

Document:-
A/CN.4/SR.1887

Summary record of the 1887th meeting

Topic:
**Draft code of crimes against the peace and security of mankind (Part II)- including the
draft statute for an international criminal court**

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

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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.

2. The importance of the work on the draft code had been repeatedly stressed both in the Commission and in the Sixth Committee of the General Assembly. At a time when aggression, subversion, military occupation and other illegal acts were constantly being committed, thereby endangering the sovereignty, territorial integrity and political independence of many States, especially small and newly independent States, the preparation of such an international legal instrument would help to strengthen international peace and security. Hence the priority which the General Assembly had requested the Commission to attach to the draft code.

3. An examination of the Special Rapporteur's three reports, and of the Commission's own reports, revealed that the Commission had been making steady progress and that it was moving ahead in the right direction. The present debate had given a clear picture of the questions that deserved most attention. The first was the delimitation of the scope *ratione personae* of the draft code. Generally speaking, the Commission endorsed the approach adopted by the Special Rapporteur, whereby the draft code should cover the criminal responsibility of individuals, an approach that had also been followed in the 1954 draft code. In article 1, that code defined offences against the peace and security of mankind as "crimes under international law, for which the responsible individuals shall be punished". A similar formulation was to be found in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.⁶

4. The criminal responsibility of individuals under international law had thus long been recognized. There remained, however, the complex and difficult question of whether other entities, particularly States, could commit offences against the peace and security of mankind and should accordingly come within the scope of the draft code. He believed that the answer to that question should be in the affirmative. Article 19 of part 1 of the draft articles on State responsibility⁷ made express provision for categories of internationally wrongful acts which constituted international crimes. The concept of States committing international crimes was no longer a mere conjecture. States had indeed been the perpetrators of such acts as aggression, colonial domination and *apartheid*, and most of the offences included in the 1954 draft code, as well as in the draft under consideration, could only be committed by States or with their connivance or encouragement.

5. While at the present stage limiting the application of the draft to individuals only, the Special Rapporteur pertinently asked in his third report (A/CN.4/387, para. 11) whether individuals could be the principal perpetrators of offences against the peace and security of mankind. He answered in the negative by adding:

... it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals. ...

... The same is true, moreover, of all crimes against humanity, which require the mobilization of means of destruction which the perpetrators can obtain only through the exercise of power. Some of these crimes—*apartheid*, for example—can only be the acts of a State. (*Ibid.*, paras. 12-13.)

6. Admittedly, some of those offences, such as genocide and terrorism, could be committed by private individuals, but it was none the less true that States were the principal authors of offences of that nature. It could hardly be the purpose of the Commission or of the General Assembly to devise an instrument that would penalize the smaller or secondary perpetrators while leaving the cardinal authors of the offences immune. It would be paradoxical to recognize that States were the most qualified candidates for the commission of offences against the peace and security of mankind yet concentrate efforts on the pursuit of less qualified perpetrators, namely individuals.

7. He was not unaware of the enormous theoretical and practical problems to be faced when crossing the dividing line between the criminal responsibility of individuals and the criminal responsibility of States. For his part, he simply wished to stress the dilemma the Commission was facing and strongly urged further study of the matter. At the present stage, it seemed clear that something more should be done than dealing solely with the criminal responsibility of private individuals. At least, the general principles to be drafted should make it clear that the punishment of individuals did not relieve the State of its responsibility for offences committed by it or by its agents. He also shared Mr. Balanda's view (1882nd meeting) that the Commission should not foreclose the possibility of applying the draft code to entities other than individuals. In view of the divergence of opinion on that point, and in the interests of advancing the Commission's work, he himself would agree provisionally with the Special Rapporteur's proposal regarding the scope *ratione personae* of the draft code. That approach was not inconsistent with the Commission's own conclusion that the draft code should be limited at the present 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".⁸

8. Defining the offences to be covered by the draft code was certainly a difficult task. Few domestic criminal codes, if any, tackled the issue. The definition in the 1954 draft code was not, strictly speaking, a definition at all. At previous sessions, the Commission had used the tests of gravity and extreme seriousness as criteria for characterizing an offence against the peace and security of mankind. In his third report, the Special Rapporteur submitted two definitions, each based on a criterion which took into account both subjective and objective elements, relying largely for that purpose on article 19 of part 1 of the draft articles on State responsibility.

9. From the standpoint of methodology, it was wise to take that article 19 as a point of departure or

⁶ See 1879th meeting, footnote 6.

⁷ *Ibid.*, footnote 9.

⁸ *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (a).

reference. The two topics were so closely interrelated that resort to article 19 helped to maintain unity of approach in the Commission's work, and good use could also be made of the achievements in the progressive development of international law. But that did not mean that article 19 should be borrowed as it stood; rather, it should be adapted to the actual purposes of the code.

10. He understood the misgivings of those members who had expressed their concern that linking article 19 of part I of the draft articles on State responsibility with the draft code might involve the risk of confusing two different subject-matters or making work on the draft code even more difficult. He himself, however, did not share that concern because the scope *ratione personae* of the draft code had been confined to the criminal responsibility of individuals and article 19 applied only to States. Moreover, the provisions of the draft code could be appropriately termed "primary rules" and as such were unlikely to overlap with the provisions on State responsibility. Again, since article 19 recognized that States could commit international crimes but did not elaborate on the specific breaches falling within that category of crime, the work done on the draft code might well prove useful in understanding and applying article 19. He accordingly saw no good reason for completely separating the elaboration of the draft code from article 19.

11. Suggestions had also been made to dispense with a general definition or to adopt a definition by enumerating various concrete acts. In fact, that had already been done for some of the offences listed in article 4 of the Special Rapporteur's draft. In domestic criminal law, definition by enumeration was not uncommon and the method had also been frequently used in international codification. As he saw it, abstract definition, definition by enumeration, or a combination of the two could all be tried where appropriate, but account must be taken of the necessity for consistency in form.

12. With regard to the list of acts constituting offences against the peace and security of mankind, he noted that the Commission was unanimous in the view that aggression should be the first offence in the list. The question none the less arose how to integrate the concept of aggression in the draft code. The method of incorporating the complete text of the Definition of Aggression adopted in 1974⁹ had, among other drawbacks, the uncertainty involved in leaving the determination of punishable acts to a political organ. The 1974 Definition, which constituted the most recent and comprehensive achievement in defining aggression, should be taken as a basis for elaborating a new definition in the light of the nature and characteristics of the draft code.

13. The threat of aggression was expressly prohibited in the Charter of the United Nations and in a number of other international instruments and should therefore come within the purview of the draft code.

14. Preparation of aggression was difficult both to define and to prove. Moreover, if it did not materialize in actual aggression, it might not cause much harm. Preparation of aggression, however, was often accompanied by discernible acts such as an order to mobilize the nation. Also, the preparations themselves, even if not followed by aggression, could indeed produce harmful consequences detrimental to international peace and security. The question should be the subject of further study and discussion.

15. Interference in the internal or external affairs of a State was almost universally condemned. With a proper formulation, that offence should therefore find its due place in the draft code.

16. Similarly, there should also be no hesitation about including terrorism in the list. The problem was rather that of determining what kind or what forms of terrorism were to be covered. The Special Rapporteur preferred to consider only State-sponsored terrorism, namely terrorism that involved the participation of State authorities, provided it was directed against another State. Doubts had been expressed, however, as to whether that choice might not be too limited and whether other terrorist acts might still have the effect of endangering the peace and security of mankind. In his opinion, further examination of the problem was required. With regard to the definition or the formulation of the offence of terrorism, he was inclined to agree with the suggestion made by the Special Rapporteur in his third report (A/CN.4/387, para. 149).

17. Some members viewed violations of the obligations assumed under certain treaties as a thing of the past. Although somewhat unfamiliar with the subject-matter, he considered that the offence might have a potentially wider dimension than was commonly imagined and, if it was to stay on the list, its intended objective and scope of application should be more clearly defined.

18. The reprehensible nature and universal condemnation of colonial domination qualified it as a primary candidate for inclusion in the list of offences against the peace and security of mankind. He approved of the Special Rapporteur's reference to "colonial domination", instead of "colonialism", since it not only retained the basic connotation of colonialism, but also constituted a more acceptable legal definition.

19. Mercenarism, which was still being used as a means of destabilizing or overthrowing the Governments of small and newly independent States or of undermining the struggle of national liberation movements, thereby threatened the peace and security of mankind and it should therefore be included in the list of offences, subject to a satisfactory definition.

20. With regard to economic aggression, the Special Rapporteur, in his well-founded analysis, favoured ranking it among the forms of interference in the internal affairs of another State. There appeared to be no better way of dealing with that offence.

21. With reference to the draft articles submitted by the Special Rapporteur, he had no comments to make on article 1, which was generally acceptable.

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

22. Two alternative were proposed for draft article 2, the first relating to individuals and the second to State authorities, and they reflected two different lines of thought in the Commission concerning the scope *ratione personae* of the draft code. In order to accommodate the different views, he suggested that the alternative versions should be merged in a single formulation along the following lines:

“Individuals, including State authorities, who commit an offence against the peace and security of mankind are liable to punishment.”

The Commission might also adopt the first alternative, but make provision in the general principles for the idea embodied in the second alternative. A third possible course would be to adopt the first alternative and include explanatory notes in the commentary to the article.

23. Lastly, in view of his earlier comments on the linkage between article 19 of part 1 of the draft articles on State responsibility and the draft code, and on the list of offences, no observations on draft articles 3 and 4 were required.

24. Mr. ARANGIO-RUIZ thanked the Chairman and members of the Commission most sincerely for the warm welcome extended to him.

25. He had read with great interest the three reports of the Special Rapporteur on the present topic, admired the results achieved, and intended for his own part to contribute a few general thoughts and suggest a number of additions to the list of offences against the peace and security of mankind. Those general thoughts related to the *raison d'être* of the code under consideration and, in particular, to the general concept of the offences and their delimitation *ratione personae*.

26. As he saw it, the essence of the General Assembly's decision to revive consideration of the code after having postponed it in 1954 was the determination not to leave the protection of the peace and security of mankind to the imperfect rules and mechanisms by which—under the Charter of the United Nations or under other instruments—the so-called international community endeavoured to protect itself from the most serious evils of the modern world. The basic idea was to try to overcome—or reduce—the dramatic and centuries-old distinction between two domains: the inter-State domain of international law, on the one hand, and the inter-individual domain of national legal systems, on the other. Unfortunately, the distinction had tended so far to keep the individual out of the direct reach of the law of nations. Indeed, individuals were out of the reach of international law, whether they acted merely as private parties or as agents of States. The idea underlying the draft code seemed to be precisely to lift in part the barrier resulting from the distinction in question, so as to place individuals under the direct—or, more exactly, less indirect—reach of international law, at least in so far as certain offences against mankind were concerned.

27. The undertaking was undoubtedly an extremely difficult one. International law being what it was, in other words a radically and constitutionally inter-State (or inter-Power) law, States tended to maintain

their exclusive control over all private individuals present on their territory. Individuals acting as State agents, for their part, tended to cover themselves—even in present times and in the freest of societies—with that sanctity and immunity which in the days of absolutism was the prerogative of kings.

28. To bring either class of individuals—private individuals and, so to speak, public individuals—under a more direct (or less indirect) rule of international law appeared at first sight a daring enterprise, especially since international law was far from perfect and almost totally lacking in adequate institutional apparatus; to bring individuals under its operation might therefore raise more problems than it would appear to solve. It was for that reason that he had much sympathy with the suggestion by Mr. Francis (1883rd meeting) that more work should be done at the present session on the general principles.

29. Since the beginning of work on the draft code, two sets of precedents had been under scrutiny. One was the disappointing experience of the period between the two world wars regarding the establishment of a common international criminal law and criminal jurisdiction; the other was the positive, successful, and in many ways unique experience represented by the London Agreement of 1945 for the prosecution and punishment of the major war criminals,¹⁰ and the Charter of the Nürnberg Tribunal and the Judgment of the tribunal. It was hardly necessary to stress how circumscribed were the three classes of crimes envisaged in that Agreement and tried in those proceedings. It was precisely because of the difficulty of lifting the barrier between the law of nations and the law of human beings that, ever since the first years of the United Nations, efforts had been concentrated on the major offences against the peace and security of mankind, without extending the projected code to coincide with a common international criminal law. It was because of that difficulty that, even when one went beyond the 1954 list, one had to focus on the most serious among the offences in question.

30. As to the question of delimitation *ratione personae*, he agreed that, in view of the difficulties involved, the Commission should set aside for the time being the idea of extending the draft code to offences committed by States themselves. States were on a different level and it would be even more difficult to bring them before a court of justice than it was to do so in the case of individuals. In addition, the wrongful acts of States—whether termed delicts or crimes—were covered by other rules, and different machinery was applicable. He had in mind mainly the provisions of the Charter of the United Nations and of the draft articles on State responsibility. In that connection, he saw no point in arguing whether article 19 of part 1 of the draft articles on State responsibility¹¹ set forth a criminal or a civil liability of States, or perhaps some form of mixed liability.

¹⁰ See 1879th meeting, footnote 7.

¹¹ *Ibid.*, footnote 9.

31. The code should deal both with individuals acting as private parties and with individuals acting as State agents. He agreed with those members who had expressed reservations with regard to the expression "State authorities", which seemed to involve the State itself. Whether as State agents or as private parties, individuals could have acted in isolation or in one or more groups. As a matter of fact, in most cases groups would be involved, but, even in that instance, the code should consider each individual on his own. There could be no such thing as collective criminal responsibility. The concept of "delinquent association" was of course known in the criminal law of most countries, yet it did not mean that a group of individuals would be punished as a whole. On the contrary, each member of the delinquent group was liable, in addition to the penalty attaching to the specific crime he was convicted of, to the further specific penalty attached to the distinct—and still individual—crime of "delinquent association".

32. Another matter which should not be confused with a form of collective criminal responsibility was the responsibility that might be incurred by a corporate body or, to use the French term, a *personne morale*. There was no obstacle to the subjection of such a corporate body to criminal law, with the reservation that it could not be made subject to any physical punishment. As a rule, it would be liable in a financial sense. Criminal liability as such should be confined to individuals.

33. As to the list of offences, on the whole he favoured the inclusion of all those indicated by the Special Rapporteur, subject of course to proper formulation and definition of each offence and also to the general principles.

34. He wholeheartedly supported the inclusion of drug trafficking in the list, as suggested by the representative of the Congo in the General Assembly and as so eloquently endorsed by Mr. Reuter during the present discussion (1879th meeting).

35. For his own part, he would also advocate a few additions to the list, in the light of certain events in his own country of which he had had personal experience. He had in mind the events which had paved the way for the series of acts of aggression committed by the "authorities" of the Italian State in the mid-1930s and for participation by those same authorities in the Second World War. He wished to stress the preparatory acts, because acts of aggression did not come out of the blue. The acts in question had been the violent seizure of power by the Fascists between 1922 and 1925; the complete suppression by 1925 of political rights and fundamental freedoms in Italy; the consequent establishment of the Fascist dictatorship and the systematic elimination of political opponents; the violation by the foregoing actions of the right of the Italian people to self-determination; the imposition on the Italian people of an aggressive foreign policy; the imposition on the Italian people of an unwanted—and unexpected—alliance with Hitler; the acceptance—partial but none the less monstrous—of the policies of racial discrimination against the Jewish citizens of Italy; and the acts of aggression or

military interventions against Ethiopia, Spain, Albania, France, the United Kingdom, the USSR, Yugoslavia, Greece and other countries.

36. It would be recalled that Mussolini and his partners had been apprehended not by the allied forces, but by the Italian resistance movement and summarily executed. Had they been tried, like the Nazi war criminals, they would have been accused and found guilty in 1945 only of the offences contemplated in the 1945 London Agreement for the prosecution and punishment of the major war criminals, in other words crimes against peace, crimes against humanity and war crimes in the narrow sense. The Fascist leaders would have escaped trial and punishment for all the other crimes they had committed against the Italian people. The worst of those crimes had been to lead Italy into the Second World War, so that many Italian citizens had been forced to wish for the defeat which alone would have brought back the institutions under which they had lived before Fascism had taken over.

37. In the light of those remarks, he stressed the need to include in the draft code the preparation of aggression. Preparation for military action could sometimes be presented as preparation for self-defence. The establishment of Fascism, however, and the suppression of all opposition had been the best preparation for the multiple acts of aggression the Fascists were to commit later on. To deprive a whole people of their right to choose their own government was in itself one of the most serious offences against the peace and security of mankind.

38. Like other members, he supported the inclusion of terrorism in the draft code. At the previous meeting, Mr. Ushakov had proposed a text for the condemnation of acts of terrorism which indicated that they must be directed by one State against another. In his own view, however, such action would constitute not so much a form of terrorism as a form of intervention or indirect aggression. Terrorism should be taken to mean offences committed by more or less numerous and organized groups of persons who perpetrated the most wanton acts of violence under the utterly indefensible pretext of alleged "political" ends. In certain cases, of course, such acts of terrorism were encouraged, supported or even instigated from abroad, but they should be condemned whatever their presumed foreign connection. It was for him a matter of pride that the Italian State's reaction in such circumstances had been particularly civilized. It had respected, in particular, all the guarantees of fair trial and penalty—including non-application of the death penalty—but he could not help feeling that its attitude had perhaps been unduly lenient. On the other hand, the Italian State had encountered a number of obstacles in the tendency of some Governments to deny extradition—or other forms of judicial co-operation—on the absurd basis of the "political" qualification attached to those crimes by their authors. If certain forms of wanton terrorism were included among the offences covered by the draft code, international co-operation in the prevention and suppression of terrorism might be facilitated.

39. Lastly, the question of the general principles was connected with the relationship between the

inductive approach and the deductive approach. He had given an example of the inductive approach by dealing with past misdeeds committed in the name of his country—just as he could have dealt with Nazi crimes. Nevertheless, the Commission was perhaps being much too inductive and not sufficiently deductive when it proceeded to list offences without trying first to determine, at least provisionally, the essential principles for choosing the offences and the ways and means—international, national or mixed—whereby condemnation would be effectively implemented.

40. Mr. USHAKOV said that there was a very wide range of acts of terrorism: an act of terrorism that was perpetrated by a single person against another and could be considered as an international criminal offence for which the perpetrator should be punished by any State or extradited for punishment, but which did not affect the whole of mankind and was not an offence against the peace and security of mankind; an act of terrorism by an individual which constituted a danger to society and concerned only the State on whose territory it was committed; an act of international terrorism by an individual which endangered the interests of the community of States, such as the intentional commission of a murder, kidnapping or other attack on the person or liberty of an internationally protected person, or a violent attack on the official premises, private accommodation or means of transport of an internationally protected person likely to endanger his person or liberty, as listed in article 2, paragraph 1 (a) and (b), of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.¹²

41. Other acts of terrorism by individuals that were international in scope could possibly be viewed as international criminal offences but, for the purposes of the draft code, the only ones that could and should be covered were the most serious, in other words acts of terrorism perpetrated by one State against another State and acts by persons who had planned, prepared, ordered or engaged in acts of State terrorism against another State.

42. The CHAIRMAN said that the Special Rapporteur would no doubt wish, in his summing-up, to give his view on the question whether it would be desirable, with regard to terrorism, to limit the scope of the draft code to State-sponsored terrorism or to expand that concept, and if so, how that should be done.

43. Sir Ian SINCLAIR said that he naturally agreed on the need to provide in the draft code for the case of nationals of one State who became involved in the preparation, execution or incitement of terrorist acts against another State. In his view, however, that was not enough, for there were at least two other classes of acts that had attained the same degree of gravity as those mentioned by Mr. Ushakov.

44. The first case was where persons acting as agents of a State engaged in the preparation, encouragement or financing of terrorist acts, or in other

forms of complicity in such acts, in another State, and the acts were directed not against that other State or internationally protected persons but, for instance, against political opponents of the State to which the agents belonged. That was a very grave offence against the peace and security of mankind and should certainly be covered in the draft code.

45. The other case was where persons who, acting as agents of a State, financed, encouraged, or conspired or otherwise acted in complicity in the carrying out of terrorist acts by private individuals or groups, such terrorist acts again to be committed in another State, whether against the authorities of that State or against private individuals. To take account of such acts would of course mean widening the concept of terrorism under the draft code, but in the light of recent events consideration should be given to whether the Commission should not go at least that far, without entering the more difficult and controversial area to which Mr. Díaz González had referred at the previous meeting.

46. Mr. ROUKOUNAS thanked the Chairman and members of the Commission most sincerely for the warm welcome extended to him.

47. He also wished to thank the Special Rapporteur for a report (A/CN.4/387) that was excellent in every respect. In his comments, he would follow the sequence of the major sections of the report. With regard to the concept of an offence against the peace and security of mankind, in the terminology of modern international law at least six types of offence constituted offences under international law: an international offence, an offence against international peace and security, a crime against humanity, a war crime, a serious breach of humanitarian law and an offence against the peace and security of mankind. After the Second World War, international criminal justice had associated the concept of “crimes against humanity” with the concept of war crimes. Since then, however, the concept of a crime against humanity had evolved, particularly in treaty law, and had become markedly autonomous in character—for example, genocide, *apartheid*, the seizure and hijacking of aircraft—with legal consequences that exhibited some uniformity. As to offences against the peace and security of mankind, the topic now under discussion, the Special Rapporteur had taken care to emphasize the unity of the concept, for its two components were indivisible, and had then gone on to differentiate between such offences and offences against international peace and security by stating (*ibid.*, para. 28) that the two expressions “do not coincide exactly”. Offences against international peace and security involved inter-State relations, whereas offences against the peace and security of mankind could cover different situations. The Special Rapporteur’s clarification was therefore important: an offence against the peace and security of mankind, as conceived at the present time, would, depending on the steps ultimately taken to establish the list of offences, encompass either all of the concepts mentioned or a large number of them, but it might well relate to only some of the offences in those different categories.

¹² United Nations, *Treaty Series*, vol. 1035, p. 167.

48. He fully realized that, in order to work out a general definition of an offence against the peace and security of mankind that would effectively apply to all the acts punishable under the code, it was essential to determine the whole range of offences to be included; but a point of departure was needed and matters would become clearer as the work proceeded.

49. The Special Rapporteur had proposed, in draft article 3, two alternatives for a general definition, one alternative consisting of an analysis of the fundamental values to be protected and hence, implicitly, the relevant breaches to be punished, and another alternative consisting of a synthesis which adopted a frontal approach to the concept of the offence envisaged. It had been said of the first alternative, which related to breaches of "international obligations", that it lay more within the realm of the international responsibility of the State. Yet the Commission was engaged in preparing a text on the obligations of the individual under international law, obligations of such a kind that they did not necessarily introduce the concept of the State. It had also been said that the first alternative established too close a link with article 19 of part 1 of the draft articles on State responsibility.¹³ Personally, he would not have any great objection to such a link if the two provisions covered the same types of offence. First, however, the perpetrators of the offences were different, and secondly, the offences to be covered by the future code were specific offences which included a number of breaches that were as serious as, but perhaps different in scope from, those in the draft articles on State responsibility. Accordingly, at a later stage some elements might well merge, whereas others might not, and in order to avoid confusion the point of departure should not be a formulation identical with that of article 19.

50. The second alternative proposed for article 3 seemed more appropriate, for it comprised two relevant elements: the international wrongfulness of the act, in other words the wrongfulness under international law, and recognition of the wrongfulness by the international community as a whole. Such "recognition" was admittedly not the same as the vague formula of the "universal conscience of mankind", so cherished by the literature of the nineteenth century: the international community in question was a community with a particular degree of institutionalization. But were those two elements enough to clarify the matter? The Special Rapporteur had frequently emphasized that an offence against the peace and security of mankind must be particularly serious and Mr. Ushakov had said that the act must constitute a danger to the international community. For his own part, he therefore suggested that the Special Rapporteur should continue his endeavours to arrive at a definition on the basis of the second alternative and take into consideration, apart from the wrongfulness of the act, its recognition by the international community, its seriousness and the danger it constituted, and the values involved, values which would be incorporated into the text not as subjective and

abstract concepts, but as elements intrinsically bound up with the rules that best illustrated the modern international system.

51. In the matter of the persons covered, he noted that international responsibility had sometimes been regarded as a guarantee, either a principal or a subsidiary guarantee, for the purposes of the observance of international law. The problems of the relationships between the international responsibility of the individual and the international responsibility of the State had been amply discussed in the Commission, with very firm arguments. He would confine himself to a few comments on the criminal responsibility of the individual, as dealt with in the report of the Special Rapporteur. Clearly, the implication of the individual as an "international offender" was closely bound up with his status as an organ of the State, or rather an agent of the State and in the event of an offence, an individual-organ no longer enjoyed the customary jurisdictional immunity—the expression "agent of the State", in the broadest sense under both older and more recent international legal theory, being taken to mean not only a person vested regularly, and so to speak officially, with the power of the State, but also a person who acted occasionally, even on a secondary basis, on behalf of the State. Moreover, the concept of an organ of the State covered both "rulers" and "executants", and for that reason the use of the term "authorities of a State" which seemed to designate the former rather than the latter, would not be quite appropriate in the circumstances.

52. Immediately after the Second World War, the courts had not admitted the criminal responsibility of private individuals. Of course, the international military tribunals, under their mandate to punish crimes against peace, war crimes and crimes against humanity, had indeed judged individuals—in that instance, manufacturers—but the acts for which those persons had been judged had been linked with the perpetration of criminal acts on behalf of the State, or of acts which could not have been committed without the organs of the State violating international law, by commission or omission. But developments since then offered no room for doubt: private individuals could incur international criminal responsibility and could be prosecuted, tried and convicted for acts contrary to international law, provided, of course, that the acts seriously affected the interests of the international community. One problem of legal terminology also arose, for both the words "individual" and "person" were used in practice. Strictly speaking, "persons" could signify both legal persons and natural persons. Most of the relevant conventions and the corresponding resolutions of the General Assembly used either term, but the Commission should determine which term it would adopt.

53. Accordingly, the first alternative proposed for article 2 was preferable. However, the texts prepared by the international organizations were also instructive and he would suggest that the Commission should include an express mention of "agents of the State" by altering the draft article to read:

"Individuals who, whether or not acting in their capacity as agents of the State, commit an offence

¹³ See 1879th meeting, footnote 9.

against the peace and security of mankind are liable to punishment.”

That proposal was, moreover, similar to Mr. Huang's (paragraph 22 above).

54. With regard to the list of offences proposed by the Special Rapporteur, the Commission could not establish an exhaustive list because it could not engage definitively in an interpretation of the treaties in force. The task of selection was an extremely delicate one, but it should be done from the standpoint of the development of international law. Some of the Special Rapporteurs's proposals were based on firm foundations, whereas others reflected newer trends. The Commission should study all of them in detail, even though it would select only those which seemed to be most in keeping with the criteria for a minimum list, for such a list was already an accepted principle.

55. Regardless of the offences that would ultimately be included, it was important to specify that codification by *renvoi* was not a sound method, particularly since the Commission still had to determine the legal nature, binding or not, of the instrument it was elaborating. Each offence should figure separately in the draft. Moreover, in setting forth the constituent elements of each offence, every effort should be made to avoid using the “telegraphic” style used in the 1954 draft code. The offences were special in character and the Commission should clarify each concept by stating it in an analytic fashion. Admittedly, it was not a technique normally used in criminal codes under internal law, but the Commission was not elaborating such a code and there was no certainty that it was elaborating an international criminal code.

56. It was gratifying to note that the Special Rapporteur's approach coincided with his own ideas on the topic. The proposed list included only a certain number of offences because the Commission was, as yet, only in the early stages of its work. He fully endorsed the inclusion in the future code of the threat of aggression, the preparation of aggression, intervention in a State's internal affairs, terrorism, mercenarism and colonial domination.

57. Among the offences to be incorporated in the draft code, there was one on which all members of the Commission agreed, namely aggression. In that connection, the Commission had postponed consideration of a code of offences against the peace and security of mankind in 1954 because it had experienced difficulties in defining aggression, pending the elaboration of such a definition by the United Nations. That definition now existed, regardless of what might be said of it, and, what was more, the General Assembly had adopted it by consensus¹⁴ during a period of détente, for 1974 had also been the year of the Helsinki Conference. The Special Rapporteur had in his wisdom included in the list, on a preliminary basis, the whole of the Definition of Aggression. It was true that article 8 of the Definition, reproduced in subparagraph (f) of the first alternative of section A of draft article 4, stated that:

In their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provisions.

That was a warning against breaking up the text that should perhaps be taken into account. Another approach would be simply to make a *renvoi* to the General Assembly resolution, as the Special Rapporteur had also proposed. The answer would depend upon whom the future code was intended for: if it was intended for a judge, for example, he could not be expected to engage in research to determine the meaning of “aggression” in international law. An effort might well be made to provide a description of the constituent elements of each act of aggression.

58. On the other hand, article 5, paragraph 2, of the Definition, reproduced in subparagraph (d) (ii) of the first alternative of section A of draft article 4, stated that:

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

Yet, in his third report (A/CN.4/387, para. 28), the Special Rapporteur pointed out that there were grounds for making a qualitative distinction between offences against “international peace and security” and offences against “the peace and security of mankind”, something which might warrant the inclusion of only some elements of the Definition in the future code.

59. Drug trafficking, a matter raised by Mr. Reuter (1879th meeting) had already been of concern to those who had drafted the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁵ for they had included “causing serious bodily or mental harm” to members of a group of persons (article II (b)) as an act constituting genocide, and that undoubtedly covered drug trafficking. In the 1954 draft code, the Commission had, in article 2, paragraph (10) (ii), used a similar formulation without making express reference to that Convention. Hence a precedent, albeit indirect, did exist and the Commission could well consider including and specifying the content of the abominable crime of drug trafficking in the draft code.

The meeting rose at 1.05 p.m.

¹⁵ See 1885th meeting, footnote 13.

1888th MEETING

Friday, 24 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, 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. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

¹⁴ See footnote 9 above.