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Summary record of the 1885th 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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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. Laclea 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 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. 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

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.

subordinated to the other. In its report on its thirty-sixth session, the Commission had stated its intention⁷ that the content *ratione personae* of the draft code "should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments". The issue of the criminal responsibility of States thus remained very much an open question, as was indeed required by the written comments of Governments (A/39/439 and Add. 1-5), of which he cited in particular those of Botswana, Czechoslovakia, Peru and Suriname.

3. As to the definition of an offence against the peace and security of mankind, he thought that the absence of such a definition from the 1954 code did not constitute a fatal defect. Most national penal codes did not define the notion of "crime". In any case, if a definition was to be included in the draft code, it would be necessary to rework draft article 3 and identify the essential constituent elements of all the international offences against the peace and security of mankind. The first alternative proposed for draft article 3 by the Special Rapporteur appeared to rely exclusively on article 19 of part I of the draft articles on State responsibility, and that approach did not seem appropriate. For his part, he preferred the second alternative, which provided that: "Any internationally wrongful act recognized as such by the international community as a whole is an offence against the peace and security of mankind." That formulation was sufficiently flexible to cover the whole list of international crimes, while leaving room for development of the law in that field. It was necessary to specify, however, that only the most serious wrongful acts constituted offences against the peace and security of mankind.

4. He agreed with the Special Rapporteur that the expression "peace and security of mankind" was indivisible (A/CN.4/387, para. 38). He also endorsed the Special Rapporteur's test of "extreme seriousness" for determining which crimes should be placed on the list of offences against the peace and security of mankind. It was the seriousness of the violation and the importance attached by the international community to the obligation violated that should justify characterization as an offence against the peace and security of mankind. The Special Rapporteur, after observing (*ibid.*, para. 61) that all international crimes were characterized by the breach of an international obligation essential for safeguarding the fundamental interests of mankind, rightly added: "But some interests should be placed at the top of the hierarchical list. These are international peace and security, the right of self-determination of peoples, the safeguarding of the human being and the preservation of the human environment." In that context, he joined Mr. Francis (1883rd meeting) and other members of the Commission in appealing to the Special Rapporteur to include in the draft an indispensable statement of general principles, and ex-

pressed the hope that the Special Rapporteur would avail himself of the offer of assistance by an *ad hoc* working group.

5. In the list of offences proposed by the Special Rapporteur, he found it appropriate that aggression should come first. Fortunately, the General Assembly had adopted a broadly accepted Definition of Aggression.⁸ He did not agree that it was a political definition lacking legal content. Long years of effort had been required to arrive at a definition that was generally acceptable. Nevertheless, it would be preferable not to reproduce that definition verbatim, as was done in the first alternative of section A of draft article 4, because some of its provisions might not meet the purposes of the draft code. Reference had already been made to the provision on the power of the Security Council to determine whether an act constituted aggression or not. Once adopted, the code should be definitive and exhaustive, and he therefore preferred the second alternative of section A proposed by the Special Rapporteur.

6. He agreed with the Special Rapporteur (A/CN.4/387, para. 91) that the draft code should include the threat of aggression, already included in the 1954 draft, which was manifested by concrete material acts, such as the concentration of troops on common frontiers, and which, like aggression itself, could enable a powerful State to dictate to a weaker one.

7. Similarly, the acts of "planning, preparation, initiation or waging of a war of aggression", mentioned in subparagraph (a) (i) of Principle VI of the Nürnberg Principles (*ibid.*, footnote 3), were an integral part of the crime of aggression. Hence there was no reason to exclude the preparation of aggression from the code; the difficulty of proof was no justification for dropping a charge which would certainly have a deterrent effect.

8. In an increasingly lawless world in which large States used the many and varied means at their disposal to impose their will on weak emerging States, the list of offences must include the concept of interference by the authorities of a State in the internal or external affairs of another State. Acts aimed at the destabilization of other Governments, whether by fomenting civil war or any other form of internal disturbance or by economic blackmail and intimidation, must be included in the code.

9. As to mercenarism, it was important to put it in its proper perspective, stressing not only the pecuniary aspect, but also the motive of destabilizing a State. The OAU Convention for the Elimination of Mercenarism in Africa, which had been adopted at Libreville in 1977,⁹ specified in its article 1, paragraph 2, that:

2. The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who, with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practises any of the following acts:

⁸ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

⁹ See 1884th meeting, footnote 15.

⁷ Yearbook ... 1984, vol. II (Part Two), p. 17, para. 65 (a).

... In view of the role of mercenarism in the modern world, particularly in Africa, that crime should have a prominent place of its own in the draft code.

10. He could not agree that colonialism should not be mentioned because it had become past history. In fact, colonial domination in its classical form had not yet disappeared; Namibia was an example. Furthermore, a new form of colonialism had appeared: politico-economic domination which deprived newly independent States of the effective exercise of their right freely to dispose of their resources.

11. The crime of *apartheid* should also be included in the draft code, even though, as an institutionalized form of racial discrimination, it was practised only in South Africa. The definition given in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*¹⁰ was much broader. Article II of that Convention specified that:

For the purpose of the present Convention, the term "the crime of *apartheid*", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

It was clear from that provision that the crime of *apartheid* could be committed elsewhere—an important point, given the increase of racism in many countries and the growing intolerance towards minorities.

12. He would reserve until later his comments on the question of economic aggression and how the Special Rapporteur proposed to deal with it, and on the problem of breaches of certain treaties designed to ensure peace and security.

13. As to terrorism considered as an offence against the peace and security of mankind, he noted the Special Rapporteur's intention to restrict that offence to State-sponsored terrorism directed against another State (*ibid.*, para. 136). An international instrument such as the draft code under discussion could not cover all forms of terrorism, which was in any case already punishable under internal law.

14. Finally, he expressed dismay at the omission from the draft code of the gravest of all offences against the peace and security of mankind, namely the use of nuclear weapons, particularly against States which did not possess them. The Commission would be failing in its duty if it did not consider the most serious threat against the very survival of mankind posed by nuclear weapons and by the arms race carried on by the super-Powers on the pretext of safeguarding international peace and maintaining nuclear deterrence. In contravention of existing international conventions and General Assembly resolutions and declarations, that reckless arms race was now being extended to outer space, with incalculable consequences for mankind. Faced with that ominous development, the Commission surely could not remain silent.

15. Mr. THIAM (Special Rapporteur) said that, in order to prevent the discussion from going astray, he

must point out that he had never written or said that he was leaving aside the problem of State responsibility, but only that it was necessary at the current stage to confine the work to the responsibility of individuals. Moreover, in its report on the work of its previous session, the Commission had said that it intended the content *ratione personae* of the draft code to be limited, at the current stage, to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility.¹¹ Hence the Commission should no longer discuss a problem that had not been definitely set aside, but was simply reserved.

16. Moreover, at the 1882nd meeting he had asked members of the Commission to confine their comments to the offences referred to in his third report (A/CN.4/387). They should therefore refrain from speaking of war crimes and crimes against humanity, both of which were in categories separate from the only category considered in the report under consideration, that of offences against the peace and security of mankind.

17. Mr. BARBOZA said that, in commenting on the Special Rapporteur's excellent report (A/CN.4/387), he would follow the order in which the questions it dealt with were presented. With regard to the content *ratione personae* of the draft code, he thought it necessary, at the risk of delaying the debate, to revert briefly to the question of the criminal responsibility of States. In a previous intervention,¹² he had intimated that he did not find it conceptually impossible that States should assume responsibility of that kind. He appreciated the practical difficulties of the problem, in view of which some members of the Commission would prefer to leave it aside. For the time being, it would be better not to reopen a debate on the substance. As was its custom, the Commission should first seek the areas of agreement and leave until later the more controversial questions, while keeping them constantly in mind. For there was no doubt that it would be necessary, in the end, to take a clear decision on the question of the criminal responsibility of States.

18. With regard to the two alternatives proposed by the Special Rapporteur for draft article 2, the discussion seemed to show quite clearly that the text should not refer to "State authorities" but to "individuals", a term which covered both State authorities and private persons. The perpetrators of certain crimes, such as genocide, were not necessarily agents of the State. As was clear from article IV of the Convention on the Prevention and Punishment of the Crime of Genocide,¹³ that crime could be committed by Governments, public officials or private individuals. Unlike the Special Rapporteur, he believed that the purpose of the code was not solely to prevent the abuses of those vested with power. In his view, it would be desirable for the code to apply to all those who could commit offences against the peace and

¹¹ See footnote 7 above.

¹² See *Yearbook ... 1983*, vol. I, pp. 12-13, 1757th meeting, para. 11.

¹³ United Nations, *Treaty Series*, vol. 78, p. 277.

¹⁰ United Nations, *Treaty Series*, vol. 1015, p. 243.

security of mankind, as perpetrators or as accomplices. War crimes, in particular, could be committed in practice by any armed individual, from a general to a private soldier.

19. The peace and security of mankind, in the view of the Special Rapporteur, was an indivisible concept, wider than that of international peace and security. In addition to the crimes included in the 1954 draft code, the draft code that was being prepared covered some other offences. The 1954 draft had already been based not only on the principles derived from the judgment of the Nürnberg Tribunal, but also on some other concepts. But the situation had evolved since then, and the Nürnberg Principles were quite specific, relating to specific crimes. Crimes against peace were those relating to the preparation, conduct, etc. of war, and crimes against humanity, or crimes of *lèse-humanity*, were those that violated the highest human values and caused horror by their atrocity. War crimes properly so called were those that violated the usages and customs of war. In modern times, however, the notion of peace and security had become less specific and referred to a kind of international public order, and the only criterion for classifying those offences was that of their seriousness. In some systems of internal law, as was known, offences were divided into crimes, delicts and contraventions according to their seriousness. At the international level, offences against the peace and security of mankind, international crimes and international delicts were distinguished according to their seriousness. It appeared that, apart from offences against the peace and security of mankind, there were not many other international offences, it being understood that piracy, for example, had already been expressly set aside. Crimes coming under internal law, but the punishment of which required international co-operation, should not, of course, be taken into account. It therefore seemed that the proposed division might be rather unbalanced, since offences against peace and security were far more numerous than those in the other category of international offences. Perhaps it would have been better to include all international offences in the draft code.

20. The procedure followed by the Special Rapporteur in trying to give a definition of the concept of an offence against the peace and security of mankind was correct; a national legislator would not proceed otherwise in drafting a penal code. Article 19 of part 1 of the draft articles on State responsibility¹⁴ was a good starting-point, but nothing more. In his opinion, a definition should not be formulated until the outlines of the subject became clearer. The examples listed in article 19 gave only an initial idea of the offences to be included. After further examination, perhaps only some of them would be decided upon as offences and used for the definition.

21. During the discussion, which had turned on the relations between the topic under discussion and article 19, the question of the criminal responsibility of States had frequently been raised. Did that question belong to the subject-matter of parts 2 and 3 of the

draft articles on State responsibility being prepared by Mr. Riphagen? It should be noted first that article 19 of part 1 of that draft only listed a number of offences, without defining them; it did not specify what State conduct constituted the offences. Article 19 only indicated that certain forms of State conduct, which violated certain obligations, were to be considered, having regard to their consequences, as particularly serious and characterized as "crimes". In the draft articles of part 2 prepared by Mr. Riphagen, the wrongful acts were not defined; only their consequences were dealt with. Logically speaking, the Commission should confine itself to saying that, in the case of State conduct considered by the international community as a whole to constitute an international crime, such conduct would have such and such consequences. That, moreover, was the course Mr. Riphagen had tried to follow in the draft articles submitted in his fifth report (A/CN.4/380).¹⁵ According to article 5, subparagraph (e), the expression "injured State", in the case of an international crime, meant any State suffering injury. According to article 14, an international crime entailed all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as were determined by the applicable rules accepted by the international community as a whole. Those rules, however, were not stated in the article, the purpose of which was not to formulate them. It was then stated that an international crime committed by a State entailed an obligation for every other State not to recognize as legal the situation created by such a crime; not to render aid or assistance to the State which had committed such a crime in maintaining the situation created by it; and to join other States in affording mutual assistance in carrying out the obligations previously specified.

22. So far, the draft code in preparation dealt only with part 1 of the secondary rules. For penal rules did not describe primary obligations, but the conduct which constituted breaches of them. They were not drafted in terms such as "Thou shalt not kill", but in terms such as "Whosoever kills another person is liable to the penalty of imprisonment". Thus a penal rule was a typical secondary rule. So far, the draft had been confined to describing criminal violations. If the Commission did not provide for the criminal responsibility of States in the draft code prepared by Mr. Thiam, and if it did not adopt provisions sanctioning the conduct of States, that task would not devolve on Mr. Riphagen as Special Rapporteur for the topic of State responsibility. It would then be necessary either to prepare a third set of draft articles, if the international community considered that necessary, or to abandon the task altogether.

23. The example given by Mr. Mahiou (1882nd meeting) showed that, under internal law, a crime committed by an official in the performance of his functions could have consequences both in criminal law and in administrative law. The reason why he had given that example was to show that in international law the conduct of an individual could also give rise to double responsibility: that of the indivi-

¹⁴ See 1879th meeting, footnote 9.

¹⁵ See 1890th meeting, para. 3.

dual and that of the State. If the draft code dealt only with the criminal responsibility of individuals, to the exclusion of that of States, an act of aggression committed by a head of State would engage only his individual criminal responsibility. But for the State in question that act would also entail consequences relating to civil responsibility. Under article 14 of part 2 of the draft on State responsibility, that act would be attributed to the State with all the consequences deriving from the commission of an internationally wrongful act, as enumerated in draft article 6 of that part. Civil responsibility was mainly concerned with reparation for the injurious consequences of a wrongful act. But if the principle of criminal responsibility of a State was laid down in the draft code, certain conduct might be attributable both to a State and to an individual. But then the responsibility of the State would not be an indirect responsibility, as it was in internal law. The conduct could give rise to a double criminal charge, against an individual and against a State, and to double responsibility. He was not opposed to that possibility, which was not inconceivable in law, but wished to draw the Commission's attention to it.

24. He was surprised that the question of the formulation of general principles should have given rise to so much discussion. The Commission had before it a list of general principles derived from the Charter and Judgment of the Nürnberg Tribunal, some of which seemed incontestable. On the basis of that list it should be able to identify a certain number of offences, but would probably find it very difficult to formulate all the applicable principles precisely without knowing exactly what offences would be included or whether the criminal responsibility of States would be taken into consideration. The Commission should follow its usual method, which was to start from preliminary general ideas and then consider the concrete situation, before reverting to general considerations and trying to identify general principles. It should therefore begin by specifying the offences to be included, while bearing in mind the problems raised by the definition of offences against the peace and security of mankind, the formulation of general principles and the consideration of the criminal responsibility of the State.

25. The considerations he wished to put forward concerning the acts constituting offences against the peace and security of mankind were only of a preliminary nature. With regard to aggression, the discussion had shown that the Commission should not adopt the second alternative proposed by the Special Rapporteur for section A of draft article 4, which contained only a reference to the Definition of Aggression adopted by the General Assembly.¹⁶ Not only should the text of that Definition be reproduced, but it should also be adapted to the situation created by the fact that the criminal responsibility of individuals was being considered. In his view, aggression was the typical example of a crime which only States could commit, to the exclusion of individuals; but, at the same time, certain individuals could be held responsible for it. It was therefore necessary to describe

the conduct of the State, not of State authorities, and to attribute responsibility to individuals whose conduct corresponded to the act of the State.

26. At the beginning of the first alternative of section A of draft article 4, the words "The commission [by the authorities of a State] of an act of aggression" should be replaced by the single word "Aggression", subparagraph (a) remaining unchanged. With regard to subparagraph (b), which dealt with evidence of aggression and competence of the Security Council, it had been rightly observed that the Security Council was a political, not a legal body, and that its competence should not be relied upon for the characterization of an act of aggression. It was for the judge to determine whether an act of aggression had taken place. In subparagraph (c) (viii), it was provided that it was the Security Council that could characterize as aggression acts other than those enumerated in draft article 4. That provision had provoked the same objection to the Security Council; on the other hand, if a competent court existed, it could not be excluded from making such a characterization, especially as in doing so it would not be violating the principle *nulum crimen, nulla poena sine lege*, provided that the act that was being judged fell under the general definition of aggression, even if it was not one of the acts expressly referred to in the Definition adopted by the General Assembly. Subparagraph (d), entitled "Consequences of aggression", began by stating an interpretative criterion rather than a true consequence of aggression: "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". That criterion, which could be applied by a court, certainly had no place under that heading. It suggested the notion of preventive aggression. It was then specified in subparagraph (d) that a war of aggression was a crime against international peace and security and that aggression gave rise to international responsibility; that was perfectly acceptable, although it should be stated who would be the subject of international responsibility. Finally, subparagraph (d) provided that no territorial acquisition or special advantage resulting from aggression was or should be recognized as lawful—a matter that might be treated as part of the topic of State responsibility, for which Mr. Riphagen was Special Rapporteur. Subparagraph (f), on interpretation of the articles, might not be necessary, since it provided for a perfectly normal technique for the interpretation of treaties.

27. The threat of aggression, dealt with in section B of draft article 4, should be included in the draft code, since it constituted a very serious crime which disrupted the international public order and threatened international peace and security. The preparation of aggression and preparatory measures for aggression had a place in the draft code only in so far as they could be proved. While it was true that it was often difficult to establish the existence of the preparation of aggression in the sense of a more or less theoretical planning, the same did not generally apply to material preparations, which did not constitute aggression, even though they were also a very serious offence.

¹⁶ See footnote 8 above.

28. With regard to interference in the internal or external affairs of another State, he agreed that among such acts there were those that were more or less serious, and that it was difficult to distinguish between the internal and the external affairs of a State. The formulation proposed by the Special Rapporteur in section C of draft article 4—mention of interference followed by examples, such as the fomenting of civil strife—provided a good starting-point and gave an idea of the degree of seriousness which the interference must have if it was to be characterized as an offence against the peace and security of mankind. He thought it would be possible to include a general definition of interference, such as that given in article 18 of the Charter of OAS,¹⁷ which incidentally had been drawn on in the Definition of Aggression adopted by the General Assembly, and which contained important elements. Under the terms of that Definition, any attempted threat against the personality of the State or against its political, economic or cultural elements constituted interference. In other words, in order to be characterized as an offence against the peace and security of mankind, interference must affect the constituent elements of the personality of the State.

29. Among the acts having the character of interference in the affairs of another State, the Special Rapporteur mentioned terrorism directed against a State at the instigation of another State. That was justified, but it was equivalent to leaving aside the terrorism that might not be secretly instigated by a State but that was nevertheless to be universally condemned because of the horror inspired by its methods. The question therefore arose whether terrorism should be included in the category of acts constituting interference in the affairs of another State, or whether the Commission should make it a separate offence against the peace and security of mankind, especially as terrorism was already the subject of international conventions, as Mr. Njenga had pointed out.

30. The same applied to mercenarism, although it might well be said that a separate mention was necessary, since mercenary action could succeed in destabilizing small, weak countries.

31. As to breaches of obligations under certain treaties, they went back to a historic event—the violation of the 1919 Treaty of Versailles by Germany. But it was also a contemporary problem or one that might arise in the future: there existed multilateral treaties providing for the demilitarization of certain zones or countries, as well as bilateral ones, such as the Treaty on territorial delimitation concluded between Argentina and Chile in 1881,¹⁸ article V of which provided for the permanent neutralization of the Straits of Magellan, and there also existed agreements establishing peace zones or denuclearized zones.

32. Lastly, the forcible establishment or maintenance of colonial domination should be included in the future code in that formulation, which was pref-

erable to “violation of the right to self-determination”, since the term “self-determination” could cover secessionist aspirations or the machinations of countries wishing to maintain one or other of the various forms of colonial situation.

33. Mr. McCAFFREY complimented the Special Rapporteur on his third report (A/CN.4/387) and on the trenchant manner in which he had dealt with the difficult issues involved. Referring first to general principles, he said he felt bound to express serious reservations about the viability of the topic. That was no reflection on the Special Rapporteur, but was inherent in the subject. It was extremely doubtful whether States would be able to accept a draft code of the type envisaged, for a number of reasons, including the vague and indefinite nature of many of the offences contemplated and the lack of any mechanism for implementing the code. Those two considerations interacted inasmuch as, without a universally accepted criminal tribunal and a set of procedures to implement the code, what was left was universal jurisdiction and the “obligation” to prosecute or extradite. Very few States would feel comfortable with, and therefore be able to accept, universal jurisdiction to try and punish offences that were so loosely defined as to vest a largely unfettered discretion in any State happening to lay hands on a hapless alleged perpetrator. Moreover, the less precise the definition of the offences and the less sure the means of implementation, the less effective would any code be as a deterrent, which was one of the prime functions, if not the prime one, of a system of criminal law.

34. He approved of the outline for the future code proposed by the Special Rapporteur (*ibid.*, para 4), but considered it necessary for the Commission to work on general principles at the same time as on the offences themselves, if not before the elaboration of a list of offences. As he had already had occasion to say, he found it difficult to see how the acts or practices to be covered by the code could be identified without any criteria for such identification other than the vague standard of seriousness. General principles should cover matters such as an indication of the manner in which the code was to be implemented, the availability of defence, and the types of punitive consequences that a tribunal might impose, failing which it would be very difficult to evaluate the candidates for inclusion in a list of offences. It would also be very difficult for States to accept the different offences, since they would in many respects be signing a blank cheque.

35. While he sympathized with the Special Rapporteur's view that it was difficult to list general principles at the current stage, the Commission would none the less be greatly assisted if it had at least a provisional set of principles on which to base its work, which could be revised as and when necessary. Indeed, the Special Rapporteur had already started on the difficult task of formulating a set of principles, since he examined (*ibid.*, paras. 7 and 9) some of the questions that would have to be faced. As Mr. Ogiso (1884th meeting) had pointed out, the principles referred to in those two paragraphs could serve as a valid basis for discussion along with the Nürnberg

¹⁷ United Nations, *Treaty Series*, vol. 119, p. 3.

¹⁸ C. Parry, ed., *The Consolidated Treaty Series*, vol. 159 (1881-1882) (Dobbs Ferry (N.Y.), Oceana Publications, 1977).

Principles—apart from Principle VI—and other universally recognized principles. The question that arose, however, was what was the nature of the evidence required, in both quantitative and qualitative terms, to support the inclusion of a particular notion in the list of general principles. For instance, in the case of the principle of the non-applicability of statutory limitations, referred to in paragraph 9 of the report, there was at least one form of empirical evidence available which suggested that that principle was not universally accepted. That evidence was to be found in the fact that, as could be seen from the compendium of relevant international instruments (A/CN.4/368/Add.1, p. 4), only seven out of 51 African States, four out of 40 Asian States, two out of 33 Latin American States and no Western European or other States had become parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Furthermore, while a case could be made out to show that universal jurisdiction and the notion that a State must either extradite or prosecute had been accepted by a number of States so far as piracy and hijacking were concerned, it was by no means clear that those principles were generally accepted in the case of any—let alone all—of the offences under discussion by the Commission. Again, the question arose: what should be required as evidence of the general acceptance of such a principle?

36. On the matter of general principles, therefore, he would conclude by encouraging the Special Rapporteur to pursue his efforts to elaborate at least a provisional working set of general principles for consideration by the Commission at an appropriate early stage.

37. Commenting on chapter I of the report, he first expressed his general agreement with the Special Rapporteur's conclusions concerning the scope *ratione personae* of the draft code. For reasons developed at length at the thirty-fifth and thirty-sixth sessions of the Commission, he believed it would be a mistake to seek to make States subject to the code. That did not mean, however, that States should be absolved from responsibility duly incurred for acts committed by their officials, in so far as the State concerned was involved in such acts. Rather, there were different régimes of responsibility for individuals on the one hand, and States on the other, and the draft code should be concerned with the régime governing individuals. As noted in the topical summary of the discussion in the Sixth Committee of the General Assembly at its thirty-ninth session (A/CN.4/L.382, paras. 20-21), a number of representatives had agreed that the scope of the draft code should be confined to individuals, at least provisionally; certain other representatives had even gone so far as to say that a principle of criminal responsibility of States did not exist in international law—a view which he shared.

38. The difficulty of determining the appropriate penal consequences for States, together with the dubious acceptability of such consequences for the international community as a whole, reinforced the soundness of the decision to exclude States from the scope of the code. An added reason for their exclu-

sion was that, if they were included, the draft code might interfere—if not be frankly inconsistent—with the mechanisms established under Chapter VII of the Charter of the United Nations.

39. He agreed with the position taken by the Special Rapporteur (A/CN.4/387, para. 17) that it was mainly acts by individuals who wielded power that the draft code sought to deter. He recognized, however, like Mr. Reuter (1879th meeting), that some groups, such as those involved in drug trafficking, could produce effects similar to those which the draft code was intended to prevent. The subject merited further study and it would be useful to obtain the views of Governments.

40. He agreed broadly with the position that the concept of the peace and security of mankind was a unitary one (A/CN.4/387, para. 38), and he welcomed the Special Rapporteur's careful examination of what was a threshold issue to be dealt with before the Commission further refined the criteria. Although it was too early for him to offer an informed opinion on the statement that all the offences were "marked by the same degree of extreme seriousness" (*ibid.*), *prima facie* it seemed to him to be questionable.

41. The Special Rapporteur's analysis of the difficult conceptual issues raised by the notion of an offence against the peace and security of mankind (*ibid.*, paras. 40 *et seq.*) showed the difficulty of the task that lay ahead. The Special Rapporteur had pointed out that many of the available criteria were essentially subjective, and that was certainly true of the notion of seriousness. For his own part, however, he was not convinced that it was also true of the requirement, under article 19 of part I of the draft articles on State responsibility,¹⁹ that an international crime must be recognized as such by the international community as a whole. In many cases such recognition could perhaps be established by an empirical analysis of State practice, as revealed mainly by the ratification records of the principal international instruments relevant to the offences in question. In so far as the term "subjective" was used to refer to the attitude of States as revealed by their practice, he agreed that such recognition was a subjective element.

42. As to the relationship of article 19 to the draft code, he did not believe that the criminal responsibility of the State existed as such under international law, especially as there was no definition of, let alone agreement on, the consequences of the so-called "crimes". However, taking article 19 to refer to a category of especially serious internationally wrongful acts, he believed that there was some relation between the criterion for identifying such acts and that for identifying offences against the peace and security of mankind, in that the act or practice in question had to be recognized as an offence against the peace and security of mankind by the international community as a whole. Beyond that, however, he saw very little connection between article 19 and the draft code. That was particularly true of

¹⁹ See 1879th meeting, footnote 9.

many of the examples listed in article 19 and the manner in which they were described, which was much too vague to comply with the maxim *nullum crimen sine lege*. Moreover, the draft code, as currently defined, did not deal with all international crimes, but only with the most serious. For all those reasons, he would prefer a general and flexible definition on the lines of the second alternative proposed for draft article 3.

43. With regard to chapter II of the report (Acts constituting an offence against the peace and security of mankind), he was not at all sure that the 1954 draft code provided a sound basis for the Commission's work. That code had been controversial in 1954 and the passage of time had not rendered it, nor indeed the whole concept of a draft code of offences against the peace and security of mankind, more acceptable to States. Much had been made of his country's early involvement in the effort to produce such a code, but by 1954 it had become evident to many countries, including the United States of America, that such an instrument did not accord with the realities of the post-war world. The 1954 code had not been received with open arms, as was apparent from a statement made by Mr. Charles H. Mahoney, the United States representative in the Sixth Committee of the General Assembly, in 1954. Explaining his vote on a draft resolution on the draft code, Mr. Mahoney had said that the United States considered that the formulation of a draft code of offences under international law was inappropriate and that differences of view among Governments on important matters of international obligation rendered impossible the development of a meaningful international criminal code applicable to individual persons.²⁰

44. A similar cautionary note should perhaps be sounded in regard to the Nürnberg Principles, which should be assessed in the factual context in which they had been developed and having regard to the manner in which they had been applied in specific cases. On the facts, the Nürnberg Tribunal had remained within the confines of what could truly be said to be universally recognized crimes that were not only *malum in se*, but were also of the most horrific character. Detached from their factual context, the Nürnberg Principles did not have that specific character. That caveat was borne out by General Assembly resolution 95 (I) of 11 December 1946, which reflected an endorsement of the principles under the special circumstances rather than a blanket endorsement of abstract principles for all purposes. Hence it was not possible simply to transplant the Nürnberg Principles or the 1954 draft code into the draft under consideration without taking account both of the context in which those instruments had been elaborated and of the fact that, when drafted, neither had been accepted as having application in all circumstances and for all time.

45. A second general point, to which he had already referred, concerned the nature of the evidence, both qualitative and quantitative, required to establish that a given act or practice amounted to an offence

against the peace and security of mankind in the eyes of the international community as a whole. Care was needed in evaluating State practice in that regard, lest the project be stillborn, just as in the case of the 1954 code.

46. A third general point was that, inasmuch as for the time being the subjects of the draft code were individuals, it seemed appropriate to refer to the International Covenant on Civil and Political Rights,²¹ and specifically to its article 15. According to the standards set out in that article, there were three criteria for basing individual criminal responsibility on general principles of law: (a) the principle must have been established when the act was committed, which was indicative of codification rather than of norm-creation; (b) there must be universal consensus in regard to the principle; (c) the act or practice in question must be of a *malum in se* character such that its criminal wrongfulness was evident even to the average person.

47. Thus, in identifying acts that constituted an offence against the peace and security of mankind, evidence of actual custom and practice was required. A comparative study of municipal criminal law would seem indicated, to determine what constituted actual custom and practice; it would be interesting, for example, to carry out research into the municipal military law of different countries on the defence of superior orders. The main point, however, was that great care should be exercised in drawing up a code of offences of the magnitude of those involved; in that connection, he endorsed the Special Rapporteur's statement concerning the coercive nature of criminal law and its strict interpretation (*ibid.*, para. 131).

48. Of the specific acts listed for inclusion in the draft code, aggression, which was the most fundamental of the offences against the peace and security of mankind, should definitely have a place. While he understood the reasons for the Special Rapporteur's suggestion that the full text of the Definition of Aggression adopted in 1974²² should be incorporated in the code, that approach raised several problems. In the first place, that definition had been developed for the guidance of the political organs of the United Nations and it was extremely doubtful that it would be appropriate for use in the context of criminal proceedings, mainly because of the vagueness of its language and because some of its provisions were simply inapposite. Secondly, the use of the Definition of Aggression raised questions regarding the role of the Security Council in regard to the draft code. Possibly the Security Council should have a role when only individuals were concerned, but that involved the question of implementation, which had not yet been explored. Thirdly, great care must be taken not to interfere with the Definition of Aggression or to open the door to attempts to use the draft code as a means of circumventing the mechanism provided by the Charter of the United Nations, particularly in Chapter VII. Subject to any decision taken regarding implementation, a possible third

²⁰ *Official Records of the General Assembly, Ninth Session, Sixth Committee, 425th meeting, para. 46.*

²¹ United Nations, *Treaty Series*, vol. 999, p. 171.

²² See footnote 8 above.

alternative for section A of draft article 4 might be: "The commission of an act of aggression as determined by the Security Council pursuant to General Assembly resolution 3314 (XXIX) of 14 December 1974."

49. In his view, the threat of aggression should not be included in the draft code. It was extremely difficult, if not impossible, to determine exactly what amounted to a threat of aggression. For instance, would the test be a subjective one? Would an overt act be required as evidence of a threat, and, if so, how would such a threat be distinguished from defensive conduct by a small or weak State? Must the threat of aggression be imminent? Must there be a clear and present danger that the threat would be carried out? None of that should be taken to impugn the prohibition of the threat or use of force laid down in Article 2, paragraph 4, of the Charter, which was a norm that served different purposes and had its own implementation procedure. The drafting of that provision had not required the same precision as a code which was to be used for the criminal prosecution of individuals.

50. Similar considerations applied to the preparation of aggression, which he agreed should not be included in the draft. As pointed out by the Special Rapporteur in his report (*ibid.*, para. 100), nearly all nations engaged in preparations to use armed force for defensive purposes, and it would be virtually impossible to prove that such preparations involved plans for aggression. It might be possible to envisage making preparations criminal when, and only when, an act of aggression had been committed, in which case threats and premeditated preparation could constitute aggravating circumstances.

51. Interference in internal or external affairs should not be included either, unless more precise wording could be found, which seemed doubtful. He agreed with the Special Rapporteur (*ibid.*, para. 119) that the distinction between the internal and external affairs of a State was now antiquated. As to coercive measures of an economic or political nature, which apparently did not involve the use of force, they did not rise to the level of an offence against the peace and security of mankind. "Coercion" was a vague term, with implications ranging from subtle forms of non-violent influence to armed aggression. It could even be interpreted to outlaw diplomacy and *inter alia* the withholding of benefits, restrictions on exports of strategic goods and on exports of or access to natural resources, conditions imposed by international lending institutions, and import quotas. Such measures had always been regarded as legitimate means of diplomacy and should, if anything, be encouraged as non-violent means of making a political point or expressing displeasure *vis-à-vis* another State. Care should be taken not to do anything that would deprive States of the opportunity of having recourse to those peaceful measures.

52. "Economic aggression" was a puzzling term. In the case of aggression as defined in the Definition of Aggression, or as ultimately defined in the draft code, the motives seemed irrelevant. But if the use of force or violence was not involved, there was no "aggression", and his remarks on economic coercion ap-

plied. If it could be proved that the sole motive for the use of economic coercion was the destruction or absorption of an existing State, the use of economic measures for that purpose would be unlawful. It would, however, be extremely difficult to prove and would be of such rare occurrence as not to warrant the inclusion of the offence in the draft code.

53. Terrorism should of course be included and, while he agreed that the code should be concerned primarily with State-sponsored terrorism, he also considered that, at the current stage, terrorist acts committed by private groups which interfered with interests protected under the code should not be excluded.

54. His main difficulty with violations of obligations under certain treaties was that not every violation of one of those treaties would amount to a criminal offence, and that it was very difficult to define those that would. Possibly, a perceived imminent threat of aggression could justify measures taken in the exercise of a legitimate right of self-defence, such as those contemplated in section E of draft article 4. To label such acts as criminal *a priori*, therefore, would not appear to be well advised.

55. As to colonial domination, he would prefer not to use the words "colonialism" or "colonial", which had a primarily historical connotation, and, since they did not accurately describe the practice the code sought to proscribe, ran foul of the principle *nullum crimen sine lege*. It would be more accurate to use wording that described the phenomenon involved, namely subjection of a people against its will to alien subjugation, domination and exploitation, in violation of that people's right to self-determination. Such wording would be more precise and also more capable of application in criminal proceedings.

56. He agreed that "mercenarism" could be covered by "aggression", but would reserve his position pending further refinement of the latter offence.

The meeting rose at 1.05 p.m.

1886th MEETING

Wednesday, 22 May 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Laclea 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.