Document:-
A/CN.4/SR.1884

Summary record of the 1884th 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:-
1985, vol. I

stated their views, either in favour of or against, State responsibility and the responsibility of individuals. Mr. Mahiou (1882nd meeting), for example, had explained—while in a way calling in question the Special Rapporteur's statements in paragraphs 12 and 13 of his report—that an act of aggression ordered by a head of State could engage both the responsibility of the head of State as an individual and the responsibility of the State. He had been careful not to refer to "criminal responsibility" and had indicated that it might be possible to use the term "State responsibility for a wrongful act", while Mr. Balanda (*ibid.*) had said that it might be possible to use the term "criminal responsibility of a State". He himself agreed with the comment by Mr. Mahiou, except that, in his own view, there were cases where it was impossible to make a distinction between the two consequences that the same act might have. Such a distinction might be made in the case of an act of aggression which was ordered by a head of State and which engaged, on the one hand, the responsibility of the head of State as an individual and, on the other, the responsibility of the State—which could be characterized either as criminal or otherwise. There were, however, cases where a particular act could not be attributed to any one individual: that was, for example, true of the crime of *apartheid* which could not be attributed to one or more individuals because it was committed by an entire State.

The meeting rose at 1 p.m.

1884th MEETING

Monday, 20 May 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

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

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*)

1. Mr. FLITAN, continuing the statement he had begun at the previous meeting, reiterated that in some cases offences against the peace and security of mankind could indeed only be an act by a State, but in some specific, exceptional cases, they could be "personalized" or "individualized". Generally speaking, it would be very difficult to "individualize" offences against the peace and security of mankind. In most instances, only the problem of the responsibility of the State would arise, but since the State, the State apparatus, even the leadership of the State, was a very nebulous concept, it would be very difficult, if not impossible, to identify the person or persons who might have committed an offence against the peace and security of mankind, whereas it was easy to identify a State which had committed such an offence.

2. Some people advocated excluding States from the scope *ratione personae* of the draft code, arguing that the responsibility of States would fall precisely under the draft articles on State responsibility and that the draft code should therefore deal exclusively with individuals, lest the two drafts interfere with each other and lest the autonomy of the future code be affected. In that regard he would reply that the fact that the code would define offences against the peace and security of mankind was in itself enough to establish its autonomy. Moreover, like other members of the Commission, he considered that the draft code should set forth secondary rules particular to offences against the peace and security of mankind, a matter the Special Rapporteur would have to examine in his next report. The tertiary rules need not be enunciated immediately, for the Commission would do so in due course, when the political organs of the international community, which were alone competent in the circumstances, provided guidance for the Commission in that regard. It should be remembered that the enunciation of secondary or tertiary rules had not been laid down as a prerequisite for elaborating part 1 of the draft articles on State responsibility.

3. Again, if the draft code was to apply only to individuals, how, for instance, could punishment be meted out in the case of aggression committed by a head of State, or by a State? What would the penalties be? Who would determine that the head of State, as an individual, was to be judged by a national court, an international tribunal or a political organ?

4. In his opinion, there would be two separate instruments: on the one hand, articles on State responsibility, which might take the form of a convention, a sort of general law on the matter, applying in all cases to all international crimes and delicts, including offences against the peace and security of mankind as well as delicts—which would not be covered by the code; and on the other hand, a code of

[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.

offences against the peace and security of mankind containing a definition of such offences and setting forth the relevant secondary rules.

5. He wondered whether a code of offences against the peace and security of mankind that excluded States from the scope *ratione personae* would be truly useful for mankind, for the majority of such offences were unquestionably committed by States. Some members of the Commission who were in favour of excluding States had cited as an example the Charter of the Nürnberg Tribunal,[6] which related only to individuals. There was no proper foundation for such an argument. Admittedly, the Nürnberg Charter could be used as an example inasmuch as it had been a great step forward in the progressive development of international law, but the delegations in the Sixth Committee of the General Assembly that had spoken on the draft code and the Governments that had communicated their written comments—particularly delegations and Governments convinced of the merits of the code—had been unanimous in maintaining that the future code should be an effective instrument for prevention and deterrence.

6. It had also been asserted, in support of the argument for excluding States from the scope *ratione personae* of the draft code, and in the light of internal law, that all offences against the peace and security of mankind could be "personalized" and that everyone should answer for his acts. In a case of intervention in the internal or external affairs of a State, however, who was to determine the person who had committed the offence? Was it to be a national court? The same question arose in regard to subversion, which had been proposed for inclusion in the code at the current session.

7. Sanctions, or penalties, were also a matter that posed some questions. What was the value of a sanction against an individual and what was the value of a sanction against a State? In the case of a head of State who had ordered aggression, what would be the value of the sanction taken against the head of State, and who would adopt the sanction? If the head of State disappeared, would the responsibility be extinguished or would proceedings still be taken in connection with the offence committed by the State? Needless to say, sanctions applicable to States had to be different from sanctions applicable to individuals. For instance, a State could be required to pay a fine, to place limits on a certain type of arms or restrict the numbers of its military forces. The Special Rapporteur would have to study the matter.

8. Again, he did not think that the absence of rules of criminal procedure applicable to States was enough to justify the exclusion of the criminal responsibility of States. The Commission could not find an argument to say to the General Assembly that only individuals could commit offences against the peace and security of mankind and be punished accordingly, when the General Assembly knew that usually it was States that committed offences against the peace and security of mankind.

[6] See 1879th meeting, footnote 7.

9. In connection with chapter II of the report, concerning acts constituting an offence against the peace and security of mankind, he agreed that aggression should figure first and foremost in the future code. The Commission should none the less avoid giving aggression a definition different from the one adopted by the General Assembly in 1974.[7] A straight referral to that definition would suffice. The threat of aggression certainly seemed to constitute, as did aggression itself, an offence against peace, as the Special Rapporteur concluded in his report (A/CN.4/387, para. 91). On the other hand, preparation of aggression should not be included among the offences against the peace and security of mankind. The code should include interference in the internal or external affairs of States, but the word "affairs" should not be qualified, because the distinction between internal affairs and external affairs was not sufficiently sharp. In the case of terrorism and violations of obligations assumed under certain treaties, he endorsed the Special Rapporteur's proposals. Colonial domination, an all too well-known offence, should also find a proper place in the code. With reference to mercenarism, however, account should be taken of the work being done by the *Ad Hoc* Committee on the elaboration of a convention on that question. Lastly, economic aggression should be included in the code, but the concept should be clarified in relation to aggression properly speaking.

10. With regard to the draft articles submitted by the Special Rapporteur, he could accept article 1. However, in order not to exclude State responsibility, he thought that the wording of article 2 might be altered to read: "Any perpetrator of an offence against the peace and security of mankind is liable to sanction." The word "sanction" was preferable to the word "punishment". Similarly, he favoured the second alternative of section A of article 4 and thought that, there again, in order to avoid adopting a position one way or the other, the expression "by the authorities of a State", in square brackets, should be deleted from the entire article.

11. Mr. OGISO said that the Special Rapporteur's meticulous and lucid analysis in his third report (A/CN.4/387) was yet another major contribution to the Commission's work. Noting that the Commission was required by General Assembly resolution 39/80 of 13 December 1984 to elaborate an introduction as well as a list of offences against the peace and security of mankind, he said that he had some doubts about the conclusion reached by the Special Rapporteur at the outset of his third report (*ibid.*, para. 9) to the effect that the formulation of general principles should be deferred until a later stage. The Special Rapporteur gave two reasons for that conclusion (*ibid.*, paras. 6, 7 and 9): the first concerned Principle VI of the Nürnberg Principles, which was not really a principle since it consisted of a list of acts, and the second related to the difference in scope of the various principles involved.

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

12. Apart from Principle VI, which he agreed was inappropriate, there was no other principle in his view which *prima facie* did not provide a proper basis for discussion of the general principles of the draft code. Principles I, III and IV, which had been incorporated in the 1954 draft, had a close bearing on the question of delimitation of the scope *ratione personae,* while Principles II and V were universally applicable and their inclusion in the draft code should cause no problems. There also seemed no reason why the other principles to which the Special Rapporteur referred in his report (*ibid.*, para. 9) could not likewise be considered by the Commission.

13. Even if there was a slight difference in the scope of application of all those principles—and he did not think that there was—there was no imperative reason for not considering the general principles at an early stage. Those principles, by definition, were applicable *mutatis mutandis*; and the very concept presupposed that each principle would be applied on a case-by-case basis. He therefore supported those members who thought that some of the general principles should be considered promptly, together with the acts constituting offences against the peace and security of mankind.

14. The Nürnberg Principles, however, should not provide the only basis for the Commission's work. There were other important and universally applicable principles, such as *nullum crimen sine lege*, the principle of non-retroactivity, and probably a principle concerning complicity. Delimitation of the scope *ratione personae* and the definition of offences against the peace and security of mankind could perhaps also more properly be considered in conjunction with the general principles.

15. Another important principle concerned international criminal jurisdiction, which included the régime of interpretation, application and enforcement of the draft code, and the establishment of a permanent international criminal court. It had been said that the criterion of seriousness was too vague and subjective, but as the Special Rapporteur pointed out (*ibid.*, paras. 40-48), such criticism was to some extent unavoidable. An international criminal jurisdiction was essential to ensure the objective, fair and equitable application of the code. If such a code was applied by national courts, it would very probably increase the subjective element and inevitably attract the criticism that the code was applied according to the procedure and interpretation adopted by the conqueror, or stronger party. That would be in direct conflict with the spirit of the law.

16. Since a permanent international court could not be set up immediately, some transitional mechanism could possibly be devised with a view to guaranteeing the necessary objectivity; for instance, *ad hoc* international tribunals so constituted as to reflect the opinions of different interest groups might be advisable. Alternatively, to make it clear that the establishment of an international criminal jurisdiction was the ultimate aim, States could be required to enact the necessary legislation for the trial and punishment of persons charged with offences under the code, pending the establishment of such a court.

17. For all those reasons, he was hesitant about the idea of postponing consideration of the general principles, and even considered that it might be rather dangerous to embark on the formulation of a list of offences without considering the general principles. Such principles would provide an indication of the general nature of the concept of offences against the peace and security of mankind and should therefore be discussed in parallel with the scope *ratione personae*, a definition of the offences, and the list of the offences.

18. He agreed that for the time being the draft code should be confined to offences committed by individuals. He also agreed that individuals who perpetrated offences against the peace and security of mankind were generally vested with power or authority deriving from the State. It was entirely conceivable, however, that a private individual or a group of private individuals, with considerable power and highly organized, might commit some of the offences covered by the draft code, independently of any control by the State. Indeed, numerous acts of terrorism had been carried out by such persons. There was therefore no compelling reason at the current stage to confine the scope *ratione personae* of the draft to the "authorities of a State". Also, the concept "authorities of a State" was not very easy to understand, since it could cover either an individual who held an official post or an organ of a State. Hence he would prefer the term "individuals", in order to indicate the scope *ratione personae* of the draft code.

19. The concept of an offence against the peace and security of mankind had a certain unity, but the second definition suggested by the Special Rapporteur (*ibid.*, para. 65) was perhaps too vague. He was also reluctant to adopt the wording of article 19 of part 1 of the draft articles on State responsibility.[8] The four major breaches covered by that article entailed the responsibility of the State, but not necessarily the criminal responsibility of individuals. Moreover, as the Special Rapporteur implied (*ibid.*, para. 61), the scope of offences against the peace and security of mankind should, by virtue of their extreme seriousness, be narrower than that of international crimes in general. There was no reason, however, why the Commission should not use as a basis for further discussion the three categories referred to in article 6 of the Charter of the Nürnberg Tribunal,[9] as listed in the report under consideration (*ibid.*, para. 57).

20. The vagueness of the general definition and the difficulty of clarifying the offences involved again underlined the need for an international criminal jurisdiction to implement the draft code.

21. Turning to chapter II of the report, on acts constituting an offence against the peace and security of mankind, he said that, in the absence of guidelines concerning the general principles or introduction, his comments would necessarily be of a tentative nature.

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[8] See 1879th meeting, footnote 9.

[9] *Ibid.*, footnote 7.

22. In his view, the Definition of Aggression adopted by the General Assembly in 1974[10] should be used without change. The formulation of any other definition would lead to confusion and have an undesirable effect on the relationship between the Commission and the General Assembly. It would also be impracticable to reopen discussion on a difficult problem on which the General Assembly had spent many years. In addition, since the Definition of Aggression had been adopted as a resolution and had not taken the form of a legal instrument, he considered that the format should not be disturbed and therefore preferred the second alternative of section A of draft article 4 submitted by the Special Rapporteur.

23. With regard to the "threat of aggression", inasmuch as it was unlikely that anyone would manifest an intention to commit an act of aggression, he would prefer the expression "threat or use of force", which was used in the Charter of the United Nations.

24. He agreed entirely that preparation of aggression should be omitted from the list of offences. Under the existing machinery for the maintenance and restoration of peace, a decision on whether a certain act constituted aggression was taken when the act had started, not at the stage of preparation. Preparation for aggression was difficult to distinguish from legitimate measures of defence. Those preparing for aggression could claim to be preparing their self-defence, and *bona fide* preparations for self-defence could be converted into aggression at the last moment. In any case, if an act was punishable once it had been shown to amount to aggression there would be no need to punish the same offender for the preparation of the same act of aggression. Also, pending the establishment of an international criminal jurisdiction, the inclusion of preparation of aggression would make the scope of the code even more vague and arbitrary.

25. The question of interference in internal or external affairs had already caused problems at the sixth session of the Commission, in 1954: three members of the Commission had abstained in the vote on the 1954 draft code, partly because of article 2, paragraph (9), which provided for an offence of intervention.[11] The scope of that offence had been so vague that even economic or political coercive measures not accompanied by the use of force against the potential aggressor could be construed as intervention; the new code should not be open to any such interpretation. However, as some members had pointed out, the wording used in the report was so vague that even legitimate and normal diplomatic activities could be regarded as interference. As Mr. Lauterpacht had remarked in 1954,[12] international political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another so as to influence its will; if the Commission treated legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning.

26. He was not altogether convinced that terrorism could be limited to State-sponsored terrorism directed against another State, as was suggested by the Special Rapporteur (*ibid.*, para. 126). He would prefer to regard as terrorism any act threatening the State authority or the public indiscriminately, whether or not the terrorist had a specific political aim or was State-sponsored and whether or not his acts were directed against a particular State.

27. He shared the view that, if a violation of the obligations assumed under certain treaties was to be dealt with in a separate article, the article should be confined to breaches of obligations under treaties in the field of disarmament, such as the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water; the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; the 1971 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (see A/CN.4/368, p. 108).

28. As to colonial domination, while he had no difficulty in accepting the proposed expression (A/CN.4/387, para. 158), he recognized that not all members were entirely convinced. He trusted that a generally acceptable formulation could be found.

29. Lastly, he considered that the problem of mercenarism had been settled by the Definition of Aggression in 1974. He also thought that economic aggression, as a separate item, should be omitted from the list of offences. Economic aggression was an offence if it constituted an offence under the Definition of Aggression or in the context of interference in the internal affairs of another State, provided that the concept of interference was carefully refined and bearing in mind his comments on interference.

30. Mr. RAZAFINDRALAMBO said he fully appreciated the difficult work the Special Rapporteur had been called upon to perform in preparing his third report (A/CN.4/387), a task of research to begin with, and then one of analysis to synthesize concepts of crucial importance, since the aim was to help to maintain and safeguard the peace and security of mankind. The Special Rapporteur's proposed outline for the draft code (*ibid.*, para. 4) consisted of a first part on the scope *ratione personae* and on the definition of an offence against the peace and security of mankind, which would be supplemented by general principles, and a second part containing a list of the acts constituting offences against the peace and security of mankind. The outline was a logical and familiar one, since it was in keeping with the classic division under national codes between one part setting forth the general principles of criminal law and the other part dealing with the various offences. He fully endorsed the proposed outline.

[10] See footnote 7 above.

[11] *Yearbook ... 1954*, vol. II, p. 151, document A/2693, footnote 6.

[12] *Yearbook ... 1954*, vol. I, p. 151, 271st meeting, para. 20.

31. Two questions of fundamental importance arose in connection with the future of the draft code: the persons covered, and the definition of an offence against the peace and security of mankind. On the first point, the Special Rapporteur noted, from the start of the report (*ibid.*, para. 2), that the general view which had emerged from the debate in the Sixth Committee of the General Assembly was that in the current circumstances the draft code should be limited to offences committed by individuals. The Special Rapporteur inferred that the draft code should be confined to the criminal responsibility of individuals and he was therefore proposing a draft article 2 in which the two alternatives related respectively to "individuals" and "State authorities", the latter being taken to mean individuals who performed or who ordered the performance of government decisions. Hence criminal responsibility on the part of the State, as a legal person, was excluded from the draft code.

32. Normally, the definition the Special Rapporteur then proceeded to give for an offence against the peace and security of mankind, in draft article 3, would thus be confined to acts by individuals. Yet in order to define such an offence, the Special Rapporteur reverted to the definition of international crimes set out in article 19 of part 1 of the draft articles on State responsibility.[13] For his own part, he shared the reservations expressed in that connection by several members of the Commission, and for a number of reasons. In the case of article 19, in the absence of a suitable term, the Commission had characterized an "international crime" as an internationally wrongful act resulting from a serious breach by a State of an obligation essential for safeguarding the fundamental interests of the international community. Moreover, paragraph 4 of article 19 specified that any internationally wrongful act which was not an international crime constituted an international "delict", a concept that was similar to that of "civil offence" in Roman law, as opposed to "criminal offence". Such a distinction could perhaps make for an understanding of the exact scope of an international "offence": an internationally wrongful act would be a kind, of "civil offence" as opposed to a "criminal offence", as Mr. Ushakov (1881st meeting) had rightly pointed out. The definitions in article 19 therefore applied to breaches which might, albeit improperly, be characterized as "offences", but which did not display any of the conventional characteristics of a criminal breach falling under the jurisdiction of the criminal courts.

33. His reservations about taking into consideration article 19 also stemmed from the fact that the objective element of an internationally wrongful act lay in a breach of an international obligation, which could only be a State obligation, whether its origin lay in customary law, treaty law or any other law. Article 18 of part 1 of the draft articles on State responsibility even required the obligation to be in force for the State concerned. Such requirements therefore meant that the international "crimes" covered by article 19 could be attributed only to State bodies. International law could conceivably impose obligations on individuals, but the obligations should be incorporated in the internal systems of States, for the individual was not a subject of international law. In any event, it was plain that any legal construction of the draft on State responsibility was based only on inter-State relations and left no room for the individual, except as an organ of the State, as provided for in article 5 of part 1 of that draft. Consequently, the fact that the international crimes covered by article 19, paragraph 3 (*a*), (*b*) and (*c*)—aggression, colonial domination, slavery, genocide and *apartheid*—were identical with the "crimes under international law" enumerated in the Nürnberg Principles and the offences against the peace and security of mankind listed in the 1954 draft code was not enough to warrant borrowing the definition in article 19, formulated for "civil offences", and applying it to "criminal offences". So far as that definition was concerned, the responsibility of the individual was ruled out.

34. Like other members of the Commission, he rejected any reference to article 19, but for different reasons. Even though offences against the peace and security of mankind formed only one special category of international offences that were marked by their extreme seriousness, as the Special Rapporteur affirmed, those members rejected any reference to article 19 because they could not admit criminal responsibility on the part of the State. Personally, he thought it was inconsistent to confine the draft code to the criminal responsibility of individuals and then proceed by transposition from what had been done in connection with the international responsibility of States in the case of international crimes, in other words of "civil offences". He hesitated to resort to article 19 in defining an offence against the peace and security of mankind because, in his view, a separate and independent definition of that concept was perfectly conceivable. Such a definition should contain both an intentional element and a material element, as for any criminal breach that was of some seriousness. It should not *a priori* rule out the possibility of criminal responsibility on the part of States.

35. In that regard, however, some passages of the report had sown confusion. The Special Rapporteur referred to an opinion or general trend in favour of a "minimum content" (A/CN.4/387, para. 3), in other words only the criminal responsibility of individuals. Both Mr. Balanda (1882nd meeting) and Mr. Flitan (1883rd meeting) had demonstrated that no such inference could be drawn from anything in the documents of the thirty-ninth session of the General Assembly, and more particularly in the topical summary of the discussions held in the Sixth Committee (A/CN.4/L.382, sect. B). Moreover, in resolution 39/80 of 13 December 1984, the General Assembly had invited the Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind, taking into account the results achieved by the process of the progressive development of international law. The resolution could not be interpreted as an invitation to leave aside, even provisionally, the question of applying the draft code to States themselves. Admittedly,

[13] See 1879th meeting, footnote 9.

in that resolution, the General Assembly also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the Commission's conclusions, and more particularly its intention of confining itself for the moment to the criminal responsibility of individuals. But it seemed to be widely accepted, as could be seen from the current discussion, that the various parts of the draft were interdependent. For instance, Sir Ian Sinclair (1881st meeting) had highlighted the interaction between the general principles and the identification of offences, and Mr. Riphagen (1883rd meeting) had sounded a warning against a premature definition which might well contradict the list of offences, because the future of the draft was tied in with the tertiary rules, in other words with implementation. Personally, he took the view that the concept of an offence against the peace and security of mankind depended on the content *ratione personae* of the code, namely the question whether the State could be held as a person subject to the jurisdiction of an international criminal court. If so, the elements of the offence could be perceived in a different way from offences committed by private individuals. In short, the choice was more political than legal, and one that should be of no concern to the Commission. The Commission's only duty, under the terms of its mandate, was to elaborate an introduction and a list of crimes.

36. Since members' term of office was to end in 1986, the suggestion by Mr. Francis (*ibid.*) that a working group should be set up to prepare a provisional list of the general principles and to study the relationships between article 19 and the draft code, if it met with the agreement of the Special Rapporteur, could help to dispel some of the uncertainty that the problem of the criminal responsibility of the State cast over the future of the draft.

37. As to the elaboration of the list of offences against the peace and security of mankind, which was to form the second part of the code, the Special Rapporteur was confining himself, as stated in his previous report (A/CN.4/377, para. 6), to the offences covered by the Nürnberg Principles and codified by the Commission in its 1954 draft code. The offences now being enumerated already commanded consensus, not only in the Commission, but also in the General Assembly. However, before reviewing the various offences listed by the Special Rapporteur, he wished to state that it would have been preferable for each one to be covered by a separate article, even in the case of offences that could be included under a broader heading. For example, mercenarism should form the subject of a special provision and not of a mere subparagraph in the article on aggression. Again, each offence covered by a separate article should have a special heading.

38. So far as aggression was concerned, the Special Rapporteur could define it only by drawing on the Definition of Aggression adopted by the General Assembly,[14] or by making a reference to that definition. Yet neither the comprehensive, nor the condensed alternative proposed by the Special Rapporteur in section A of draft article 4 was entirely satisfactory. The provisions relating to the role of the Security Council had no place in a legal instrument intended for application by a jurisdictional body. Furthermore, the text of the definition in question contained provisions that were political in character and covered solely acts that were acts by a State. The definition selected must be completely consistent with the provisions that were to determine the scope *ratione personae*. The remaining part—the various subparagraphs relating to the acts constituting aggression—met entirely with his agreement.

39. The threat of aggression, of which recent history afforded unquestionable examples, was generally accepted, but preparation of aggression did not seem to command unanimity. Yet preparation of aggression, like threat of aggression, had already appeared in the 1954 draft code. Technically speaking, there seemed to be no notable differences between the two acts: a threat was credible only if it went hand in hand with preparations for the use of force, since a threat was in some way the corollary to preparation for aggression and was truly felt only because of such preparation. When one State concentrated and trained troops or built landing-strips on the borders with another State, while threatening to overthrow the Government of that State, there was hardly any difference of degree between the threat of aggression and the preparation of aggression. Hence it would be logical to retain both as offences.

40. In the case of mercenarism, the Special Rapporteur simply kept it, as did the 1954 draft, as a particular form of aggression. However, since that time, the offence had formed the subject of many international instruments, in particular a Convention of OAU[15] and a provision of an Additional Protocol to the 1949 Geneva Conventions,[16] not to speak of the work now being done by the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Tying mercenarism in with aggression could well make it exclusively a State offence, but the most characteristic examples of the use of mercenaries pointed, at least in appearance, to individuals who had no official connection with an existing Government or armed groups financed by former government leaders who had been overthrown.

41. Intervention in a State's internal or external affairs was the subject of the same special provisions as in the 1954 draft code. Among the acts of "intervention", a term that was preferable to "interference", which had a more political connotation, it would be advisable to include acts of subversion, which were a masked form of intervention and were commonly practised against countries of the third world. The decisions taken by OAU bodies could help in elaborating a provision on intervention that included the concept of subversion.

42. Economic aggression could also be taken as a form of intervention in a State's internal affairs. It

[14] See footnote 7 above.

[15] OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

[16] Article 47 (Mercenaries) of Protocol I (see 1883rd meeting, footnote 16).

was a common act and one that was suffered especially by developing countries. In that connection, he drew attention to a particular case of economic aggression which had plunged one Latin American State into chaos and economic bankruptcy: the acts of a multinational corporation had provoked an insurrection of the army and the overthrow of the legitimate Government. It was therefore an offence that could be attributable to individuals.

43. State terrorism called for a particularly precise definition in order to distinguish it from terrorism by individuals, which did not constitute a breach of the peace and security of mankind. Accordingly, the text proposed by the Special Rapporteur was acceptable.

44. A State's obligations under a treaty on arms limitations or restrictions were of crucial importance because of the proliferation of nuclear weapons and the threat of such weapons to the whole of mankind. Violation of such obligations constituted an offence which required a special provision. Mention should also be made in the draft of the prohibition of certain weapons, such as nuclear weapons, without prejudice to the special provision announced by the Special Rapporteur (A/CN.4/377, para. 53).

45. Lastly, the offence of establishing or maintaining colonial domination by force was but one application of a principle generally regarded as part of *jus cogens*, namely the right to self-determination. The Special Rapporteur properly preferred to tackle the issue from the standpoint of "colonial domination" rather than from that of "self-determination", which could be invoked by separatist minorities. In the present context, the point at issue was colonial domination over an entire people, deprived of its right to national sovereignty. Furthermore, it should be emphasized that the offence historically termed colonialism could be attributed full well to groups of individuals, usually settlers without any official standing, who by force, if necessary, opposed the process of decolonization embarked upon by the Government of their own country.

46. As the Special Rapporteur had stated, the list of offences in his third report was not exhaustive. For his own part, he would refrain from discussing genocide and *apartheid*, although such offences posed the problem of the exact status of the perpetrators.

The meeting rose at 5.45 p.m.

1885th MEETING

Tuesday, 21 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

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*)

1. Mr. NJENGA said he would follow the outline proposed by the Special Rapporteur in his third report (A/CN.4/387, para. 4) and deal first with the scope of the code *ratione personae*. It was true that the criminal responsibility of a State could not be governed by the same régime as that of individuals, but that fact could not be taken to mean that the State was exempt from all criminal responsibility for acts committed by its agents in the performance of their functions. The nature and scope of most of the offences covered by the draft under study were such that the direct culpability of the State could not be avoided. In most cases, the role of the individual was that of an accomplice whose criminal responsibility arose from his acts as an agent of the State. To attribute criminal responsibility to the agent personally was fully justified, but the State itself could in no case be exonerated.

2. By their very nature, such international crimes as aggression, colonialism and *apartheid* had States as their main perpetrators, individuals becoming responsible either as such or as State agents. In his analysis of the deliberations in the Sixth Committee of the General Assembly, Mr. Balanda (1882nd meeting) had shown that the small participation could not justify the Special Rapporteur's conclusion that "the draft should be limited to offences committed by individuals" (A/CN.4/387, para. 2). Analysing the same deliberations, Mr. Flitan (1883rd meeting) had in fact demonstrated that the majority of speakers had supported the attribution of criminal responsibility to the State. In the Commission itself, the majority of members did not accept the idea of restricting the draft code to individuals and leaving the responsibility of States to article 19 of part 1 of the draft articles on State responsibility.[6] The two drafts dealt with separate topics, neither of which should be

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[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.