

Document:-
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Summary record of the 1886th 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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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.

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. YANKOV said that the Special Rapporteur had once again displayed outstanding competence in dealing with the difficulties inherent in a highly political topic. One of the undoubted merits of his third report (A/CN.4/387) was that it served as a catalyst for the rich debate at the current session. As to the conceptual approach and methodology advocated by the Special Rapporteur, the outline for the future code as proposed in his third report (*ibid.*, para. 4) would provide an appropriate working hypothesis for the Commission's deliberations, although the elements of that outline were not exhaustive. The Special Rapporteur should also have the necessary flexibility to proceed with his study and introduce such modifications as he might find necessary.

2. The Special Rapporteur had raised the issue of the inclusion of general principles as a conceptual and legal foundation for the draft code. Thus far, no one had disputed the need for such principles and the only question now was the point at which it would be appropriate to formulate them. While some members agreed with the Special Rapporteur that it would be difficult to list the general principles at the current stage, others had emphasized the need to consider the general principles as soon as possible, matching their formulation with the elaborating of a list of offences against the peace and security of mankind. For his own part, he considered that, inasmuch as a tentative list of offences had been proposed and considered by the Commission and by the General Assembly, an attempt should be made to indicate general criteria governing the notion of offences against the peace and security of mankind and to formulate the general principles relating to those offences on a preliminary basis. That interplay between general principles and specific offences could prove very useful and should be maintained throughout the elaboration of the draft code. There were already a number of ground rules which might be relevant for the purpose, such as the general principles of penal law, the provisions of articles 1, 3 and 4 of the 1954 draft code, the Nürnberg Principles, certain elements of the draft articles on State responsibility, and possibly also State practice, as evidenced by treaties and United Nations practice.

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.

3. With regard to the delimitation of scope *ratione personae* and, specifically, the position of individuals, the Special Rapporteur might further elaborate the main categories of individuals, namely individuals as agents of the State and individuals as private persons, acting as a group or individually, who could commit offences against the peace and security of mankind. The question was whether an individual could be the principal or only perpetrator of offences against the peace and security of mankind—a question the Special Rapporteur had answered in the negative in the case of all offences that jeopardized the independence, safety or territorial integrity of a State (*ibid.*, paras. 12-13). The Special Rapporteur had given two reasons for that view: first, the magnitude of the means involved and, secondly, the need to be vested with a power of command or, in other words, with State authority. Although justified as a general rule, that conclusion was somewhat too categorical and failed to take account of certain cases where it was possible for groups of private individuals to commit offences against the peace and security of mankind. In defining the scope of the draft code *ratione personae*, due account had to be taken of such cases, for otherwise they might unjustifiably remain outside the scope of offences against the peace and security of mankind.

4. The question of the international criminal responsibility of individuals and of States was an aspect of the scope of the code *ratione personae* that had been under discussion since the commencement of the study. For practical reasons, the Commission had concentrated on the international criminal responsibility of individuals and had left aside for the time being the question of the criminal responsibility of States and State entities, on which substantial differences of opinion persisted. His own view was that the principle of the criminal responsibility of States did not exist in international law, given the very nature of the contemporary system of international relations, which was based essentially on sovereign States. There was no equivalent international system to serve as a basis for the operation of a viable régime governing the criminal responsibility of the State.

5. The problem was not only that of the penalties and procedural rules which would be applicable to States, but also that of the nature and structure of the contemporary system of international relations and international law as essential components of the international system as a whole. There was of course no question whether the same penalties could be imposed on States and on individuals. Obviously, a State could not be imprisoned, although it could be abolished by the action of Governments; there had been many instances throughout history of States which had disappeared, been partitioned or subjected to severe sanctions with social and economic implications. Rather, the question was whether the structure of the international community as it existed allowed for sanctions other than those provided for under the Charter of the United Nations or established State practice and, if so, whether the results in terms of the functioning of the sanctions would be the same. International law was a law of co-ordination, unlike internal penal law, which was a law of subordination, and the rules of the former derived

not from the will of a single State, but from the co-ordinated will of States. Nor could there be any question of a progressive approach versus a conservative approach, since the progressive development of international law was also based on the co-ordinated will of States. Members of the Commission might, as private individuals, advocate that there should be a criminal responsibility of States, but it was always necessary to take account of how States themselves would react.

6. The non-existence of the principle of the criminal responsibility of States did not mean that States could not, as subjects of international law, be punished for internationally wrongful acts, including international crimes. For instance, article 5, paragraph 3, of the Definition of Aggression⁶ stipulated that territorial acquisition resulting from aggression should not be recognized; article 14 of part 2 of the draft articles on State responsibility embodied the same principle of the non-recognition of a situation arising out of a crime; and other sanctions were available under Chapter VII of the Charter of the United Nations. The problem, therefore, was not whether there would be a lacuna in the international legal order but, rather, what was the most appropriate way of dealing with States that had committed international crimes. The criminal responsibility of individuals, whether State agents or private persons, would thus be governed by a separate régime based on the draft code. The draft articles on State responsibility, including article 19 of part 1 of that draft,⁷ would in fact help considerably in making a clearer distinction between the main elements of the criminal responsibility of individuals and of the responsibility of States for internationally wrongful acts, including international crimes.

7. There would thus be two distinct yet parallel régimes: the régime of the criminal responsibility of individuals for offences against the peace and security of mankind, and the régime of State responsibility for internationally wrongful acts, including offences against the peace and security of mankind. There was no criminal act of a State or of a State organ that could not be committed by individuals acting as the agents of that State and there was no act of a State organ, acting in that capacity, which could not be attributed to that State. There was, of course, a difference between the scope *ratione materiae* of the topic under consideration and that of article 19 of part 1 of the draft articles on State responsibility, in other words between offences against the peace and security of mankind and international crimes and delicts. As the Special Rapporteur rightly pointed out (*ibid.*, para. 45), offences against the peace and security of mankind constituted a "special category of international crimes".

8. He particularly welcomed the fact that the Special Rapporteur had raised the question of the unity of the concept of offences against the peace and security of mankind. Despite the semantic distinction, the two notions had always been regarded as

indivisible in the context of the Charter of the United Nations and other international instruments. The proposition postulated by the Special Rapporteur to the effect that the peace and security of mankind had a certain unity that linked the various offences (*ibid.*, para. 38) could therefore prove very useful in ensuring clarity.

9. In analysing the subjective and objective aspects of the main criteria for the definition of an offence against the peace and security of mankind, the Special Rapporteur had drawn attention to three elements. The first was the extreme seriousness of the transgression. Although the Special Rapporteur regarded that criterion as too subjective and too vague, his own view was that its use could not be avoided, given the nature of the offence. The second element, with which he agreed, was that, in every instance, there had to be a breach or violation of an obligation essential for the protection of the fundamental interests of the international community; and the third element, with which he also agreed, related to general recognition by the international community as a whole. The last element was essential to the notion of an offence against the peace and security of mankind and, although it involved some ambiguity, certain international instruments, such as the 1969 Vienna Convention on the Law of Treaties, could provide guidance on the point. Those three elements should therefore provide a sound basis for further study, although the search for other elements should continue. He further agreed with the statement made by the Special Rapporteur that the subjective and objective elements were inextricably linked in the definition of any criminal act (*ibid.*, para. 51).

10. As to the definition of an offence against the peace and security of mankind proposed by the Special Rapporteur in draft article 3, the first alternative, in his own view, was too closely modelled on article 19 of part 1 of the draft on State responsibility. The expression "serious breach of an international obligation" referred to subjects of international law, namely States or State entities, not individuals; in that connection, he endorsed the views expressed by Mr. Ushakov (1881st meeting). The second alternative might therefore provide a better basis for the elaboration of a definition. It avoided the confusion that could arise from the reference to "a serious breach of an international obligation of essential importance" and embodied the essential element of recognition by the international community as a whole that an internationally wrongful act was an offence against the peace and security of mankind. Such general or universal recognition had to be a key element of the legal definition of the offence, especially under the existing international system.

11. Turning to chapter II of the report (Acts constituting an offence against the peace and security of mankind), he said he could agree that the Special Rapporteur should, at the current stage, confine the list to certain offences on the understanding that the list would not be exhaustive. For instance, the scope of the draft code *ratione materiae* would, in his view, be very incomplete if the use of nuclear weapons and other weapons of mass destruction were omitted. He understood, however, that those offences would be dealt with in the Special Rapporteur's next report.

⁶ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

⁷ See 1879th meeting, footnote 9.

12. With regard to aggression—the first offence in the list and the most serious one against the peace and security of mankind—he fully agreed that the basis should be the Definition of Aggression adopted in 1974,⁸ which was itself based on the prohibition in the Charter of the United Nations on war of aggression.

13. Although the threat of aggression and the preparation of aggression were difficult to distinguish from aggression itself, for the purposes of the study at least and until all aspects had been explored, they must not be overlooked, especially in view of the relevance of premeditation to aggression.

14. He particularly appreciated the Special Rapporteur's attempt to identify the main features of the concept of interference in the internal or external affairs of a State and the variety of its forms, especially with regard to civil strife and intervention by coercive measures of a political and economic nature. He also agreed with the Special Rapporteur's suggestion that civil strife should be considered in close connection with other forms of interference (A/CN.4/387, para. 118).

15. Terrorism as an international phenomenon had acquired special significance in terms both of its gravity and of its international dimensions and, basically, he shared the views expressed in the report, particularly regarding State-sponsored terrorism. As to whether an enumerative method or a general definition, or both, should be adopted, he would favour a general concept, illustrated by an enumeration of the various acts involved. He also considered that it would be advisable, for the time being, to treat terrorism as a separate offence, while exploring all its features, and to decide later whether it should in fact come under the heading of aggression.

16. In the case of violations of the obligations assumed under certain treaties, he understood that the treaties in question had to be of such significance for the maintenance of international peace and security that a violation of their provisions would amount to an offence against the peace and security of mankind. That offence had been included in article 2, paragraph (7), of the 1954 draft code because of the influence of the Second World War and a series of treaty violations. He would therefore like the Special Rapporteur to explore the implications of such violations of treaty obligations.

17. With regard to colonial domination, he endorsed the Special Rapporteur's reasoning and agreed that an attempt should be made to determine the juridical context of colonialism, as distinct from other forms of oppression or interference. A much greater variety of reliable legal sources was available than had been the case 20 years earlier. Colonialism could not be said to be outdated or merely a historical notion: one had only to look at Namibia to realize that the existence of colonialism in its worst form could not be denied.

18. The use of mercenaries specially recruited for the purpose of infringing State sovereignty, destabilizing existing political régimes or opposing national

liberation movements was a political phenomenon that could endanger international peace and security. In its modern form, mercenarism had acquired special features: the foreigners concerned did not always form part of a national army, but could constitute separate units of their own. The Special Rapporteur should therefore be encouraged to pursue his study of the various aspects of mercenarism and its relationship to acts of aggression as provided for in the Definition of Aggression before deciding to classify mercenarism as a separate offence or to incorporate it in the concept of aggression.

19. As to economic aggression, two points required further examination: the first concerned the main characteristics and legal definitions of economic measures of coercion; the second concerned the distinction between economic coercive measures and interference in the internal and external affairs of another State by means of coercive measures of an economic character. It was not the label attached to an offence that was important, but the substance of the act against the peace and security of mankind.

20. Lastly, he suggested that draft article 1 on the scope of the draft articles should be referred to the Drafting Committee; draft article 4, however, would have to be further elaborated before it was submitted. He had already stated his preference for the second alternative of draft article 3 and, with regard to draft article 2, he considered that the two proposed alternatives, although different in substance, might perhaps be combined.

21. Mr. THIAM (Special Rapporteur) drew the attention of Mr. Yankov and of Mr. Barboza, in particular, to the fact that the proposed article 4, section D, presented terrorism as a separate offence. Moreover, the sections identified by a capital letter all referred to separate offences.

22. Mr. DÍAZ GONZÁLEZ said that, on the whole, he was in favour of the approach adopted by the Special Rapporteur in his third report (A/CN.4/387). Having explained that the draft code was limited to offences committed by individuals and that it was based on the 1954 draft code, which referred to "private individuals", the Special Rapporteur had endeavoured to define the concept of "individuals", stating that the individuals referred to in the draft were individuals acting as authorities or agents of a State, since private individuals could not commit certain offences against the peace and security of mankind. That was quite true, but it was also true that some offences against the peace and security of mankind were committed by individuals acting in their private capacity, even though they sometimes had State support. That was, for example, the case of the destabilization of a Government by transnational corporations, some of which were States within a State. It was also true in the case of drug trafficking, to which Mr. Reuter (1879th meeting) had referred, and which was not in the realm of science fiction, for Latin America was being hard hit by that problem. The survival or disappearance of the Governments of some States depended on whether or not they allowed drug trafficking. There were groups of private individuals that had the material means not only

⁸ See footnote 6 above.

to engage in drug trafficking, but also to overthrow a Government or jeopardize the territorial integrity of a State.

23. The Special Rapporteur had thus been right to deal with offences committed by individuals, but he had confined himself to individuals who were subjects of international law. He himself was of the opinion that the concept of an "individual" should also include those who, like transnational corporations, were not for the time being subjects of international law, but whose offences against the peace and security of mankind should be punished under international law.

24. The definitions which the Special Rapporteur had proposed, and which might be too closely modelled on those adopted by the Commission in article 19 of part I of the draft articles on State responsibility,⁹ offered both advantages and disadvantages. Article 19 did, however, exist. Having raised the problem, the Special Rapporteur had concluded that the concept of an offence against the peace and security of mankind had a certain unity. He himself agreed that it was an indivisible notion, since any offence against security was an offence against peace. The aim was, in fact, to maintain international public order or, in other words, to establish that an international offence against the peace and security of mankind was, as Mr. Ushakov (1881st meeting) had suggested, an act of an individual or a group of individuals who represented a danger for the maintenance of the peace and security of mankind and for the maintenance of international peace and security. The solution to the problem of definitions probably lay in the unity of the concept of an offence against the peace and security of mankind. It was of course difficult to define all the characteristics of such an offence, for, as the Special Rapporteur pointed out (A/CN.4/387, para. 40), each offence was committed in its own particular circumstances. There were, for example, very obvious reasons why the Nürnberg Tribunal could not have taken account of offences such as colonialism or the use of nuclear weapons.

25. In his view, the Commission had to follow the main lines of the definitions adopted for article 19 of part I of the draft articles on State responsibility, although it did not have to be too closely bound by them, particularly with regard to the obvious corollary of the draft code, namely the punishment of an offence. Article 19 brought the Security Council into play, but the Security Council was neither a legal organ nor a court, and some of its members had the right of veto. It was therefore impossible to empower it to determine an act of aggression, for example, or any other offence against the peace and security of mankind. To do so would be to kill the draft code in the making.

26. Turning to chapter II of the report, on acts constituting an offence against the peace and security of mankind, he said that he fully supported the Special Rapporteur's approach of taking the Definition of Aggression adopted by the General Assembly¹⁰ as

a working basis for an act of aggression. In addition to aggression, however, that definition referred to the threat or use of force. The preparation of, or preparatory measures for, aggression had also been discussed at length. Aggression required preparation and preparatory measures and the preparation of aggression was thus in itself an act of aggression. It was a threat and an act of aggression to mine the territorial waters of a State or to station 10,000 soldiers on the border of a small State, and it was economic aggression to take economic sanctions against another State. The preparation of aggression therefore had to be regarded as an offence against the peace and security of mankind and as part and parcel of aggression, even if it did not culminate in an act of aggression. Psychologically, a threat would in itself destabilize the political system of a State, particularly when that State was small and weak.

27. As to interference in the internal or external affairs of a State, he was of the opinion that no distinction should be made between "internal affairs" and "external affairs", which were now inextricably linked, since a State's external policy was only a reflection of its internal policy, and that intervention by an international organization such as the United Nations with a view to eliminating colonialism should not be regarded as interference. In that connection, he recalled that article 18 of the Charter of OAS¹¹ defined interference in fairly explicit terms and formally prohibited it. Interference should therefore be included as a separate offence in the future code.

28. Terrorism was very difficult to define: individual terrorism at the internal level was different from State terrorism or what was known as guerilla terrorism. When German troops had occupied France during the Second World War, the French patriots who had taken to the Maquis had been called terrorists; in a colonized country or a country occupied by a colonial Power, patriots who died in prison or who were killed by the colonial Power's army were also called terrorists. When those countries regained their freedom, however, those terrorists became leaders. Indiscriminate terrorism, which took the lives of innocent persons, could and must be condemned and punished, but it could be asked whether a soldier of a colonial Power who imposed State terrorism on those being colonized was innocent. The problem was thus to determine what kind of terrorism would be covered by the future code and how terrorism would be defined. The Convention on the prevention and punishment of terrorism adopted by OAS¹² established distinctions, and the Commission must do so as well. Terrorism had to be covered by the future code, but it would have to be carefully defined, for not everything that was known as terrorism was actually terrorism. The problem was a serious and complex one, but it would not be impossible to resolve.

29. The violation of obligations assumed under certain treaties designed to safeguard international

⁹ See 1879th meeting, footnote 9.

¹⁰ See footnote 6 above.

¹¹ See 1885th meeting, footnote 17.

¹² OAS, Treaty Series No. 37 (Washington (D.C.), 1971).

peace and security was an offence that had to be included in the draft code.

30. Colonialism was another serious offence that had to be included in the list of offences against the peace and security of mankind. It had been stated that colonialism was only a historical concept, not a legal one, but all concepts were, initially, of a historical, sociological, economic or other nature and they acquired a legal character only when they had been embodied in a code. An act could be characterized as an offence only if it was provided for in a code. Genocide, for example, had been only a historical concept until it had been covered by the Charter of the Nürnberg Tribunal¹³ and had later formed the subject-matter of an international convention. It was paradoxical that the genocide condemned by the international community had been the historical genocide committed by the Nazis and that the crimes of genocide which had been committed since the entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide¹⁴ continued to go unpunished because some members of the Security Council had the right of veto. When colonialism had been characterized as an offence, it would, legally, become an offence. It was not a thing of the past but, rather, a fact of life, as illustrated by examples to be found in Latin America. It was an offence that had to be condemned not only because its existence had been historically established, but also because it had been referred to in various United Nations resolutions and in the Charter itself. With regard to the terms to be used in defining that offence, the Commission had a choice between a reference to "self-determination" or a reference to "the forcible establishment or maintenance of colonial domination". He personally preferred the second alternative, which took account of the two types of colonization that had been identified by the General Assembly in its Declaration on the Granting of Independence to Colonial Countries and Peoples,¹⁵ and by OAS: colonial territories and colonial peoples, on the one hand, and occupied territories, on the other. The principle of self-determination, however, could give rise to misinterpretations and might even lead to the partitioning of States as a result of manoeuvres by other States.

31. The majority of the members of the Commission appeared to want mercenarism to be included in the draft code. It was not possible to apply the 1949 Geneva Conventions¹⁶ to mercenaries who were involved in the offence and used in certain colonial wars. It was, of course, often difficult to know whether a mercenary was serving a good cause or a bad one. It was primarily new States that faced wars waged with the assistance of mercenaries. The Special Rapporteur would probably be able to propose a definition of mercenarism that would be generally

acceptable. That definition might be based on the resolutions and the Convention of OAU¹⁷ relating to the condemnation of acts of mercenarism.

32. It had been claimed by some that coercive measures of an economic nature should not be characterized as acts of aggression, which would mean limiting the notion of aggression to that of armed aggression. Economic measures, however, were extremely effective in many cases. They were better than massive destruction by means of weapons of war for asphyxiating a State and condemning its population to die of starvation. In a number of instruments, the United Nations had endeavoured, if not to define economic aggression, at least to explain it. It was thus a serious offence against the peace and security of mankind which was designed to destabilize States or to subject one State to another's rule, and it must therefore be included in the draft code.

33. He had no problems with the first of the four articles submitted by the Special Rapporteur. With regard to article 2, he preferred the first alternative, which referred to individuals, not to State authorities; however the category of individuals in question would have to be specified. The first alternative of article 3, as proposed by the Special Rapporteur, was perhaps based too closely on article 19 of part I of the draft articles on State responsibility, but that article existed and it had to be taken into account. The second alternative, which contained only a general definition, was somewhat too vague, for, if an offence against the peace and security of mankind was to be recognized as such by the international community as a whole, it had first to be expressly provided for. It would not be desirable for the international community to have to decide in each particular case.

34. Like the Special Rapporteur, he was of the opinion that the members of the Commission should have a clearer idea of the content of the draft code before they went on to enunciate the general principles to be included in part IV.

35. The acts constituting an offence against the peace and security of mankind, as listed in draft article 4, raised the question whether the Security Council, which was not a court, could characterize an act as an offence against peace and security. In his view, it would be dangerous to attribute such competence to the Security Council, because that would mean relying on a few persons to take the serious decision of defining an offence *a posteriori*.

36. Subparagraph (c) of the first alternative of section A of draft article 4 stated that any of the acts listed therein would, "regardless of a declaration of war", qualify as an act of aggression. The reference to a declaration of war should be deleted because the Charter of the United Nations itself prohibited war and the Kellogg-Briand Pact¹⁸ had outlawed it. Subparagraph (c) (viii) of the same provision stated that the Security Council could determine that acts other than those listed constituted aggression. It was difficult for a jurist to agree that exclusively legal and

¹³ See 1879th meeting, footnote 7.

¹⁴ See 1885th meeting, footnote 13.

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

¹⁶ See 1883rd meeting, footnote 10.

¹⁷ See 1884th meeting, footnote 15.

¹⁸ League of Nations, *Treaty Series*, vol. XCIV, p. 57.

non-political functions should be entrusted to the Security Council, whose decisions, moreover, could, always be vetoed.

37. In subparagraph (b) (iii) of section D, the Special Rapporteur stated that terrorist acts included “any wilful act calculated to endanger the lives of members of the public, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity”. Since some of those offences had already been specifically covered by international conventions, the wording of that provision might be simplified.

38. Subparagraph (b) (iv) of section D, which read, “the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act”, raised the question of the meaning of the term “terrorist act”. To which form of terrorism did that provision apply? In the case of terrorism in countries under colonial régimes, it should be noted that the international community had recognized the inalienable right of those countries to independence and freedom, as well as their right to rebellion against the colonial power. Every national liberation movement needed weapons and could obtain them only if it had sources of supply.

39. In his view, the proposal to set up a working group was inappropriate. When the Commission had begun its study of the topic, it had established a working group to identify the steps to be followed in preparing the draft code. Once the working group had completed the task entrusted to it, the Commission had appointed a Special Rapporteur for the topic. The Commission and the Sixth Committee of the General Assembly were, in a way, working groups which could advise the Special Rapporteur. The establishment of another working group would only complicate matters because problems that had already been considered would be reopened for discussion. He was therefore opposed to a proposal which he found unnecessary and inappropriate.

40. Mr. FRANCIS said that his suggestion had been misunderstood by Mr. Díaz González. What he had suggested at the 1883rd meeting was that the members of the Commission should consider whether the Drafting Committee might not be asked to appoint a sub-committee from among its members to examine a provisional list of general principles.

41. The CHAIRMAN said that, as he recalled, it had been suggested during the debate that a small working group should be set up to assist the Special Rapporteur. The suggestion had been made for the consideration of the Special Rapporteur, not as a formal proposal, and Mr. Díaz González's comments on that point were only the expression of an opinion, not an objection to a formal proposal.

42. Mr. USHAKOV, continuing the statement he had made at the 1881st meeting, recalled that he had emphasized the need to forget for the time being article 19 of part 1 of the draft articles on State responsibility. The draft articles which had been submitted by the Special Rapporteur and on which he would now comment showed that the Special Rap-

porteur himself had sometimes forgotten to draw inspiration from that provision. The threat of aggression, interference in the internal or external affairs of another State, terrorist acts and violations of the obligations assumed under certain treaties were not international crimes within the meaning of article 19, paragraph 3. Several members of the Commission had, moreover, proposed that crimes other than those referred to in article 19 should be included in the draft code.

43. He also noted that, as they now stood, the draft articles submitted by the Special Rapporteur did not make it clear whether they applied to States or to individuals, since neither the former nor the latter were expressly referred to therein. The reference in square brackets to the authorities of a State was not of much help in that regard because it could be taken to mean both the State itself and the individuals who were the authorities of a State. It seemed quite clear that the Special Rapporteur's intention was to deal only with individuals. It had not been his task to prepare a list of the offences that could be committed by States.

44. Three categories of crimes, namely crimes against peace, war crimes and crimes against humanity, were listed in the Charter of the Nürnberg Tribunal and had been reproduced in Principle VI formulated by the Commission on the basis of the Charter and Judgment of that Tribunal.¹⁹ On the basis of the crimes in those three categories, which obviously belonged in the draft code, he proposed to draft an article modelled on article 2 of the 1954 draft code. The article would begin with an introductory phrase, which might read:

“The following persons shall be recognized as responsible under international law for offences against the peace and security of mankind and shall be liable to punishment”; and it would be followed by a list of the offences that could be committed by individuals. The list would begin with

“persons planning, preparing, initiating or causing an act of aggression to be committed or a war of aggression to be waged by a State”.

Since the meaning of the word “persons” was very broad, no distinction should be drawn between agents of a State and mere private individuals, who would in most cases be agents of a State. Reference would also be made to:

“persons ordering, committing or inciting acts in serious violation of the laws or customs of war which include, but are not limited to, ill-treatment or deportation to slave labour, or for any other purpose, of civilian populations, murder or ill-treatment of prisoners of war or of persons on the seas, killing of hostages, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

That wording was based on Principle VI (b). It would be followed by a paragraph based on Principle VI (c), and referring to:

“persons ordering, committing or inciting acts of murder, extermination, enslavement, deportation

¹⁹ See 1879th meeting, footnote 6.

and other inhuman acts against any civilian population, or persecutions on political, racial or religious grounds”.

All those provisions would apply to persons who were guilty by reason of their own conduct, not by reason of the conduct of another person or of a State. A final paragraph would refer to “persons participating in a common plan or conspiracy for the accomplishment of any of the acts referred to in the preceding paragraphs”.

45. With regard to the offences which he proposed to list first, namely an act of aggression and a war of aggression, he stressed the need to make it clear that the perpetrators of such offences were persons who had planned, prepared, initiated or caused an act of aggression to be committed or a war of aggression to be waged by a State. It was important to prove that such offences existed. At the Nürnberg Tribunal, it had been proved that certain leaders in Fascist Germany had methodically planned, prepared or caused a war of aggression to be waged against the Soviet Union, in accordance with a pre-established plan. It had then been possible to try and to convict those persons.

46. The Commission did not have to define the notion of aggression. It simply had to state that persons who had planned, prepared, initiated or caused an act of aggression to be committed or a war of aggression to be waged by a State were responsible for an offence against the peace and security of mankind, quite independently of the existence or absence of a definition of aggression and regardless of the organs empowered to determine the existence of an act of aggression.

47. Immediately following aggression, reference should be made to the offence which was perhaps the most serious threat to the peace and security of mankind, but for which the Special Rapporteur had not yet made any proposal, namely the offence committed by “persons planning, preparing or ordering the first use by a State of nuclear weapons”. According to paragraph 1 of the Declaration on the Prevention of Nuclear Catastrophe,²⁰ “States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity.”

48. Referring to section C of draft article 4, he pointed out that interference in the internal or external affairs of a State could take various forms, the most serious of which was probably armed intervention. He intended to include that offence in his list by adding a paragraph referring to:

“persons planning, preparing, ordering or causing a State to engage in armed intervention in the internal affairs of another State”.

That provision should be easy to accept because the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations²¹ placed armed intervention on the same footing as aggression.

²⁰ General Assembly resolution 36/100 of 9 December 1981.

²¹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

49. With regard to terrorist acts, the most serious of which were committed by States, he proposed a paragraph referring to:

“persons planning, preparing, ordering or causing terrorist acts to be committed by a State against another State”.

Along the same lines, he proposed two other provisions which would refer to “persons planning, preparing, initiating or causing a State to commit serious violations of its international obligations in respect of arms limitations or disarmament” and to “persons planning, preparing, ordering or causing acts to be committed with a view to the forcible establishment or maintenance of colonial domination”. As to mercenarism, he proposed to refer to “mercenaries who engage in armed attacks against a State which are so serious that they are tantamount to acts of aggression”.

The meeting rose at 1.05 p.m.

1887th MEETING

Thursday, 23 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: 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. Reuter, 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. HUANG thanked the Chairman and members of the Commission most sincerely for the warm welcome extended to him.

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.