Document:-
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**Summary record of the 1888th 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**

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 consensus[14] 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.*

[14] See footnote 9 above.

[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. Lacleta 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.

**Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)**

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. TOMUSCHAT expressed appreciation to the members of the Commission for their kind words of welcome and thanked the secretariat of the Commission for its assistance. He paid a tribute to the Special Rapporteur for his three reports, which reflected outstanding analytical skill and impressive legal precision.

2. As a new member, he had hesitated to speak at the current stage of the work, but the draft code was of paramount importance to Germany, since the ideas it embodied had emerged as a consequence, in particular, of the atrocities committed by Nazi Germany, and he had feared that his silence might lead to misunderstandings as to his attitude towards the basic premises of the draft code.

3. The Nürnberg Principles[6] were by no means outdated and they deserved the international community's full support. All too often, the fact that crimes were committed in the name of the State protected those responsible from criminal sanctions. The exercise of government power should not serve as a justification for criminal acts, especially the most abhorrent ones. The lessons of Nürnberg had to be borne in mind when framing the draft code of offences against the peace and security of mankind.

4. Two basic parameters should permeate the whole texture of the draft code: the first was the criminal responsibility of the individual *vis-à-vis* the international community, whether or not the individual in question had been acting as an agent of the State; the second was the particularly serious nature of the offence. He would also add a third criterion, which related to the purpose of the undertaking: the elaboration of the draft code should not be a mere exercise in political rhetoric, but a genuine attempt to shape an instrument which could, if adopted, serve as an effective deterrent. That goal would be achieved only if the draft code was confined to acts which the international community as a whole agreed should be condemned. If the scope of the substantive rules was stretched too far, they might never be implemented and any undue expansion of the list of offences would also weaken the system of implementation.

5. With regard to the scope of the code *ratione personae*, he agreed with the Special Rapporteur that it should apply to individuals. He was not altogether sure what the criminal responsibility of a State would entail, but logically it would have to derive from article 19 of part 1 of the draft articles on State responsibility[7] and would thus arise in the case of the most serious international crimes. The result would be a three-tiered structure of international responsibility consisting of ordinary internationally wrongful acts, international crimes and certain crimes that would be even more serious. Those issues should, in his view, be dealt with by the Special Rapporteur for the topic of State responsibility, since they involved the consequences of an international delict. In any event, the rules governing the responsibility of States and those governing individual criminal responsibility were of necessity entirely different and it would therefore be almost impossible to frame both sets of rules at the same time.

6. Furthermore, he perceived two main difficulties. The first stemmed from the fact that, broadly speaking, breaches of international obligations or, rather, of inter-State law provided the starting-point for the draft code. It was the general thrust of the code to hold responsible individuals who, as agents of a State, had wilfully acted in breach of the rules for the protection of the sovereign equality of States. However, although prohibitions addressed to States might be acceptable even if they were somewhat vague, criminal statutes had to be clear and precise. The maxim *nullum crimen, nulla poena sine lege* was recognized by all nations and represented an achievement that should not be lightly sacrificed. As had rightly been noted, therefore, the specificity of inter-State rules had to be adapted to the special requirements of modern criminal law. In that connection, it might be useful to have a provisional set of general principles to give the Commission an idea of what the process of adaptation would involve in specific terms. The suggestions made by Mr. Ushakov at the previous meeting could be a step in the right direction.

7. The second major difficulty arose from the complexity of some of the situations with which the Commission had to deal: even aggression could be extremely hard to identify. Although most members had stated that they were opposed to any power of determination by the Security Council, that organ might be in a far better position than any judge to know what had really occurred: a judge was normally concerned with individual cases and would, for instance, be unable to assemble all the facts required to clarify the relationship between enemy States prior to the onset of hostilities. It was for that reason that German courts were extremely reluctant to express themselves on foreign policy issues, an area in which they recognized that the executive had broad discretion. In that connection, he pointed out that, as early as 1951, the Treaty Instituting the European Coal and Steel Community[8] had included a provision (article 33, first paragraph) prohibiting the Court of Justice of the European Communities from reviewing

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1879th meeting footnote 6.

[7] *Ibid.*, footnote 9.

[8] United Nations, *Treaty Series*, vol. 261, p. 140.

the conclusions of the High Authority drawn from economic facts and circumstances. His point was that the more complex and subtle the rules, the less likelihood there was that any judge would be able to handle them as required by the principles of fair trial. Questions of implementation should therefore be taken into account at the standard-setting stage.

8. With regard to interference, economic aggression and subversion, which were burning issues, particularly for third world countries, he was not sure that it would be any easier to cope with them by labelling them as offences against the peace and security of mankind. It seemed to him that it would be much more profitable to strengthen the Security Council, so that, in such cases, States would be urged, if not forced, to comply with the relevant rules of international law. He would also advocate that the basic proposition that only the most serious offences should qualify as offences against the peace and security of mankind should carry two corollaries, namely that the draft code should be concerned with basic violations of the human right to life and dignity, as well as with the use of violent means.

9. He would point out that the example of Nazi Germany, rightly taken as a basis for consideration of the topic, was somewhat ambivalent: it was a good example in so far as it demonstrated the need for rules on the subject, but a bad one in that it made things seem almost too simple. For the most part, the situations that had arisen throughout history had been infinitely more complex and, although there had been no other such trial since the Nürnberg trial 40 years previously, the world had not for all that been free of barbarous atrocities.

10. Turning to the draft articles submitted by the Special Rapporteur, and specifically to draft article 2, he said that he preferred the first alternative. A reference to State authorities alone would be tantamount to saying that the State was responsible, whereas in most cases individuals would have to be held liable because, in exercising governmental authority, they had made criminal use of such authority. The two alternatives might, however, be combined.

11. He had some doubts about the two proposed alternatives for draft article 3. As he had already emphasized, a criminal statute should avoid all ambiguity. Yet those texts might give the erroneous impression that any conduct by an individual which corresponded to the definition in article 3 would automatically be regarded as an offence against the peace and security of mankind and therefore be punishable under the code. Such reasoning would not be in keeping with the Commission's approach inasmuch as article 3 was not regarded as establishing an offence. Moreover, the reference in the second alternative to recognition by the international community as a whole would leave the door open for the inclusion of other offences against the peace and security of mankind. Again, while there would be no objection to that approach in typical inter-State law, legislation in the field of criminal law had to be clear and precise. A list of punishable offences could not be supplemented by means of the same processes that applied in the case of amendments to inter-State law.

12. He fully endorsed the priorities which the Special Rapporteur had set in draft article 4 and agreed in particular that armed aggression should be placed at the top of the list. With regard to the method of drafting, however, the Commission was on the horns of a dilemma. Obviously, if it attempted to derogate from the Definition of Aggression adopted by the General Assembly,[9] it would be severely criticized, but it had to adapt that definition for the purposes of the draft code. The Definition of Aggression was tailored to inter-State situations and thus gave a prominent role to the Security Council, which was even empowered to determine that other acts which were not specifically listed constituted an aggression. In criminal law, that would be contrary to the principle *nullum crimen sine lege*. The only course would therefore be to reformulate the definition and to delete all the elements that had no bearing on individual responsibility, such as those contained in subparagraph (*c*) (ii) and (iii) of the first alternative of section A of draft article 4.

13. He wondered whether the threat of aggression (section B) was not typical of the kind of situation that should be considered by the Security Council, since that organ had devised its own methods of preventing wars. Would it really be a constructive contribution to peace to provide that the authors of a threat of aggression which had been successfully averted through available international machinery were liable to be punished for having committed an offence against the peace and security of mankind? That point called for careful consideration.

14. With regard to interference in the internal or external affairs of another State (section C), he noted that the report under consideration (A/CN.4/387) made no reference to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[10] He had already stated that he had reservations with regard to the inclusion of such an international delict in the draft code, since he very much doubted that any degree of precision could ever be attained. Indeed, the more he read about intervention, the less sure he was what it meant.

15. In the list of offences against the peace and security of mankind, the Special Rapporteur had rightly referred only to State-sponsored terrorism. Other forms of terrorism, which were no more than ordinary crimes whose authors should be punished or extradited, should not be given specific international recognition. There was, however, one major lacuna, namely terrorism used as a covert means of aggression. Terrorism, which by definition involved recourse to violent means in open defiance of the minimum requirements for civilized coexistence, was characterized by the insidious nature of its attacks, which were often aimed indiscriminately at civilians and members of the armed forces or police in circumstances that permitted no defence. Terrorists were not to be confused with insurgents or freedom fighters, as

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

[10] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

recognized in the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II).[11] To benefit under that Protocol, a fighting group had to comply with minimum requirements, such as those set forth in its article 1, paragraphs 1 and 2, and those requirements were not met in the case of terrorists.

16. In his view, the provision of section E of article 4 relating to the breach of obligations under a treaty designed to ensure international peace and security was too broadly framed in the context of article 3, which marked the limits of what were to be regarded as punishable offences. He therefore suggested that that provision should be adapted to take account of developments in the past 30 years and, specifically, that it should refer explicitly to bacteriological weapons. Any violation of a ban on the use or production of such weapons should be characterized as an offence against the peace and security of mankind.

17. With regard to section F, the term "colonial" could be retained. However, although there would no longer be any trace of colonialism in the traditional sense of the term once Namibia had gained its independence, that would not put an end to alien domination and exploitation, and an appropriate provision should therefore be included in the draft to cover that type of situation.

18. In any social system, criminal law was the last line of defence after all other mechanisms of social control had failed. It would be unrealistic to expect too much of a criminal code. Criminal sanctions were but one element in the overall machinery for ensuring peace, order and justice. Accordingly, the Commission should be aware that it was drawing up an instrument of last resort whose use would normally be an indication that major damage had already occurred or that the political institutions of the United Nations had been unable to prevent the ensuing chain of events.

19. Mr. LACLETA MUÑOZ, referring to the scope *ratione personae* of the draft code, said that, while he agreed with the statement by the Special Rapporteur (A/CN.4/387, para. 2), that "the general view which emerged from the debate in the Sixth Committee of the General Assembly, was that, in the current circumstances, the draft should be limited to offences committed by individuals", he shared Mr. Balanda's opinion (1882nd meeting) that a majority of the members of the Commission wanted to deal not only with the criminal responsibility of individuals, but also with the responsibility, criminal or otherwise, of States, and that the Commission should pursue that effort. The Commission must, however, abide by the conclusion which it had reached in that regard at its thirty-sixth session and which it had stated as follows:

> With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments.[12]

20. His own view was that it would be unsatisfactory to limit the code to the responsibility of individuals. In explaining the concept of an international crime in his report (A/CN.4/387, paras. 44, 54 and 61 *et seq.*), the Special Rapporteur had drawn attention to article 19 of part 1 of the draft articles on State responsibility;[13] he had also referred to that article in his oral introduction to his report (1879th meeting) and several members of the Commission had referred to it as well. In his own statement on the topic at the Commission's thirty-fifth session, he had said that the Commission had to be consistent.[14] It therefore had to analyse the relationship between the draft code and the draft articles on State responsibility. As he saw it, that relationship was quite simple. In his fifth report on State responsibility, Mr. Ago, the then Special Rapporteur, had pointed out that:

> ... in making a distinction between internationally wrongful acts on the basis of the degree of importance of the content of the obligation breached we shall necessarily be obliged subsequently to draw a distinction also between the régimes of responsibility to be applied.[15]

The draft articles on State responsibility did not, however, define primary rules; they defined only secondary rules. In the case of that draft, the Commission thus merely had to take note of the existence of primary rules and determine which régime of responsibility applied in the event of a breach of those rules. That task had been undertaken by Mr. Riphagen, the Special Rapporteur for part 2 of the draft articles on State responsibility, who had had to categorize the primary rules violated in order to determine the legal consequences of their breach. The legal consequences of the breach of a primary rule which came within the category of primary rules whose breach constituted a crime were enunciated in articles 14 and 15 of part 2 of that draft.[16] Where were those primary rules listed? Article 19 of part 1 of the draft articles on State responsibility gave some examples, but it was obviously not a code of internationally wrongful acts of a particularly serious nature or, in other words, of international crimes. It was thus in the future code of offences against the peace and security of mankind that the Commission would have to enunciate those primary rules and determine which acts, not only by individuals, but also, in his view, by States, constituted offences against the peace and security of mankind.

21. For the time being, however, that was not the task with which the Commission would be dealing, at least not directly, even though it had to do so indirectly. For the present, its task was to prepare a list of offences against the peace and security of mankind that were committed by individuals. That was the result of the origin of its work on the draft code, on which it had started immediately after the Nürnberg and Tokyo trials in historical circumstances that were quite different from current circumstances. At that time, it had been looking at the recent past, when no

[11] See 1883rd meeting, footnote 16.

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

[13] See 1879th meeting, footnote 9.

[14] *Yearbook ... 1983*, vol. I, pp. 22-23, 1758th meeting, para. 38.

[15] *Yearbook ... 1976*, vol. II (Part One), p. 52, document A/CN.4/291 and Add.1 and 2, para. 146.

[16] See 1890th meeting, para. 3.

question of State responsibility had arisen, since the State responsible had been defeated and had surrendered unconditionally. Its criminal responsibility had not been in question: the only issue at stake had been the responsibility of its leaders and authorities. The draft code now under consideration must, however, be future-oriented and designed as a genuine code or as a set of applicable rules, and in legal terms it was only logical that it should contain all the rules relating to the definition of offences against the peace and security of mankind, including acts by a State that had to be regarded as such.

22. In chapter I, section A, of his excellent report, the Special Rapporteur explained why he was proposing two alternatives for draft article 2 (Persons covered by the present articles), one applying to "individuals" and the other to "State authorities". Several members of the Commission had suggested that the two alternatives should be combined and he himself agreed with that suggestion because he was of the opinion that the majority of the offences against the peace and security of mankind which would be included in the future code could be committed only by those who had the State's power apparatus behind them or, in other words, by the authorities of a State, and he did not see how an individual could, save in a very exceptional case, commit an offence against the peace and security of mankind. Such a case was, however, possible and he was therefore in favour of combining the two alternatives and of retaining the reference to "State authorities", if only to prevent that article from being taken to mean that the authorities of a State were covered by some kind of immunity, which would probably be invoked if State responsibility was not accepted. He thus found the wording proposed by Mr. Ushakov (1886th meeting) to be very clever, although at first it seemed to refer only to the individual responsibility of "State agents"—a term which was probably meant in the broadest sense—and not to take account of the obviously exceptional responsibility of an individual whose conduct could not in any case be attributed to a State. In that connection, he was not certain whether the words "persons planning, preparing, initiating or causing" an act of aggression, for example, were intended to refer to all persons, from head of State down to private individual, who might have taken part in the act of aggression. In his view, reference should be made only to an act by an authority whose orders had to be obeyed, not to an act by his subordinates. That was, moreover, probably one of the questions that would be dealt with in the part of the draft relating to general principles. If the future code made no reference to State responsibility or, consequently, to the individual responsibility of certain persons, namely the authorities of a State, that would be tantamount to overlooking the existence of the State.

23. With regard to chapter I, section B, of the report, relating to the definition of an offence against the peace and security of mankind, he agreed with the arguments put forward by the Special Rapporteur and, in particular, with his conclusion concerning the unity of the concept of an offence against the peace and security of mankind. However, he did not think it was possible to give a definition of an offence against the peace and security of mankind. Penal codes did not contain such definitions: they contained only a list of punishable acts, whose seriousness would determine which penalty was to be applied. In that connection, he fully agreed with Mr. Tomuschat. The Commission would none the less have to establish criteria for identifying the acts which would be included in the future code as offences against the peace and security of mankind. Those criteria had to be based on article 19 of part 1 of the draft articles on State responsibility, as the Special Rappporteur indicated in his report (A/CN.4/387, paras. 54 and 61 *et seq.*). In any event, a definition such as that proposed in either of the alternatives of draft article 3 should not be included in the body of the code, for its interpretation might be contrary to the penal-law principle of the specificity of offences and, in particular, to the principle *nullum crimen, nulla poena sine lege*. An explanation such as the one given in article 3 might, however, be included in the preamble to the draft code.

24. His position with regard to general principles was the same as the Special Rapporteur's. General Assembly resolution 39/80 of 13 December 1984, which governed the Commission's work on the draft code, did not require the Commission to formulate general principles before it drew up the list of offences. He would, of course, not have any objection if, in his next report, the Special Rapporteur included and analysed the general principles identified thus far that did not require any definition and did not give rise to any discussion, such as the principle *nullum crimen, nulla poena sine lege* and the principle of the non-applicability of statutory limitations.

25. On the basis of the Definition of Aggression adopted by the General Assembly,[17] aggression should definitely be regarded as an act constituting an offence against the peace and security of mankind. The role of the Security Council, as provided for in that Definition, did, of course, raise a serious problem. The suggestion by Mr. Roukounas (1887th meeting) was worth considering because neither the reproduction of the full text nor a reference to it would be satisfactory. It should also be noted that the provision contained in subparagraph (*b*) of the first alternative of section A of draft article 4, on evidence of aggression and competence of the Security Council, was not, strictly speaking, part of the definition of an act of aggression: it merely gave the Security Council an option with regard to evidence and referred only to the competence of the Security Council to determine, in the exercise of its functions, that an act of aggression had been committed. It was thus a procedural provision. The problem at hand was not so much one of definition as one that related to the implementation of the code, an extremely important issue with which the Commission would have to deal at a later stage.

26. He had doubts about the advisability of including the threat of aggression in the future code, for it was not an act that was easily imaginable. It might be preferable to refer, on the basis of the Charter of the United Nations, to the threat of the use of force.

[17] See footnote 9 above.

27. He had even stronger reservations with regard to the preparation of aggression. It would be more logical to consider that the "preparation" of aggression was not an offence in itself, but one step leading to an act of aggression, rather like an attempt. In any event, he did not think that it would be possible to prove that the preparation of aggression had occurred because, in view of modern military technology and modern weaponry, and in the absence of an act that had actually been committed, the difference between preparatory measures for an act of aggression and those carried out for defensive purposes could be established only by means of a prosecution for intent.

28. Interference in the internal or external affairs of a State could obviously be an offence against the peace and security of mankind, but that concept had to be further clarified. It was, however, difficult to define interference in external affairs: did diplomatic representations to obtain an advantage from a State qualify as interference in its external affairs, in the broad sense of the term? They undoubtedly did, just as negotiations, even the most friendly ones, did.

29. The question of terrorism was extremely important. In his view, the end never justified the means. It was one thing to refer to terrorism and quite another to speak of sabotage, raids or guerrilla activity, which could be and were entirely legitimate in some cases. Blind terrorism organized not only to obtain a material advantage by means of violence, but also for the sole purpose of creating terror could never be a legitimate means of defending any cause whatsoever. The definition of terrorism had given rise to an extremely interesting exchange of views and the one proposed by Mr. Ushakov (*ibid.*) was open to criticism because it did not take account of terrorist acts that were not carried out on behalf of, in the interest of, or with the assistance of a State. He himself agreed with Sir Ian Sinclair (*ibid.*) that the definition should be broader: terrorism was one of the rare cases in which acts by individuals or groups of individuals having no link to a State could constitute offences against the peace and security of mankind, taken not only in the sense of international peace and security, as had been emphasized many times, but perhaps also in the sense of the peace and security of any segment of mankind, including the population of a State or the population of a region of a State.

30. With regard to mercenarism, account should be taken of the work in progress on the drafting of an international convention against the recruitment, use, financing and training of mercenaries. It was, however, not in itself an offence to recruit and use mercenaries: the regular armed forces of many countries, including his own, Spain, had included or did include "mercenary" elements, in the sense of "elements on the payroll", some of whom might be foreigners. Mercenarism must therefore be regarded from the point of view of the purposes for which it was used. If it was used for aggression or interference, it was definitely an offence against the peace and security of mankind.

31. Economic aggression had to display the characteristics of genuine aggression in order to be regarded as an offence against the peace and security of mankind, but it was obviously very difficult to distinguish it from economic measures in the context of inter-State relations.

32. He fully supported the comments made by Mr. Díaz González (1886th meeting) concerning colonial domination. He saw no reason why the term "colonial domination" should not be used and did not think that that concept should be equated with the right to self-determination, which had other connotations.

33. He could not complete his statement without referring to the implementation of the code, whether or not it applied to State responsibility. The implementation of the code was, in any event, of major importance. He did not think that it would be of any use if it was not linked to appropriate implementation machinery, which would of necessity require an international jurisdiction. Moreover, if it was not so linked, it might become a dangerous weapon that could be used in the General Assembly or in the Security Council to implicate individuals, authorities or even a State as criminals. Worse still, it might become a terrifying weapon that could be used, for example, by a revolutionary Government which had overthrown an established Government as a justification for its action in accusing former leaders of being criminals and in punishing them with all the rigour of internal law. That was a serious danger which the Commission had to take into account. He would be able to support the work being done on the elaboration of a draft code and agree that it should, for the time being, be limited to offences committed by individuals only if the Commission took account of the absolute necessity of also providing for international machinery for the implementation of the code.

34. Mr. MALEK, commenting on a point which was worth emphasizing in order to avoid any possible confusion at a later stage, said that, in his third report (A/CN.4/387, para. 9), the Special Rapporteur had analysed some general principles which might be included in the draft code because they seemed to be universally applicable and had, by way of example, referred to the principle of the non-applicability of statutory limitations. During the debate, there had been some doubt whether that principle was universally applicable, apparently because only a relatively small number of States, which did not represent, or were not sufficiently representative of, all regions of the world, had so far ratified or acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[18] Like the principle it embodied, that Convention was universally applicable, even though only 24 States had so far ratified it or acceded to it. The principle of the non-applicability of statutory limitations was, in fact, applicable under the internal law of a large number of countries. Many countries with different legal systems either had no such thing as statutory limitations or did not apply them in the case of serious offences. Moreover, in most countries where statutory limitations applied to all offences, they were formulated in such a way that it was open

[18] United Nations, *Treaty Series*, vol. 754, p. 73.

to question whether they were likely to produce any effect in the case of major crimes. Accession to the Convention, whose objective was to prevent war crimes and crimes against humanity from going unpunished, was therefore not necessary for all those countries, since that objective could be achieved through the application of the provisions of internal law.

35. The Convention enunciated the principle of the non-applicability of statutory limitations as one that already existed in international law. Article I thus stated that no statutory limitation would apply to the crimes referred to therein, irrespective of the date of their commission. The Convention applied specifically to crimes or categories of crimes that had been committed during a particular period in the past and which it was designed to remove from the scope of application of the internal rules relating to statutory limitations. It did so without regard for the principle of non-retroactivity, thus implying that that principle would not apply to those particular categories of crimes under international law. Since, according to the authors of the Convention, statutory limitations were neither explicitly nor implicitly provided for in international law, the principle of the non-applicability of statutory limitations had to apply to crimes that should originally have been punished under that law. Moreover, none of the reasons that were usually invoked in favour of the application of statutory limitations to ordinary crimes, such as the presumption of the offender's remorse or willingness to mend his ways and the disappearance of evidence, justified the application of statutory limitations to the international crimes in question.

36. In addition, no reasonable comparison could be made between crimes under internal law and crimes under international law as far as their effects on the conscience of mankind were concerned, for the latter violently rejected the idea that a serious crime under international law should be allowed to go unpunished. That was why the non-applicability of statutory limitations to such crimes tended to be regarded as a rule of *jus cogens*, a fundamental rule of public international order from which States could not derogate, even constitutionally.

37. There was another point to which attention should be drawn. As its title indicated, the Convention in question related only to war crimes and crimes against humanity—and that was so because its immediate purpose had been to ensure that the principle of the non-applicability of statutory limitations applied to those two categories of crimes, which had been committed during the Second World War and were within the sphere of the legal and legislative competence of States. The persons who had been guilty at that time of crimes against peace had had to be tried and punished by the Nürnberg and Tokyo international tribunals. The preamble to the Convention nevertheless contained two paragraphs that were extremely relevant in that regard. The fourth preambular paragraph stated that "war crimes and crimes against humanity are among the gravest crimes in international law", thus indicating that the States parties had not lost sight of the existence of other international crimes or categories of international crimes which were at least as serious as war crimes and crimes against humanity. The conclusion of a treaty on the question of the non-applicability of statutory limitations to those two categories of crimes only had in no way prejudiced the question of the applicability of statutory limitations to crimes such as crimes against peace and other equally serious crimes. Under the seventh preambular paragraph, the States parties had recognized "that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application". The wording of that provision suggested that, for the time being, it was not necessary under the Convention to make the same affirmation with regard to other serious crimes under international law.

38. He hoped that his comments would help to encourage the Special Rapporteur not to change his views with regard to the principle of the non-applicability of statutory limitations. In any event, the efforts which the international community was making or would make with a view to the development of international criminal law should involve not only the elaboration of rules to prevent odious international crimes and crimes as serious as those to be included in the future code from going unpunished, but also, and in particular, the establishment of an international authority which would have all the necessary integrity to identify offenders, and not to protect them.

39. The CHAIRMAN, speaking as a member of the Commission, said that he had a few general observations to make before examining the main issues raised by the Special Rapporteur's third report (A/CN.4/387).

40. The political sensitivity of the topic under consideration was fully appreciated by the Commission, which had been dealing with it since its establishment in 1949, and had formulated the Nürnberg Principles in 1950[19] and prepared a draft Code of Offences against the Peace and Security of Mankind in 1954. In 1950, the Commission had also considered the desirability and feasibility of establishing an international criminal court to try persons who had committed genocide or other international crimes.

41. The question of the definition of aggression and that of the establishment of an international criminal jurisdiction had been dealt with by other United Nations bodies, whose work had led to the adoption of the Definition of Aggression by the General Assembly in 1974.[20] It was against that background that the General Assembly had, by its resolution 36/106 of 10 December 1981, invited the Commission to resume its work with a view to elaborating the draft code of offences and to review the 1954 draft code "taking duly into account the results achieved by the process of the progressive development of international law".

[19] See 1879th meeting, footnote 6.

[20] See footnote 9 above.

42. In its parallel treatment of the topic of State responsibility, the Commission had also dealt with the question of international crimes and international delicts in article 19 of part 1 of its draft articles on that topic,[21] the first reading of which had been completed in 1980.

43. In its work on the present topic, the Commission had been and should remain conscious of the work done in 1954. It should review and update that work in a realistic and forward-looking manner and seek to promote consistency with its work on State responsibility.

44. In his first report,[22] the Special Rapporteur had drawn attention to the ineffectiveness of a draft code which, in the absence of an international criminal jurisdiction, said nothing about penalties. The effective prosecution, trial and punishment of individuals for serious international crimes under the code would, moreover, be questionable except in the case of a defeat in war or when the accused were already in custody.

45. One reaction to those difficulties would be to conclude that the exercise of drafting the code was futile and that it would have no deterrent effect on the conduct of States or of their agents or spokesmen. A more positive reaction would be to proceed advisedly, step by step, in the conviction that the draft code would be useful and that it would have a deterrent effect. In the fourth preambular paragraph of its resolution 36/106 referring the topic to the Commission, the General Assembly had, for example, expressed the belief that the elaboration of the code "could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations". That positive view was shared by most members of the Commission.

46. He broadly agreed with the outline of the draft code proposed by the Special Rapporteur (*ibid.*, para. 4). The code should be simple, clear and precise. It should be drafted along the lines of the 1954 draft code, which should be updated. The offences could, where necessary, be organized into separate groups. Provisions concerning procedure, penalties, jurisdiction and implementation could be examined later and included in the code in due course.

47. As to scope *ratione personae*, the draft code was restricted for the time being to individuals as subjects of international criminal law and to individual criminal responsibility. It did not refer to groups, States or other entities, although the content of certain grave offences clearly indicated that the acts in question could be committed only by decision of a State. That restriction of the scope of the draft code to individuals had been justified on the basis of the precedents of the Nürnberg and Tokyo judgments, the 1954 draft code and the argument that a State was an abstract entity, so that the crimes attributed to it were committed by men: only by punishing the individuals who committed the crimes could the provisions of international law be enforced. It had also been argued that a breach by a State of its international obligations engaged its international responsibility, which was dealt with in Chapter VII of the Charter of the United Nations and in the draft articles on State responsibility. It had accordingly been said that the concept of the criminal responsibility of a State was not part of existing international law and was unlikely to serve any useful purpose, and that attempts to include it in the draft code would involve the risk of making the code politically more unacceptable.

48. Actually, equally plausible arguments could be put forward in favour of the inclusion in the draft code of the concept of the culpability of States and other groups and entities—the groundwork for which had already been laid by developments which had taken place since the elaboration of the 1954 draft code and by the Commission's work on State responsibility. The Commission should certainly await further responses by Governments and comments in the Sixth Committee of the General Assembly before going into that question in depth. In connection with the draft on State responsibility, it would also be examining the consequences of an internationally wrongful act of a State. If it did not deal with the criminal responsibility of States under that topic—as would most likely be the case—it would have to revert to that matter under the present topic. The main question to be considered was whether a State could be prosecuted as an accused—or as a co-accused with individuals—in a criminal proceeding and, if so, with what consequences. The Commission should examine that question very carefully and formulate concrete suggestions in order to ensure against any legal void.

49. As to the question of the individuals to whom the draft code would apply, he agreed with the Special Rapporteur that, for the time being, account should be taken only of individuals who had acted as agents of, or on behalf of, the State or whose acts were attributable to a State because of its instigation, toleration, negligence or complicity.

50. He also agreed with the Special Rapporteur, that the concept of the "peace and security of mankind" was indivisible. Even within that unity, however, the offences in question could be divided into two categories, namely those relating to international peace and security and those relating to the peace and security of mankind. The latter category was broader and, in some cases, such as that of genocide, the subjects of the code might therefore have to include private individuals, as had been provided in article 2, paragraph (10), of the 1954 draft code. For the present, the first alternative of draft article 2 proposed by the Special Rapporteur could be retained, on the understanding that the intended meaning of the word "individuals" would be specified later.

51. Like the Special Rapporteur, he thought that it would be useful not only to draw up a list of offences, but also to give a definition of an offence against the peace and security of mankind. For that purpose, the Special Rapporteur had relied largely on article 19 of part 1 of the draft articles on State responsibility. Of the two alternative texts proposed for article 3, the

[21] See 1879th meeting, footnote 9.

[22] *Yearbook ... 1983*, vol. II (Part One), pp. 146-147, document A/CN.4/364, para. 50.

first, if properly delimited, would keep the scope of the draft code within the concept of offences against the peace and security of mankind and the Commission could then avoid embarking on the ambitious project of an international penal code. If the first alternative were adopted, it might prove necessary to organize the list of offences according to the four headings contained in that definition and to abandon the traditional headings of crimes against peace, war crimes and crimes against humanity. It would also be possible to use the 1954 list, which did not have any headings.

52. He preferred the second alternative of article 3, which was of a more general nature, but he suggested that, in order to emphasize the seriousness of the offence, the text should be amended to read:

"Any internationally wrongful act which, because of its seriousness, is recognized as such by the international community as a whole is an offence against the peace and security of mankind."

53. As to the general principles, they had a relationship of interaction with the content of the offences covered by the draft code. The Special Rapporteur had, however, preferred to leave the general principles pending until the content of the offences had been further clarified. During the debate, it had been suggested that a set of general principles might be adopted on a provisional basis. The matter would be best left to the discretion of the Special Rapporteur, who was fully familiar with the views of the members of the Commission in that regard.

54. The list of offences contained in the Special Rapporteur's third report was still not complete, referring as it did only to offences against international peace and security. With regard to aggression, one possible course would be to adapt the definition given in the first alternative of section A of draft article 4 by referring to the decisions of the international criminal jurisdiction rather than to those of the Security Council. A second course, which he himself would prefer for the sake of consistency, would, however, be to refer to the Definition of Aggression adopted by the General Assembly and to leave the adaptation of the content of the Definition to interpretation and application by the competent international criminal jurisdiction. The list of offences would thus be more concise, without losing any of its precision or effect. The wording of that second alternative should be reviewed in the light of the 1954 draft code and of article 1 of the Definition of Aggression. He suggested the following wording for the second alternative of section A of article 4:

"Any act of aggression, as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974, including the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations."

55. He supported the inclusion in the list of offences of the threat of aggression and saw no reason why the preparation of an act of aggression should be left out. Without such preparation, a threat could well become an empty threat. Moreover, a threat, when supported by adequate preparation, could have the same effect as the use of armed force. He therefore agreed with those members who had urged the inclusion of the preparation of aggression in the draft code. In order to differentiate between preparation for self-defence and preparation for an act of aggression, the text of article 2, paragraph (3), of the 1954 draft code could provide useful guidance.

56. He agreed with the idea of including offences arising out of interference and terrorism. In that connection, the suggestion by Mr. Boutros Ghali (1879th meeting) to include acts of subversion, either as a part of interference or as a separate offence, deserved serious consideration.

57. Mercenarism should also be dealt with separately, with proper emphasis on its objectives, such as destabilization and subversion.

58. Lastly, he said he agreed with the Special Rapporteur that economic aggression was covered by the offence of interference under section C, subparagraph (*b*), of draft article 4, although it would have been better if express reference had been made to the real injury caused to the sovereignty of the State over its natural resources and to its autonomy in determining its system of production, and if safeguards had been provided.

59. Mr. FRANCIS recalled the comments made by some members of the Commission on the role of the Security Council as a political body. In that connection, reference might be made to the role that legal experts played in internal law as draftsmen and advisers in the preparation of basic documents for approval by higher authorities. When the Commission prepared a draft, it acted as a body of legal experts and then submitted the text to the General Assembly. Even if the members of the Sixth Committee who examined the text were legal experts, they acted not as such experts, but as government representatives.

60. Thus, both in international law and in internal law, legal experts prepared the drafts, but political bodies made the law. That fact made it possible to place the role of the Security Council in its proper perspective. The Definition of Aggression adopted by the General Assembly enabled the Security Council to determine that certain acts were acts of aggression. If the Security Council decided that, in a given situation, a particular act constituted aggression, that did not mean that, in that case, an individual would be directly affected by that decision; if the decision had been taken after the individual concerned had committed the act in question, a court could certainly not take it into account, owing to the principle of non-retroactivity.

61. The CHAIRMAN recalled that the Commission was a creation of the United Nations and responsible to its principal organs. At the same time, however, the members of the Commission were elected in their personal capacity by the General Assembly. They therefore had a measure of freedom to assess situations and to make recommendations to the General Assembly, or to any other body concerned, in as responsible a manner as possible.

62. He declared closed the debate on agenda item 6 and said that, at the next meeting, the Special Rapporteur would sum up the debate and reply to the comments made by members of the Commission.

*The meeting rose at 12.50 p.m.*

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## 1889th MEETING

*Tuesday, 28 May 1985, at 3 p.m.*

*Chairman:* Mr. Satya Pal JAGOTA

*Present*: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta 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.

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**Draft Code of Offences against the Peace and Security of Mankind[1] (*concluded*) (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 (*concluded*)

ARTICLES 1 TO 4[5] (*concluded*)

1. The CHAIRMAN extended a warm welcome to Mr. Suy, Director-General of the United Nations Office at Geneva.

2. He invited the Special Rapporteur to sum up the debate on the draft Code of Offences against the Peace and Security of Mankind and to make proposals concerning draft articles 1 to 4 and their possible referral to the Drafting Committee.

3. Mr. THIAM (Special Rapporteur) said that the interest shown in the topic by all members of the Commission and the fruitful debate prompted by his third report (A/CN.4/387) encouraged him to persevere with his work.

4. It was not surprising that there had not been unanimous agreement on the method to be followed in preparing the draft code, since working methods never secured unanimity. Two comments must, however, be made on that point. First, the fact that he had not yet formulated the general principles applicable to the subject did not mean that he was not thinking of them. Moreover, he had recalled some principles (*ibid.*, para. 5), which derived from the Statute and Judgment of the Nürnberg Tribunal; but he was well aware that other principles would have to be stated, since the subject had greatly evolved in recent decades. If he had opted for the deductive method, which some members advocated, he would probably have been reproached for stating abstract principles without being able to prove their universal application. When he had submitted his second report (A/CN.4/377), he had indicated that he intended to take existing international instruments as the basis, because they could not be contested. It should nevertheless be noted that even an instrument such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[6] might not be considered to be unanimously accepted, either because it had not won the support of some particular group of States, or because some countries did not recognize statutory limitations. Other general principles, such as that of *nullum crimen sine lege*, were not recognized in all countries. As opinion on the method of work to be adopted had been very divided in the Sixth Committee of the General Assembly, it would be better to give further consideration to the general principles before trying to state them. Although it had always been clear to him that the draft code, when completed, would include an introduction laying down general principles, he had never asserted that the Commission must necessarily begin by stating those principles.

5. The second comment called for on the method of work related to the comparison often made between the elaboration of the 1954 draft code and the work now in progress. It could be seen from the Commission's reports on the 1954 draft code that the acts constituting offences against the peace and security of mankind had been studied before the general principles; so he had not introduced any innovation. It should also be noted that if the 1954 draft code had been so perfect it would not have been left aside for so long. But certain definitions, now considered unnecessary by some people, had seemed necessary at the time and had constituted a reason for suspending work on the code.

6. With regard to the scope *ratione personae* of the future code, some members had urged the need to examine forthwith the problem of the criminal responsibility of States. The Commission had, however, already decided to start with the criminal responsibility of individuals, without excluding the study of the criminal responsibility of States at a later stage. It was, indeed, always advisable to proceed from the simple to the complicated, and the criminal responsibility of individuals already raised so many problems that it would be better not to study it at the same time as the criminal responsibility of States. Besides, as Mr. Reuter had observed (1879th meet-

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1888th meeting, footnote 18.