emphasize the various subject-matters to which a breach of the obligation in question may apply". The first definition, according to the Special Rapporteur (*ibid.*), "has the merit of being coherent. It takes as its starting-point the same approach and formulation as article 19. It emphasizes the two elements that are at the basis of a criminal transgression: the subjective element (the opinion of the international community) and the objective element (the subject-matter of the obligation violated)."

34. He himself could not agree with that argument. When an offence was listed in the draft code, the Commission should not be thinking all the time of article 19. Its main concern should be to indicate clearly—and as objectively as possible—certain forms of conduct, certain acts and, possibly, certain omissions which constituted offences and for which individuals were punishable. In the case of aggression, if the Commission used the term "aggression" and referred to the Definition of Aggression, which had been so painstakingly elaborated by the General Assembly and contained all the elements characterizing aggression, it would have accomplished its task.

35. The Special Rapporteur had included in the draft code the threat of aggression (section B of draft article 4), but was not in favour of including the preparation of aggression. He agreed with the Special Rapporteur that: "The concept of preparation does not appear to add much, apart from an element of

confusion, and it could be eliminated." (A/CN.4/387, para. 101 *in fine*.) He was inclined to think the same with regard to the threat of aggression. While it was true that the threat of aggression was prohibited by international law, including the Charter of the United Nations, and that it engaged the responsibility of the State, it was nevertheless doubtful, whether it could be deduced therefrom that the threat of aggression should be included in the draft code as an offence that made its authors liable to punishment. Criminal law attached particular importance to results and the Special Rapporteur had himself stated: "It has sometimes been asked whether a threat of itself, not followed up, could be comparable with aggression. Certainly, the threat is not the act of aggression, but the use of threats is designed to bring pressure to bear on States and to disrupt international relations." (*Ibid.*, para. 92.) The question nevertheless arose whether such an attempt to use pressure or to disrupt international relations was of sufficient gravity to justify the subjection of individuals to international criminal responsibility and consequent punishment. He accordingly urged that aggression as such, and only aggression, should be included as an offence in the draft code and that both preparation and threats should be left aside. The possibility of the punishment of attempted aggression under the general provisions of the draft code would, of course, not be precluded.

36. The second offence, set forth in section C of draft article 4, was that of "interference in the internal or external affairs of another State". He pointed out that the term *intervention* used in the original French text would be better translated into English by "intervention", which had been widely used, for instance in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.[11] Interference or intervention in the affairs of another State was of course a violation of the rules of international law and engaged the international responsibility of the State. It nevertheless had many different aspects. The sending of a diplomatic note, a speech by an ambassador, or the opening of a diplomatic bag could constitute acts of "interference" or "intervention", but it was clear that they did not have the seriousness that would justify their inclusion in the draft code as offences for which their authors should be punished. However, other acts that fell within the general category of intervention might deserve to be included in the draft code. The Special Rapporteur seemed to be aware of that fact, for, after referring, in draft article 4, to interference, he had added:

> The following, *inter alia*, constitute interference ...
>
> (*a*) fomenting or tolerating the fomenting ... of civil strife or any other form of internal disturbance or unrest in another State;
>
> (*b*) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

37. With regard to subparagraph (*a*), he pointed out that the words "internal disturbance or unrest" were not an accurate translation of the French words *troubles ou soulèvements intérieurs*. That wording constituted an attempt to introduce the precision that the entire draft code should have: interference or intervention was objectively translated into certain specific acts, such as fomenting internal troubles or exerting political or economic pressure. The provisions suggested by the Special Rapporteur came almost untouched from the 1954 draft code. In his third report (*ibid.*, para. 112), the Special Rapporteur raised the question "why the fomenting of civil strife in a State and interference in the internal or external affairs of that State should be the subject of two separate provisions". If he was not mistaken, however, that was not the case in the 1954 draft code, which did not contain a general provision on intervention. Intervention was mentioned in article 2, paragraph (9), only in so far as it took the form of "coercive measures of an economic or political character"; and that provision referred to such measures, not to intervention in general.

38. On that basis, and since there was a wide variety of forms of intervention, as the Special Rapporteur himself recognized (*ibid.*, para. 111), it would be wise for the Commission not to consider intervention in general as an offence, but to break down the concept of intervention and list only the specific acts that constituted intervention. Two such acts were indicated by the Special Rapporteur in his draft articles and, on the basis of other examples given in his report (*ibid.*, para. 110), he would be able to add to the list.

39. The Special Rapporteur proposed that terrorism should be included in the list of offences. The opening paragraph of section D of draft article 4 was an almost word-for-word repetition of article 2, paragraph (6), of the 1954 draft code. The Special Rapporteur had then added a subparagraph (*a*), which gave a definition of terrorist acts, and a subparagraph (*b*), which listed four types of acts constituting "terrorist acts". He himself was not at all certain that those subparagraphs were really necessary. Unlike intervention, terrorism was a concept that was clearly understood by all and the term "terrorist acts" was quite clear both in legal terms and in ordinary language. He therefore suggested that the Commission should use only the term "terrorist acts", without definition or exemplification.

40. Section E of draft article 4 dealt with acts prohibited under treaties which placed restrictions or limitations on armements, strategic structures, etc. That text differed in two ways from article 2, paragraph (7), of the 1954 draft. The first difference was simply a question of modernization of terminology: the term "fortifications", which was obsolete, was replaced by "strategic structures". The other difference, however, might give rise to some doubts. The 1954 draft referred to "acts ... in violation" of a State's obligations under certain treaties, whereas the draft under consideration referred to "a breach" of such obligations. For the sake of consistency, it was better to speak of "an act": an act was clearly imputable to an individual, whereas the breach of an obligation would be attributable to a State. He was inclined to agree with Mr. Jacovides that the question of treaties imposing restrictions or limitations on

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

armaments was largely historical in nature. The Commission should nevertheless not overlook the possibility of such restrictions being established by treaty. That provision should therefore be retained.

41. The last offence in the proposed list was colonialism. Section F of draft article 4 thus read: "The forcible establishment or maintenance of colonial domination [by the authorities of a State]." At the previous session, he had expressed doubts regarding the reference to colonialism, which had historical implications.[12] He would have preferred a reference to the more modern concept of self-determination. In view of the absence of a definition of self-determination and of the political implications of that term, however, he could now accept, on a provisional basis, the reference to colonial domination in the provision under consideration. At the same time, he urged the Special Rapporteur to give further consideration to the matter with a view to arriving, if possible, at a more precise definition of "colonial domination". The Special Rapporteur should also consider whether the establishment or maintenance of colonial domination constituted "an act" and hence a crime for which individuals could be punished.

42. Mr. MALEK said that the Special Rapporteur indicated at the beginning of the introduction to his very well thought-out third report (A/CN.4/387, para. 2) that the draft code had to be limited to the criminal responsibility of individuals, apparently because that had been the general view expressed in the Sixth Committee of the General Assembly. Although, as matters now stood, the Special Rapporteur shared that view, he nevertheless pointed out (*ibid.*, para. 16) that "it must never be forgotten that the aim is also—and indeed primarily—to erect a barrier against the irrational and lawless acts to which the exercise of power may give rise, and that what must be prevented are the crimes and exactions of those who possess the formidable means of destruction and annihilation that threaten mankind today". He stated further that, even if the subject of law, in the case of offences against the peace and security of mankind, was the individual, it must also be remembered that the individual in question was first and foremost an authority of a State. In his own view, the subject of law in question was, rather, the State, particularly a State with a genuinely democratic régime, in other words a State where the individual or individuals who took decisions on its behalf were vested with such power directly or indirectly by the nation itself in accordance with a constitutional procedure on which it had freely agreed in advance. Why, for example, if such a State committed an act of aggression, should account be taken only of the criminal responsibility of its leaders, agents or authorities, whereas in fact and in law such responsibility was actually attributable to the nation as a whole?

43. In the relatively recent past, it had been extremely difficult to establish that an individual could be regarded as a subject of international law. The Nürnberg Tribunal had helped to show that was in fact the case when it had stated, in its judgment, that it had long been agreed that international law established duties and responsibilities for natural persons and that crimes against international law were committed by men, not by abstract entities, and that only by punishing individuals who committed such crimes could the provisions of international law be enforced. Those conclusions, however, had taken a long time to become part of the legal conscience of the international community. Although the 1954 draft code had dealt only with the criminal responsibility of individuals, no reasons for that choice had been given in the text of the draft, either in the commentaries to its articles or in the preparatory work. The fact was that that draft had derived directly from Nürnberg law, whose purpose, in view of the *de facto* situations leading up to its formulation, had been the trial and punishment not of a particular State, but of war criminals whose offences had had no particular geographical location. Neither the 1945 London Agreement and the Charter of the Nürnberg International Military Tribunal annexed thereto[13] nor the resulting trial, which had been the real starting-point for the modern-day development of international criminal law, had contained any provisions on the guilt of the State as such. At that time, recourse to legal channels had apparently not been desired or regarded as desirable. In that connection, he recalled that, soon after the judgment of the Nürnberg Tribunal had been rendered, the President of the United States of America had stated, in the General Assembly of the United Nations, that 23 Members of the United Nations had bound themselves by the Charter of the Nürnberg Tribunal to the principle that planning, initiating or waging a war of aggression was a crime against humanity for which individuals as well as States should be tried before the bar of international justice.[14]

44. On the basis of a proposal by the United States delegation, the General Assembly had, on 11 December 1946, adopted its resolution 95 (I), in which it had affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of that tribunal. Moreover, it had directed the recently established Committee on the codification of international law to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the tribunal. The aim had thus been only to codify the Nürnberg Principles. In accordance with that resolution and with General Assembly resolution 177 (II) of 21 November 1947, the Commission had in 1950 formulated the Nürnberg Principles of international law[15] and, in 1951, prepared a draft Code of Offences against the Peace and Security of Mankind,[16] taking those principles fully into account.

[12] *Yearbook ... 1984*, vol. I, p. 32, 1820th meeting, para. 26, and p. 45, 1822nd meeting, para. 43.

[13] See 1879th meeting, footnote 7.

[14] Speech delivered on 23 October 1945 (*Official Records of the Second Part of the First Session of the General Assembly, Plenary Meetings*, 34th meeting).

[15] See 1879th meeting, footnote 6.

[16] *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, para. 59.

45. The 1951 version of the draft code, as revised in 1954, endorsed the principle of the criminal responsibility of the individual, but did not rule out the responsibility of the State as such, and determined, in the text of the articles or in the commentaries thereto, the degree of responsibility that could be attributed to individuals as a result of the commission of any of the offences listed therein. The commentary to the offences listed in article 2, paragraphs (1) to (8), of the 1954 draft code thus indicated that such offences could be committed only by the "authorities of a State", although the criminal responsibility of individuals under international law could be engaged as a result of the application of the provisions of the draft article relating to conspiracy, direct incitement, attempts and complicity. The commentary to the offences listed in paragraphs (9) to (11) made it clear that such offences could be committed either by the authorities of a State or by private individuals. However, according to article 2, paragraph (11), of the 1954 draft code, concerning offences against mankind, for an act to be characterized as an offence in that category it must have been committed by the authorities of a State or by private individuals "acting at the instigation or with the toleration of such authorities". That condition had not been laid down in the corresponding definition contained in the Charter of the Nürnberg Tribunal. The Commission had added it in order to prevent every inhuman act committed by private individuals from being regarded as a crime under international law. In his view, instigation or express or tacit toleration by the authorities of a State, if not one of the elements of offences against mankind, was at least one of the basic characteristics of that category of offences, including genocide, which, because of its nature and proportions, could in no case be committed by private individuals acting on their own initiative and by their own means without State support.

46. In any event, it should be clearly understood that the Commission would subsequently be able to change its mind about limiting the draft code to the criminal responsibility of individuals. A final decision on that issue should be taken by the General Assembly itself.

47. Turning to section B of chapter I of the report, dealing with the definition of an offence against the peace and security of mankind, he pointed out that paragraphs 20 to 39 related not to offences against peace and offences against mankind, as indicated in the title preceding those paragraphs, but to offences against the peace and security of mankind. Confusion between the two very different concepts of "an offence against mankind" and "an offence against the security of mankind" was always possible and it was moreover such confusion that had made one of the ideas he had expressed in his statement on the topic at the previous session totally meaningless.

48. Having explained the origin of the concept of an offence against the peace and security of mankind, established its unity and defined its meaning, the Special Rapporteur had proposed a definition in his report (draft article 3). He had, however, also described the problem involved in defining the concept of crime, particularly international crime, and, if he seemed to believe that it was possible to define an offence against the peace and security of mankind, that was because he had apparently been encouraged in that belief by the definition of a serious crime contained in article 19 of part 1 of the draft articles on State responsibility.[17] The first alternative definition proposed by the Special Rapporteur was based primarily on the definition contained in that article 19 and it had all the drawbacks and defects of that definition. The main feature of the second alternative was that it was of a very general nature. Although he himself would reserve his position with regard to the two alternatives, he questioned whether a definition of the concept of an offence against the peace and security of mankind was really necessary. The fact that the Commission had not tried to define that concept in its 1954 draft was not without some significance in that regard.

49. In chapter II of his report, dealing with acts constituting an offence against the peace and security of mankind, the Special Rapporteur paid particular attention to an act of aggression and had also proposed two alternatives in defining that concept (draft article 4, sect. A). The first was based entirely on the provisions of the Definition of Aggression adopted by the General Assembly in 1974,[18] while the second merely referred to that definition. Both alternatives were feasible, and from the legal point of view it would not make much difference which one was used.

50. In preparing the draft code, the Commission must not lose sight of the fact that the code would very probably one day be applied by an international criminal court. In that connection, he recalled that the first Special Committee on the Question of Defining Aggression had been expressly requested, by General Assembly resolution 688 (VII) of 20 December 1952, to study "the problems raised by the inclusion of a definition of aggression in the Code of Offences against the Peace and Security of Mankind and by its application within the framework of international criminal jurisdiction". In its report,[19] the Committee had indicated that some of its members were in favour of the inclusion of such a definition, as well as of the establishment of an international criminal jurisdiction. In that connection, the representative of the Netherlands had stated that, although a definition of aggression to be applied by the political organs of the United Nations could play only a negligible part in the maintenance of international peace and security, since it would bind neither the Security Council nor the General Assembly, such a definition would have a great chance of succeeding in the domain of international criminal jurisdiction. He had also said that the objections that could be raised to a definition of aggression intended to be applied under the system of collective security would not all apply to a definition to be used in the more restrictive field of international criminal jurisdiction. He had stressed, however, that two problems might arise from the application by an international criminal

[17] See 1879th meeting, footnote 9.

[18] See footnote 7 above.

[19] *Official Records of the General Assembly, Ninth Session, Supplement No. 11* (A/2638).

court of a definition of aggression: first, a decision by such a court bearing on a case of aggression might hamper the Security Council in its essential function, which was to maintain international peace and security; secondly, the Security Council and the international criminal court might pronounce contradictory decisions on a case of aggression brought simultaneously before both of them.[20]

51. Some representatives in the Sixth Committee of the General Assembly had stated that the Commission had taken the wrong approach to the preparation of the draft code (A/CN.4/L.382, para. 38). The Commission had given the impression of having focused entirely on the compilation of a list of offences and of thus no longer having the intention, expressed in its report on its thirty-fifth session,[21] of preparing, in the initial stage, an introduction dealing with the general principles of criminal law to be covered by the draft code; the formulation of such principles was to make it easier to draw up the list of offences. It nevertheless had to be admitted that, in confining itself for the time being to the preparation of a list of offences, the Commission did not thus far appear to have encountered any problems owing to the absence of a decision on a particular general principle of criminal law. It might even be said that it would be rather surprising to proceed to consider the general principles of criminal law relating to penalties without first identifying the offences which had to be punished and those to which such principles would apply.

52. It would be interesting to know whether the Special Rapporteur thought that it was now possible to deal with other questions raised by the preparation of the draft code and, in particular, the question of the implementation of the code. At its second session, in 1950, the Commission had expressed the view that it was both desirable and possible to establish an international judicial organ to try persons accused of offences which, under international conventions, would be within that organ's jurisdiction.[22] Although the consideration of that question involved a number of problems, which were not, incidentally, insurmountable, the study of other questions raised by the preparation of the code was probably much less problematic in view of the development of international law in that regard, the relevant conventions in force and the work carried out by the Commission itself. It had thus often been proposed that general principles of criminal law should be included in the draft code and the Special Rapporteur had begun to consider them in the introduction to his third report. It was to be hoped that those principles, or at least some of them, would be studied in depth in the next report.

53. The principle of the legality of charges and penalties or its corollary, the principle of the non-applicability of statutory limitations, was a general one that was closely related to the list of offences to be included in the draft code. The draft code adopted by the Commission in 1951[23] contained an article 5 on penalties, which read:

> The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

In the light of the comments made by a number of Governments and on the recommendation of the Special Rapporteur of the time, for whom that draft article did not properly take account of the generally accepted principle *nulla poena sine lege*, the Commission had not included article 5 in the 1954 draft code. In that connection, he pointed out that the Commission could not submit to the General Assembly a draft code that did not refer to the applicable penalties. The ideal provision in that regard would not be the above-mentioned article 5, but rather an article which, as in national penal codes, prescribed a penalty for every offence or category of offences defined in the code. That might also be the provision which, under existing international law, would prescribe the harshest penalties for all the offences defined in the code, which were the most serious of international crimes. At least for the time being, however, it was neither desirable nor possible for the Commission to formulate such a provision, particularly if it was to take account both of the principle of the criminal responsibility of individuals and of the principle of the criminal responsibility of States.

54. Accordingly, the Commission should perhaps reconsider the draft article 5 that had been deleted in 1954 only after a great deal of hesitation. That article would at least offer the advantage of enhancing the effectiveness of the code by clearly showing that the offences listed therein would not deliberately go unpunished. The fact that, under that article, the competent court would be free to determine penalties would not necessarily be contrary to the principle *nulla poena sine lege*. Where the competent court was a national court, it would apply the penalties prescribed by internal law. If an international criminal court was established and given jurisdiction to try the offences defined in the code, it might be required to apply the penalties prescribed either by existing international law, under which penalties up to and including the death sentence could be imposed, at least for crimes against peace, crimes against humanity and war crimes, or by any international instrument that was directly binding on it, such as the instrument establishing it and conferring jurisdiction on it.

55. In that connection, he recalled that the draft statute for an international criminal court prepared in 1951 by the Committee on International Criminal Jurisdiction contained an article 32 relating to penalties which stated:

> The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court.[24]

[20] *Ibid.*, p. 12, para. 96.

[21] *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 67.

[22] *Yearbook ... 1950*, vol. II, p. 379, document A/1316, para. 140.

[23] See footnote 16 above.

[24] *Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136), p. 23.

That article, which had been retained as it stood in the draft statute for an international criminal court prepared by the 1953 Committee on International Criminal Jurisdiction,[25] was almost identical with draft article 5 of the 1951 draft code. The opinion had however also been expressed that it did not take account of the principle of the legality of penalties.

56. It would be quite natural to refer to the two aspects of the principle of the non-retroactivity of criminal laws and to try to take them fully into account at the current stage in the preparation of the draft code, and in general at the current stage in the process of the formation and development of international criminal law, namely the branch of law that was taking shape as a result of international agreements and of international efforts to prevent and punish international crimes, particularly the most serious crimes, such as crimes against peace, crimes against humanity and war crimes. In that connection, it should be noted that the term *droit international pénal* had no equivalent in legal writings in English. The term "international penal law" did not exist in English. The subject-matter covered by what was usually called *droit international pénal* formed part of the branch of international law known in English as "international criminal law". In French, however, that branch of law covered offences that differed from offences under internal criminal law only in that they involved an element of extraneousness which affected the perpetrator, the victim, the place and the purpose of the offence and which gave rise to conflict of laws and jurisdiction. Such law formed part of the internal law of each State.

57. According to one school of thought, the principle *nullum crimen sine lege, nulla poena sine lege* had absolute value not only in internal criminal law, but also in international criminal law. It therefore had to be decided whether and to what extent the Commission would be able to take that principle into account in preparing the draft code. The preparation of the draft meant that the offences to be covered had to be defined as precisely as possible on the basis of conventions and other relevant instruments in order to take account of the first part of the principle, namely *nullum crimen sine lege*. It would have to be decided, however, whether a special provision should be included in order to allow for the possibility of other charges, which would be characterized as offences against the peace and security of mankind under conventions or other international instruments that would be applicable in future. That question might arise in connection with the offences which were dealt with in existing conventions and other international instruments and which, for one reason or another, would not be covered in the code, but might one day be characterized as offences against the peace and security of mankind.

58. He did not see how the Commission could take account of the second part of the principle, namely *nulla poena sine lege*, without drafting a general provision that would be similar to article 5 of the 1951 draft code. It the Commission decided to include States as active subjects of the offences provided for in the code, its task might be even more difficult. It might be better advised merely to adopt a text that would leave the competent court free to determine, in each case, which sanction or penalty should be imposed in accordance with the applicable law. A national court would base itself on the penalties prescribed by internal law, whereas an international criminal court would apply the penalties prescribed or the sanctions recognized by existing international law, which of course offered a number of useful indications in that regard.

59. With regard to the prevention and punishment of such crimes under international law, the Commission should not attach too much importance to the principle of the non-retroactivity of criminal laws, whether in connection with charges or in connection with penalties. Most writers were of the opinion that that principle of internal law should not, for the time being, be incorporated in international law. In that connection, Georges Scelle had pointed out,[26] immediately before the vote on the proposed deletion of article 5 from the 1951 draft code, that the rule *nulla poena sine lege* could apply only in a society which had reached a very advanced stage of legal organization—which was not yet true of the international community. That was why he had found it absolutely essential to give the competent court full freedom in that regard.

60. Since he himself had not yet carefully studied the text of the draft articles contained in the report under consideration, he reserved the right to refer to them at a later stage.

The meeting rose at 6 p.m.

1881st MEETING

Tuesday, 14 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

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[25] *Ibid., Ninth Session, Supplement No. 12* (A/2645), p. 25.

[26] *Yearbook ... 1954*, vol. I, p. 139, 268th meeting, para. 47.