

Document:-
A/CN.4/SR.1881

Summary record of the 1881st 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:-
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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. If 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. Laclata 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.

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

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

Draft Code of Offences against the Peace and Security of Mankind¹ (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 4⁵ (continued)

1. Mr. THIAM (Special Rapporteur) said that, in prompting a discussion on the distinction between "authorities of a State" and "private individuals" (*particuliers*), he had not expected the Commission to go beyond the context of a code of offences against the peace and security of mankind and take up other international offences. Yet several members had wondered about international offences which could be perpetrated by private individuals but which did not fall within the category of offences against the peace and security of mankind, for instance wide-scale drug trafficking. Offences of that kind were international solely because States were able to prosecute and then punish the perpetrators only by concluding agreements for international co-operation. On the other hand, offences against the peace and security of mankind were offences that came directly under international law. Too much should not be made of the distinction between "authorities of a State" and "private individuals", since all fell within the same legal category covered by the term "individuals" (*individus*). Regardless whether the offences were committed by individuals or by the authorities of a State, they were in the end always committed by individuals. On further reflection, he considered that the distinction between "authorities of a State" and "individuals" might well be left aside to some extent, more particularly because it was difficult to make in some instances, as in the case of national liberation movements, which could be both public and private in character.

2. Mr. CALERO RODRIGUES asked whether, in the Special Rapporteur's view, the code would apply only to individuals who were State agents, or whether criminal acts under the code could also be committed by individuals who were not agents of the State, in which case they too would be subject to the code.

3. The CHAIRMAN, speaking as a member of the Commission, said that he too would appreciate some clarification from the Special Rapporteur regarding the formula "authorities of a State". In English, it conveyed the idea that the reference was to organs or institutions, rather than to individuals. Actually, the intention in the code would appear to be to refer to individuals having State powers rather than to State authorities.

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.

4. Mr. THIAM (Special Rapporteur), replying to Mr. Calero Rodrigues, said that the term "individuals" might in some instances be taken to mean agents of the State and, in others, agents of the State or private individuals. By using the term "individuals" alone, the Commission retained the opportunity of considering, in each case, whether an offence could be committed only by the authorities, or by private individuals, or by both.

5. In reply to the question by the Chairman, he pointed out that the formula could in the circumstances signify only agents of the State and not institutions, otherwise account would have to be taken of the criminal responsibility of the State, something that the Commission had in fact ruled out.

6. Sir Ian SINCLAIR, after congratulating the Special Rapporteur on the quality of his third report (A/CN.4/387), said that his first major area of concern—a concern he had voiced at previous sessions and which had not been entirely dissipated—referred to the relationship between the draft code and the topic of State responsibility. It was fortunate that, at the current session, consideration of that topic would follow immediately on the debate on the draft code, so that the Commission would have an opportunity to consider carefully and dispassionately the relationship between the two topics.

7. At the previous session, the Commission had reached the conclusion—now in effect endorsed by the General Assembly—that its efforts in the context of the draft code "should be devoted exclusively to the criminal responsibility of individuals" and that "the question of international criminal responsibility should be limited, at least at the present stage, to that of individuals".⁶ He himself fully subscribed to that conclusion but found the qualification "at least at the present stage" over-cautious. The draft code must be confined to the criminal responsibility of individuals. Indeed, that limitation was forced upon the Commission by the nature of things. In a crucial passage, the judgment of the Nürnberg Tribunal had rightly stressed: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁷

8. Of course, an individual could commit an offence against the peace and security of mankind in his capacity as an agent of the State. If so, the same act for which he, as an individual, was criminally responsible might also be attributable and imputable to the State, whose international responsibility would be engaged under the Commission's parallel draft on State responsibility. But the responsibility of the State would not be *criminal* responsibility. If, for example, the offence was that of waging a war of aggression, it could be the special form of responsibility envisaged in article 19 of part I of the draft articles on State responsibility; it could, however, equally be the responsibility appropriate to an international delict if the offence did not fall within the

⁶ *Yearbook ... 1984*, vol. II (Part Two), p. 11, para. 32.

⁷ United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis*, memorandum by the Secretary-General (Sales No. 1949.V.7), p. 41.

scope of that article 19. In other words, there was no necessary coincidence between the substantive scope of the code and the substantive scope of article 19. It was vitally important to distinguish clearly between the potential criminal responsibility of the individual—including the individual acting in the capacity of an agent of the State—and the parallel responsibility of the State when the individual was acting in that capacity.

9. The Commission itself had sounded a warning on that point in paragraph (21) of its commentary to article 19.⁸ It had stressed that

... it would be wrong to identify the right-duty of certain States to punish individuals who have committed such crimes [i.e. the "crimes" described in article 19] with the "special form" of international responsibility applicable to the State in cases of this kind.

After recalling the responsibility of a State to punish individuals guilty of crimes against the peace, against humanity and so on, the Commission's commentary went on to point out that such punishment

... does not *per se* release the State itself from its own international responsibility for such acts. Conversely, as far as the State is concerned, it is not necessarily true that any "crime under international law" committed by one of its organs for which the perpetrator is held personally liable to punishment, despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned, but also as an act entailing a "special form" of responsibility for that State.

10. The Special Rapporteur had expressed some anxiety (*ibid.*, paras. 11-17) about limiting the scope of the code *ratione personae* to the criminal responsibility of individuals, pointing out that offences jeopardizing the independence, safety and territorial integrity of the State could be committed only by State entities. That was perhaps often true, but in the present strife-torn world the principal perpetrators of such offences could in certain instances be private individuals holding no official position. There had been recent cases of political exiles seeking secretly to recruit mercenaries abroad in order to secure the overthrow of the Government of a small State. He could himself think of at least one case in which private criminal elements had engaged in similar activities, fortunately without success.

11. Accordingly, he could not subscribe to the view that such offences could be committed only by the authorities of a State, nor was he convinced that genocide and other crimes against humanity could not be committed by individuals or groups of individuals. Communal violence was all too frequent a feature of modern society and the power of the machine-gun exercised by anarchic, terrorist or even religious groups had in many societies challenged, and at times even replaced, the power of the State.

12. It was for those reasons that he favoured the first alternative of draft article 2 proposed by the Special Rapporteur, while accepting that in many instances an offence might have been committed by individuals acting in their capacity as State agents. The second alternative appeared to ignore the fact

that offences against the peace and security of mankind were not always committed by State authorities.

13. Turning to the question of the definition of an offence against the peace and security of mankind, he noted that no general definition was contained in the 1954 draft code. Perhaps such a general definition was beyond the Commission's reach, but the Commission's critics in the Sixth Committee of the General Assembly and elsewhere had called not so much for a definition as for the elaboration of criteria for determining whether a proposed offence fell within the narrow category of offences to be covered by the code. The identification of such criteria would not appear to be an impossible task. In that regard, the seriousness of the offence was obviously a starting-point, and so was the concept that offences against the peace and security of mankind constituted a narrower category than did State crimes as described in article 19 of part 1 of the draft on State responsibility. That was precisely the consideration that led him to discard as unacceptable the definition proposed in the Special Rapporteur's first alternative for article 3. To equate offences against the peace and security of mankind with State crimes as described in article 19 was not only to fail to find the narrower category of offences in the broader description of so-called State crimes, but also to blur the distinction between offences against the peace and security of mankind and those so-called State crimes.

14. In that search for suitable criteria to distinguish offences against the peace and security of mankind from other crimes under international law, he referred to the reasons given by the Special Rapporteur (*ibid.*, paras. 5-9) for deferring the elaboration of the general principles governing the subject. He himself remained unconvinced by the reasons advanced by the Special Rapporteur. Articles 1, 3 and 4 of the 1954 draft code contained general principles; other general principles could be found in Principles I to V and VII of the Nürnberg Principles, as formulated by the Commission in 1950.⁹ Of course, those principles would have to be reviewed, but if the Commission proceeded in parallel with the elaboration of general principles and the drawing up of a tentative list of offences, there would be a helpful and positive interaction between the two. On the one hand, the Commission might conclude that a particular offence should not be included in the list because it fell outside the framework of the general principles; on the other hand, it might wish to consider supplementing the general principles in order to accommodate particular offences which should be included.

15. It was for those reasons that he could not follow the Special Rapporteur in his efforts to find a definition of the term "offences against the peace and security of mankind" by reference to the description of so-called State crimes in article 19 of part 1 of the draft on State responsibility. That definition, precisely because it took "as its starting-point the same approach and formulation as article 19" (*ibid.*, para. 66), ran the risk of producing intolerable confusion between the offences to be included in the draft code

⁸ *Yearbook ... 1976*, vol. II (Part Two), pp. 103-104.

⁹ See 1879th meeting, footnote 6.

under consideration and the category of State crimes under article 19. A much more fruitful approach would be to attempt to elaborate general principles at the same time as drawing up a list of offences, so that progress on the one could influence progress on the other.

16. As to chapter II of the Special Rapporteur's third report, it was clear that the waging of a war of aggression constituted an offence that must be covered by the code. The basic materials to be taken into account in formulating offences involving aggression were paragraphs (1) to (6) and possibly paragraph (8) of article 2 of the 1954 draft code, and the Definition of Aggression adopted by the General Assembly in 1974,¹⁰ a definition on which the Special Rapporteur had relied heavily in his tentative formulation of the various offences involving the commission of an act of aggression.

17. It had to be remembered, however, that the Definition of Aggression had been adopted for the purpose of giving guidance to United Nations organs competent to consider matters relating to the maintenance of international peace and security—in particular the Security Council; the question therefore arose whether that definition was altogether apt as a model for the formulation of criminal offences. Some of the provisions of the Definition of Aggression had very little to do with aggression as a crime under international law attracting the criminal responsibility of individuals. One example lay in article 5, paragraph 3, of the Definition of Aggression, which was reproduced in the first alternative of section A, subparagraph (d) (iii), of draft article 4 submitted by the Special Rapporteur.

18. A problem also arose in connection with the safeguard embodied in article 4 of the Definition of Aggression—and reproduced by the Special Rapporteur in the first alternative of section A, subparagraph (c) (viii), of draft article 4—to the effect that the acts enumerated were not exhaustive and that the Security Council might determine that other acts constituted aggression under the provisions of the Charter of the United Nations. That safeguard clause was very appropriate in the context of a definition of aggression intended to offer guidance to political organs, but it was surely quite inappropriate for inclusion in a criminal code, since it would offend against the principle *nullum crimen sine lege*.

19. One of the essential elements of a criminal code was that it should prescribe clearly and specifically the acts which, subject to any possible defence, would attract criminal responsibility. Accordingly, the 1974 Definition of Aggression could not be incorporated in the code as it stood; it would have to be examined carefully to see what adaptations had to be made to it.

20. The Special Rapporteur did not favour including preparation of aggression as a separate offence under the code. Mr. Calero Rodrigues (1880th meeting) not only shared that view but was also of the opinion that threats of aggression should be excluded

from the code. For his own part, he was not convinced by either of those arguments and his approach was rather similar to that of Mr. Reuter (1879th meeting); proof of any charge of preparing aggression would undoubtedly be very difficult, but if preparation of a war of aggression was proved, the criminal responsibility of the individuals involved should be attracted.

21. The next item on the Special Rapporteur's list was that of interference (or rather intervention, as Mr. Calero Rodrigues had pointed out) in the internal or external affairs of another State. The problem was a very difficult one. There was first of all the controversial issue whether the fomenting by the organs of one State of civil strife in another State constituted an act of indirect aggression or an unlawful form of intervention. Much would depend on whether the process whereby a State's authorities sought to foment civil strife in another country involved the commitment of its own military or paramilitary forces or of armed bands. If it did, the case might well constitute one of indirect aggression coming under the rubric of aggression and need not be specified separately. Conversely, the question would arise whether acts not possessing such characteristics should be covered by the code. He was doubtful whether that form of intervention which fell short of indirect aggression should be characterized as an offence against the peace and security of mankind, notwithstanding its inclusion in article 2, paragraph (5), of the 1954 draft code.

22. Similar considerations applied to the specification as an offence against the peace and security of mankind of the concept of exerting pressure, of taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind. That formulation was unacceptably vague as a definition of any crime, still more so of an offence against the peace and security of mankind. The principle of non-intervention was of overriding concern to small States in particular, but it should not be forgotten that there could exist forms of unlawful intervention which did not constitute offences against the peace and security of mankind.

23. He favoured, on the other hand, the inclusion of terrorist acts in the code provided that not only State-sponsored terrorism, but also other forms of terrorism were covered. In that connection, he was puzzled by the Special Rapporteur's reference (A/CN.4/387, para. 136) to the concept that the offence should be confined to State-sponsored terrorism. He could not agree with that suggested limitation. There were many instances of terrorist activities which did not directly and immediately involve the participation of the authorities of a State. The damage to the fundamental values the Commission was seeking to protect was none the less the same. From the point of view of the innocent victims of a terrorist act, the motivation of the perpetrator or the goal he was seeking to achieve were immaterial. State-sponsored terrorism was a particularly vicious offence, but terrorism in all its forms, and by whomsoever committed, surely called for condemnation as an offence against the peace and security of mankind.

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

24. With regard to breaches of restrictions upon armaments and so on, he was inclined to share the views of Mr. Jacovides and Mr. Calero Rodrigues (1880th meeting) that the matter was now largely of historical interest. He very much doubted whether a breach of such restrictions should be characterized as a separate offence to be included in the code.

25. Lastly, on the question of the establishment or maintenance of colonial domination by force, he recalled his statements at previous sessions on the dangers of formulating a penal code in terms of popular slogans. Colonial domination was such a slogan; its content was undefined and probably undefinable with sufficient specificity to qualify as a criminal offence. He accordingly joined Mr. Calero Rodrigues in appealing to the Special Rapporteur to re-examine the matter so as to produce a more precise definition of the offence he had in mind. Unless the Special Rapporteur did so, he himself would have to reserve his position on the suggested inclusion of that offence in the draft code.

26. Chief AKINJIDE paid a tribute to the Special Rapporteur for an excellent third report (A/CN.4/387) on a difficult topic, and expressed his agreement with the general thrust of the report. He was concerned about the length of time that had already been spent on the topic. The 1954 draft code, drawn up 31 years earlier, had been taken as the starting-point; but even as far back as the period between the two world wars there had been statements of principle regarding the need for codification of such a kind. He had in mind in particular the statement made by Justice Francis Biddle in a 1946 report addressed to President Truman.¹¹ The question that arose, therefore, was why had it been impossible so far to reach agreement on a draft code of offences against the peace and security of mankind.

27. Since 1954, there had been three major developments. First, there had been a dramatic change in the nature of weapons of war, a change that had had a great effect on Governments, particularly those of the super-Powers. Secondly, since 1954, almost 100 nations had attained independence. Those nations, albeit weak economically and weak in terms of weapons of war, were none the less members of the international community, and their stability was highly relevant to the subject under discussion. Thirdly, a number of treaties and other legal instruments had been adopted since 1954 by the General Assembly, the Security Council and various regional bodies.

28. As he saw it, there was little to fear from the great Powers, since what might be termed a "balance of terror" had been struck. It was most unlikely that any of those Powers would be the first to use its huge arsenals of weapons and, even if it did do so, the ensuing war would not last for more than a few hours and the world, as it now existed, would certainly be destroyed.

29. The real danger therefore lay not in a war between the USSR and the United States of America, but elsewhere, namely in the developing countries, and many of the offences suggested by the Special Rapporteur for inclusion in the draft code were of particular concern to those countries. For instance, two reports commissioned by the Security Council and relating to Benin¹² and Seychelles¹³ made it clear that the mercenaries who had invaded those countries had not been acting alone but had probably been working with foreign Governments. The Commission could perhaps profit from the experience of the authors of the reports in question. The newly independent States of Africa, Asia and Latin America—debt-ridden, famine-ridden and poverty-ridden—therefore stood to benefit more from a draft code than did the great Powers.

30. Hence it was urgent to set down the law that dealt with those new developments as soon as possible, and to take account of the weak position of the developing countries. What baffled him was why nations which voted for the resolutions of the Security Council and the General Assembly and signed the various regional agreements and treaties then proceeded to do the exact opposite of what was required of them under those instruments. In that connection, he drew attention to the compendium of relevant international instruments prepared for the topic under consideration (A/CN.4/368 and Add.1), from which members would note that, as far back as 1923, the League of Nations, in article 1 of a treaty of mutual assistance, had declared all aggressive war to be an international crime (*ibid.*, p. 13); and yet the Second World War had still taken place. The Protocol for the Pacific Settlement of International Disputes, also adopted by the League of Nations, on 2 October 1924, had asserted that "a war of aggression constitutes ... an international crime" (*ibid.*, p. 15); and the compendium contained the text of the Moscow Declaration on German Atrocities (*ibid.*, p. 29), signed by Roosevelt, Churchill and Stalin on 30 October 1943, when the Second World War had still been in progress. That Declaration had particular relevance to the role of the individual as criminal, since it made clear that the German officers and men and members of the Nazi Party who had committed atrocities would be sent back to the countries in which they had committed their crimes to be tried and punished. That warning by the Allies had in fact been ignored by the individuals concerned, who had subsequently been arraigned and brought to trial at Nürnberg and Tokyo. It was therefore very important to emphasize the role of the individual and he could not agree that superior orders should be a defence. Lastly, he noted that the compendium of relevant instruments also contained the text of the London Agreement of 8 August 1945, signed by the Allied Powers, regarding the conduct of the trial of war criminals (*ibid.*, p. 30).

¹¹ United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XV, No. 386 (24 November 1946), p. 954.

¹² *Official Records of the Security Council, Thirty-second Year, Special Supplement No. 3*, document S/12294/Rev.1.

¹³ *Ibid.*, *Thirty-seventh Year, Special Supplement No. 2*, document S/14905/Rev.1, and *Special Supplement No. 3*, document S/15492/Rev.1.

31. With regard to draft article 4 submitted by the Special Rapporteur, the first alternative of section A contained a subparagraph (b) concerning evidence of aggression and competence of the Security Council. However, he doubted the utility of involving the Security Council in the matter at all. If a permanent member of the Security Council was involved, that member could use its veto to block the matter, so that it would never reach the international criminal court; even if it was not involved, it could use the right of veto on behalf of a friendly State or ally for the same purpose. He would therefore urge that the Security Council be left out of the picture entirely, so that the issue could be decided between the two States concerned, with the international criminal court acting as arbitrator.

32. Mr. USHAKOV said that, initially, it might be desirable for the Commission to consider only chapter I of the report under consideration (A/CN.4/387), which related to the scope *ratione personae* of the draft code and to the definition of an offence against the peace and security of mankind. He would confine himself for the moment to that chapter.

33. By stating that the report would seek to specify the category of individuals to be covered by the draft (*ibid.*, para. 10), the Special Rapporteur acknowledged that the draft would apply to individuals. It was a choice that involved some drawbacks and would not fail to raise difficulties which he (Mr. Ushakov) would indicate later.

34. To begin with, it seemed essential to emphasize the need to forget for the time being part 1 of the draft articles on State responsibility, and particularly article 19.¹⁴ The fact that those texts existed could not prevent the Commission from preparing a draft code of offences against the peace and security of mankind perpetrated by individuals. When the Commission had elaborated the 1954 draft code, the concept of crimes committed by States had certainly not been widely accepted by the international community. Moreover, some offences against the peace and security of mankind had been defined in article 6 of the Charter of the Nürnberg Tribunal.¹⁵ None of that had prevented the Commission from preparing a draft code of offences against the peace and security of mankind for which individuals were held responsible. Again, one category of international offences, war crimes, which had existed for centuries, consisted of offences committed by private individuals and involved no notion of responsibility by the State. From an historical standpoint, it could be seen that offences committed by individuals could indeed be dealt with independently of offences which could be committed by States.

35. The responsibility of States and the responsibility of individuals did not have the same basis. Any offence, whether an act of a State or of an individual, included a subjective element, namely conduct, and an objective element, namely breach by such conduct of the requirements of the law. However, the elements were not the same according to whether the offence was committed by a State or by an indi-

vidual. Under article 3 of part 1 of the draft articles on State responsibility, the subjective element of an internationally wrongful act by a State was "conduct consisting of an action or omission ... attributable to the State under international law". In the case of an offence committed by an individual, the subjective element could not be an action or omission attributable to him under international law or even under a State's criminal law. So far as a State was concerned, the conduct had to be attributable to it under international law and the conduct was often that of an organ of the State, whereas in the case of an individual it was not enough to establish conduct: if the conduct was criminal it had to be accompanied by fault. Fault signified that the party concerned was in a position to appreciate his conduct; in the absence of will, or in a case of failure of will, there was no fault. When the will could be properly expressed, the fault could be the result of premeditation or of negligence. The notion of circumstances precluding the wrongfulness of an internationally wrongful act by a State had been introduced precisely because the notion of fault was not applicable to States.

36. Nor could the objective element of an offence be the same when the offence was committed by a State as when it was committed by an individual. Again, under article 3, the requirement in the first case was conduct, constituting "a breach of an international obligation of the State", something that plainly could not apply to individuals, for under internal criminal law, and even more under international law, individuals had only duties, not obligations. States agreed to assume obligations, either by custom or by concluding agreements, but individuals were subject only to the duties prescribed by law, through the State, such as the duty to render assistance to a person in danger. But individuals themselves did not incur such duties, for they were prescribed by law, and particularly by international law in the case of some crimes recognized as having a universal character.

37. A "criminal offence" by individuals—which he qualified in that way so as to distinguish it from an "administrative offence" or "administrative delict", two notions which existed in the Soviet Union—consisted of acts that could not be attributed to a State. That was true, for example, of the acts constituting an offence against the peace and security of mankind that were enumerated in article 2, paragraph (13), of the 1954 draft code; the notions of conspiracy, direct incitement, complicity and attempts existed only in internal criminal law and comparative criminal law, but they did not exist under international law in regard to an internationally wrongful act by a State.

38. Again, there was a difference between the responsibility of individuals and the responsibility of States. For the most serious "criminal offences", responsibility on the part of individuals led either to a penalty of deprivation of liberty or to the death sentence. State responsibility could entail measures of coercion, including military measures, under Chapter VII of the Charter of the United Nations: for example, a State could be deprived of some territory as a result of its international responsibility for certain

¹⁴ See 1879th meeting, footnote 9.

¹⁵ *Ibid.*, footnote 7.

offences, particularly the crime of aggression, or a State's sovereignty might be curtailed, or it might be required to take a particular measure within its own territory, but no such steps were comparable to a penalty of deprivation of liberty or the death sentence. Admittedly, some steps taken in that way against a State could be characterized as "criminal measures". However, to do so was to sow confusion, for the Commission's view was that the international responsibility of States took two forms: political responsibility and material responsibility.

39. Moreover, individuals could be held criminally responsible only under criminal proceedings consisting of pre-trial investigations, indictment and a judgment. However, no criminal or any other proceedings existed in the case of States. The concept of an offence by the State linked with an offence committed by an individual therefore had to be ruled out. Each incurred its or his own responsibility: the State for its internationally wrongful act and the individual for his own conduct, action or omission. Each was accountable for itself or himself. Indeed, that was illustrated by Principle VI of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.¹⁶ The crimes against peace enumerated therein were recognized as such, not as acts or wars of aggression by a State, but as acts by an individual. Planning, preparation, initiation or waging of a war of aggression could be viewed as the conduct of an individual but not as an offence by a State, or indeed as an internationally wrongful act by a State. Admittedly, the guilty individuals concerned might form part of a State's authorities, but the authorities could not be held guilty *en bloc*. The draft under consideration must take account of that aspect of the matter.

40. Hence, the draft under consideration should not draw on article 19 or on the other articles of part I of the draft on State responsibility, since an offence by a State and a criminal offence by an individual were two quite different things and the basis for responsibility was not the same in each case.

41. In connection with the Special Rapporteur's third report, he referred first to chapter I, section A, entitled "Delimitation of scope *ratione personae*: authorities of a State or individuals?" The title seemed ill-advised, even though it drew on article 2 of the 1954 draft code, which spoke of "authorities of a State". That expression, wrongly utilized, was taken in that draft to mean "agents of a State" or "politicians". But it was impossible to place individuals and State authorities on the same footing, to juxtapose them and compare them. One individual could be compared only with another individual. For the purposes of the draft under consideration, individuals could be divided into "agents of the State" and "private individuals" or private persons; it had been possible for some crimes to be committed by individuals only because those individuals had acted in their capacity as agents of the State. However, contrary to what was affirmed by the Special Rapporteur, that was not true in every case. Only agents

of the State could be held guilty of planning, preparing, initiating or waging a war of aggression, in other words of committing an offence against peace, for private persons would not be in a position to commit such acts. Yet the same was not true of, for example, genocide: organized groups of persons who were not necessarily agents of the State, or agents of the State acting outside their official capacity, could engage in an act of genocide—perhaps with the tacit consent or at the instigation of the State, but also in some instances against the wishes of the State, whether or not the latter effectively controlled the whole of its population throughout its territory. Hence it was possible, and sometimes necessary, to divide individuals into agents of the State and private individuals, but no comparison or parallel could be made between the authorities of the State on the one hand, and private individuals on the other.

42. He would not take up the question of general principles because the Special Rapporteur had not yet done so, and would simply comment that the general principles included in the draft under consideration should be the principles of internal criminal law, of comparative criminal law, stemming from the principle of *nullum crimen sine lege*.

43. As to the definition of an offence against the peace and security of mankind, discussed in chapter I, section B, of the report under consideration, the general, international definition of a criminal offence against the peace and security of mankind should be established not on the basis of article 19 of part I of the draft articles on State responsibility, but on the basis of comparative criminal law. Contrary to the affirmation of the Special Rapporteur (*ibid.*, para. 18), a definition of an offence against the peace and security of mankind existed, in the 1954 draft code. It was contained in article 1, which read: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished." Moreover, such offences must be recognized as such by the international community, in the light of international law. It was a definition by enumeration, and not a general definition. With regard to the French text of article 1, the expression *crimes de droit international* was not correct and it would have been better to speak, as did the English text, of "crimes under international law". Crimes by the State were *crimes de droit international*, crimes defined as such by international law, whereas international criminal offences by individuals were crimes under international law. The nuance was important.

44. It was none the less possible to give a general definition of an offence against the peace and security of mankind and to do so on the basis of the concept of a criminal offence in general: the Special Rapporteur stated in a number of passages in his report that there was not, in French criminal law for example, a definition of that kind. A general definition of a criminal offence existed in the USSR: a criminal offence was an act by a socially dangerous individual or group of individuals that, in itself, constituted a danger to society, society being viewed in that instance as the sum of all individuals. Similarly, there was a category of criminal offences of a universal

¹⁶ *Ibid.*, footnote 6.

character, recognized as such by the international community of States, or by States parties to certain agreements or treaties. Therefore it was possible to give a general definition of an international criminal offence as an act by an individual, or group of individuals, that presented a danger to mankind as a whole, such as piracy or issuing counterfeit money. An international criminal offence against the peace and security of mankind would be defined as an act by an individual, or group of individuals, which constituted a danger to the maintenance of the peace and security of mankind, a danger to the maintenance of international peace and security, and which was recognized as such by the international community.

45. Moreover, in his opinion it would be essential to specify in the future draft the persons whose responsibility could be incurred and which concrete acts by them could incur such responsibility. In that regard, he considered the second alternative proposed by the Special Rapporteur for draft article 2 unsuitable, namely: "State authorities which commit an offence against the peace and security of mankind are liable to punishment." What punishment could be meted out to the authorities of a State, as opposed to agents of the State who, within such authorities of the State, were responsible for an offence against the peace and security of mankind?

46. As to the phrase "Any internationally wrongful act ... is an offence against the peace and security of mankind", used in both the alternatives proposed by the Special Rapporteur for draft article 3, he queried whether it was possible to speak of an internationally wrongful act in the case of an individual, whether an individual could be held guilty of a serious breach of an international obligation when he had no national obligations and still less any international obligations.

47. In short, for the purpose of preparing the draft under consideration, it was impossible to draw on article 19 of part 1 of the draft articles on State responsibility, and a general definition could be given of an international criminal offence against the peace and security of mankind. Concrete offences that constituted a danger to the maintenance of peace and security of mankind, to the maintenance of international peace and security, would still have to be defined on the basis of the decisions of the international community in that matter, and on treaties which had been concluded.

48. He reserved the right to speak later on the draft articles submitted by the Special Rapporteur. In his view, the Commission should consider them one by one and, for the moment, confine itself to discussing the Special Rapporteur's proposals, without making suggestions for the incorporation of any particular offence, which would make the work even more complex.

The meeting rose at 1 p.m.

1882nd MEETING

Wednesday, 15 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. 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.

Draft Code of Offences against the Peace and Security of Mankind¹ (*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 4⁵ (*continued*)

1. Mr. MAHIOU said that with the Special Rapporteur's third report (A/CN.4/387) the Commission was taking up what might be the most difficult part of its work on the topic: the more thorough specification of concepts and definitions. As he would have to be absent, he would confine himself, although with regret, to making a few comments.

2. His first comment concerned the general approach to the topic. He always preferred an analytical, concrete approach, and in the present case he favoured the approach of trying to characterize and define offences or categories of offences so as to make concrete progress in the work. He supported the general plan submitted by the Special Rapporteur, although he was aware of the importance of the general principles. Like Sir Ian Sinclair (1881st meeting) he wondered whether the Commission could really make progress in defining and identifying offences if it did not concurrently study the question of general principles. Of course a starting-point had to be chosen, and the Special Rapporteur had preferred, for the time being, to concentrate on the definition of offences and of concepts. For his own part, he supported that position, but he would like the Commission at the same time to begin thinking about the general principles; for the parallel consideration of the definition of offences and concepts and of general principles might enable it to make real pro-

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.