Document:-
A/CN.4/SR.1889

Summary record of the 1889th 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

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.

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.

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.

ing), it would have to be decided sometime whether the criminal responsibility of States belonged in the subject-matter of the draft code or in that of State responsibility. The responsibility of States could have a material aspect, namely reparation for injury, as well as a criminal aspect, which did not necessarily pertain to the topic under consideration.

7. As for draft article 2, on persons covered by the draft code, the Commission appeared to prefer the first of the two alternatives, which referred to individuals and not to State authorities. It should be specified, in that connection, that the term "individuals" could mean either State agents or private persons. The expression "State authorities", used in the second alternative, could mean either institutions, such as a Government or administration, or agents of the State as understood in the jurisprudence to which Mr. Roukounas had alluded (1887th meeting). Thus an international crime could be committed by a State agent without the participation of an individual, in which case it came under international law. An international crime could also be committed by a State agent with the participation of an individual, in which case the crime of the individual came under international law because he had taken part in the commission of a State crime. Lastly, such a crime could be committed by an individual without the participation of a State agent, in which case it was open to question whether the crime came under international law.

8. Some members believed that the answer to that question depended on the magnitude of the crime. It could indeed be maintained that individuals belonging to groups of criminals or powerful economic, political or ideological groups, such as the Red Brigades, could commit large-scale crimes. But could such crimes be regarded as international crimes by reason only of their magnitude? If the Commission took the view that an individual who committed a crime of that kind committed an international crime, it would be including crimes by individuals in its draft codification. It could then be questioned whether that choice was in conformity with its initial option favouring a minimum content. If it broadened the scope of the code by taking into consideration not only the nature of the offence, but also its author, would the Commission not be drafting an international penal code rather than a code of offences against the peace and security of mankind? It would, indeed, be difficult to draw a line of demarcation between offences of that kind and other international crimes such as piracy, counterfeiting or the corruption of international officials, which the Commission had left aside because they did not necessarily endanger the peace and security of mankind.

9. Some disturbing examples had been given, however, such as the drug traffic. In his first report[7] he had asked whether, from a certain point of view, the traffic in narcotic drugs did not constitute a crime against humanity. Mr. Roukounas had held that the drug traffic, by injuring the mental health of a population, could be regarded as a crime against humanity on the same basis as genocide. But genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide,[8] involved an element of intention, namely the intention to destroy all or part of a national, ethnic, racial or religious group. But it was profit, rather than a motive of that kind, which animated those who engaged in the drug traffic, so that any analogy seemed difficult. He believed that, when individuals committed a crime against a State without the participation of State agents, they committed a crime which came under internal criminal law and not international law. Nevertheless he would be willing to include the drug traffic in the draft code, although it might extend the topic to an infinite degree. The Commission should therefore guard against also including the various preparatory acts mentioned by Mr. Arangio-Ruiz (*ibid.*), such as the take-over of power in Italy by the Fascists and the subsequent suppression of political rights and fundamental freedoms. Did States really expect the code to protect them against seditious persons and extremists of the left or right? Did States, which were always very jealous of their sovereignty, really wish the code to protect them against the internal activities of their own nationals?

10. Genocide was a crime which could be committed by private individuals, though it remained to be seen in what form. First, it should be distinguished from genocide committed by a State within its own frontiers. It might happen, for example, that a racist Government decided to exterminate part of its population, which would engage the responsibility of the State and its agents. When a crime of genocide was committed by individuals, they must come from some State; to that it was often replied that certain States were so weak that they could not control their own subjects. Such views could lead to all sorts of excuses. It must not be forgotten that a State had to assume a minimum of responsibility and could not put all the blame for certain crimes on private individuals as it pleased. Besides, it would be very difficult in such cases to determine whether the State had acted in good faith or as an accomplice. Moreover, although the crime of genocide could be committed by private individuals according to the Convention on the subject, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity reduced the problem to smaller dimensions, since according to that instrument the crime of genocide could be committed by individuals only with the participation of a State. He himself had always considered that offences against the peace and security of mankind were of such magnitude and atrocity that they could be committed only by States or with the participation of States. After the Second World War, the international community had wished to have a code for the prevention of crimes such as those perpetrated by the Nazis. Although other crimes must now be added, care should be taken not to make the list unduly long.

11. Although several members of the Commission were opposed to defining offences against the peace and security of mankind, many others had long been

[7] *Yearbook ... 1983*, vol. II (Part One), pp. 143-144, document A/CN.4/364, para. 38.

[8] See 1885th meeting, footnote 13.

in favour of such a definition. The Commission could, of course, proceed by enumeration, but that method had the disadvantage of being too rigid. The list of offences in the 1954 draft code no longer corresponded to reality. It was because he had thought it necessary to give judges some particulars by which to identify an offence against the peace and security of mankind that he had thought he should take as a starting-point article 19 of part 1 of the draft articles on State responsibility.[9]

12. Several members of the Commission had maintained that that provision related to the responsibility of States, not of individuals, and that the basis of the two responsibilities was not the same, since the former derived from a wrongful act and the latter from a fault. In reality a fault, just as much as a wrongful act, was a breach of an obligation. For just as States assumed obligations of conduct and legal obligations deriving from agreements and conventions, individuals assumed obligations of conduct and legal obligations deriving from contracts. In both cases, a breach could be a source of civil or criminal responsibility. At the international level, when the agents of a State committed a very serious wrongful act, it was an international crime for which they had to answer; but it was the State that was answerable for the injurious consequences. As to the sources of responsibility, the phenomenon was the same internally and internationally: an act could always generate two responsibilities. It was in the régimes of responsibility that the differences appeared, since a State could not be treated as an individual, particularly in regard to penalties. Consequently, he doubted whether it could be maintained that article 19 could not give rise to individual responsibility.

13. Moreover, the two responsibilities constantly overlapped. For instance, an act of aggression engaged the criminal responsibility of the State agents who had committed it and imposed on the State an obligation to make reparation. The same applied to annexation or terrorism organized by a State. Just as the State had to make reparation for injury caused to its nationals, it was responsible for injury caused to foreigners in another State or caused to another State. The notion of professional fault provided another illustration of such overlapping. In administrative law, any fault in the operation of services to users which was not particularly serious engaged only the responsibility of the State: it was a professional fault. But as soon as the fault by the agent attained a certain seriousness, it engaged his personal responsibility as well as the responsibility of the State. The result was that, when an act generated double responsibility, the criminal court had competence to decide both the question of the penalty to be imposed on the author of the act and the question of the civil reparation payable. In such cases the civil court had no jurisdiction. The situation was probably no different at the international level. Indeed, he did not see *a priori* why an international criminal court should not be competent both to punish the author of the crime and to pronounce on the civil reparation payable. It therefore seemed to him incorrect to say that article 19 could not be the source of two responsibilities.

14. It was with those considerations in mind that he had been largely guided by article 19 in preparing the first alternative of draft article 3, on the definition of an offence against the peace and security of mankind. Contrary to what some members had asserted, he had not taken over article 19 as a whole, but had confined his text to the most serious offences—those which affected a number of protected legal interests considered to be the most important. As to the second alternative of article 3, some members had suggested that it should be expanded, which might lead to a tautological definition. Just as it was difficult to define terrorism without referring to terror, it was hard to define the offences to which the draft code related without saying that they attacked the peace and security of mankind. Nevertheless, the text of the second alternative could be improved.

15. With regard to the first of the acts on the list of offences, that of aggression, he recalled, first, that the reason why examination of the 1954 draft code had been suspended was that the international community had been waiting for the concept of aggression to be defined. Now that that had been done, at the cost of long labours, some members maintained that no reference should be made to the definition because it had been drafted for political bodies, whereas the draft code was intended for jurisdictional bodies. He did not think it possible to ignore the definition, though its references to the Security Council should be removed. For it provided, first, that the Security Council could decide that an act considered to be one of aggression did not constitute aggression in the light of the circumstances, and secondly, that the Security Council could characterize as aggression acts other than those enumerated in the definition. It would not be advisable for courts to be closely bound by the decisions of the Security Council, especially as that body, because of its nature, was sometimes unable to establish the existence of an act of aggression. As the Commission seemed to be unanimously in favour of including aggression, he proposed to draw up a list of acts of aggression, specifying perhaps that it was not exhaustive. It was true that in criminal matters the principle *nullum crimen sine lege* had to be respected, but some discretion must nevertheless be left to the court. In short, the whole problem of definitions arose. It would probably be simpler to reproduce the offences listed in the 1954 draft code, without trying to define them, or those which had appeared subsequently. Being convinced of the value of definitions, however, he believed that it was worth while to try to formulate them.

16. Opinion was very divided on the threat of aggression, but most members seemed to believe, as he did, that it should be included in the draft code. It was true that it was not clearly differentiated from the preparation of aggression, but it was important to refer to it, not only because the Charter of the United Nations prohibited that threat, but because it would be inconceivable that by saying nothing the Commission should permit a State, because it was more powerful than another, to threaten that State with impunity.

[9] See 1879th meeting, footnote 9.

17. The majority of members of the Commission had spoken against including the preparation of aggression in the code. That offence was difficult to prove. Evidence of the preparation of aggression might be provided afterwards by secret documents of the aggressor State, but that evidence could only constitute aggravating circumstances for a crime already considered to be the most serious. After all, the saying "He who wants peace prepares for war" was still valid. Any State appearing before an international court could claim that it was preparing for war not in order to commit aggression, but to defend itself. That being so, it would be better to leave that offence aside.

18. It had been said of interference that it was too vague and too political a concept. Yet that concept, which was recognized both in the Pact of Bogotá[10] and in the 1954 draft code, nevertheless had a concrete content. There was interference when civil war was fomented in a State by another State. But was there interference when a State took sides in a conflict within another State between its President and its Prime Minister? And did financial support of an opposition movement constitute interference? He believed so. In spite of the difficulties raised by the definition of interference, he thought it was an offence which should be included in the draft code.

19. The crime of terrorism was much more complicated, for it had several aspects. It could be an act by individuals, but for it to be an offence against the peace and security of mankind there must be participation by a State. Mr. Mahiou (1882nd meeting) had understood that, in limiting terrorism to the acts of a State directed against another State, he (the Special Rapporteur) was leaving aside the problem of individuals. But the acts of terrorism with which he was concerned were those organized by the authorities of a State against another State, including its population, in other words individuals. That was quite clear from the definition of terrorist acts in draft article 4, section D (*a*), according to which they were criminal acts directed by the authorities of a State against another State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public. Obviously, the consequences of such acts included reparation for injuries caused to States and to private individuals.

20. Terrorism by national liberation movements, to which Mr. Díaz González (1886th meeting) had referred, raised the problem of the relationship between terrorism and guerilla warfare. It was true that the legitimacy of national liberation movements had been recognized, but it was important to distinguish between the legitimacy of a movement and that of the methods it employed. What was forbidden for States could not be permitted for national liberation movements. It had happened that national liberation movements had used terrorism against the State which was their adversary, but they could not use the same means against innocent third parties. Also, certain rules of humanitarian law applied to them in case of armed conflict.

21. On colonial domination, he did not think there was any difference of opinion. He had proposed a formula and Mr. McCaffrey (1885th meeting) had proposed a variant which the Drafting Committee could examine in due course.

22. In his opinion, breaches of obligations under certain treaties designed to ensure international peace and security were extremely serious. He found it difficult to understand how one could be in favour of including the preparation of aggression in the future code and, at the same time, be opposed to including the violation of obligations under treaties designed to ensure peace: would that not indicate some degree of bad faith? He was quite willing to cite the international instruments in question, as had been proposed. There were two groups of international instruments: those relating to areas and zones to be protected and those relating to armaments. He saw no objection to mentioning in the draft code the obligations stated in those international instruments, the violation of which would be a crime.

23. With regard to mercenarism, he saw no difficulty in drafting, as had been requested, a special provision separate from that appearing in the Definition of Aggression.

24. Subversion raised some problems for him, for it was a general notion, very vague and loose, which covered a great number of separate acts: subversion covered any act whose purpose or result was to overthrow an established régime. In view of the circumstances prevailing in Africa at the time, it was not surprising that the heads of State and Government of OAU, at their second ordinary session held at Accra in 1965, had examined the problem of subversion and identified some aspects of it, to which Mr. Boutros Ghali (1879th meeting) had referred. He hesitated to include subversion as an offence against the peace and security of mankind. At most, it might be possible to mention it in the body of the text among the acts regarded as interference in the affairs of a State.

25. Economic aggression, an expression used mainly by politicians, raised the same problem. No precise definition of that notion had yet been given, and to draft one would be a dangerous undertaking. Although aggression was characterized by the motive —political, ideological or economic—it took place, of course, from the moment when armed force was used. But in that case it was aggression pure and simple, whatever the underlying motive. And if aggression could not be characterized by its motive, by what criteria could it be characterized? There were, in fact, several ways of exerting pressure on Governments without resorting to armed force; for example, through economic measures. But that, in his opinion, was a violation of sovereignty that was not aggression. He found it difficult to present economic aggression as a well-defined concept and to propose it as such to the Commission.

26. He reminded the Commission that he had received several contributions. Mr. Ushakov (1886th meeting) had proposed an interesting text, although his approach was different from his own in that it did not define the acts. It would be for the Commission

[10] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 30, p. 55).

and the Drafting Committee, in due course, to see whether that valuable contribution could be used. In any case, it would be advisable to replace the word "persons" in Mr. Ushakov's proposal by the word "individuals", which was not ambiguous, since there were also legal persons and consideration of the problem of the responsibility of legal persons under public law had been deferred. Mr. McCaffrey (1885th meeting) had made a proposal on colonialism and the Chairman, speaking as a member of the Commission (1888th meeting), had made various proposals concerning the definition of an offence against the peace and security of mankind.

27. He was aware that all the draft articles he had submitted could not, of course, be referred to the Drafting Committee. Article 1 could be referred to it, together with the first alternative of article 2 and the second alternative of article 3, the principle of which had won support. On the other hand, it would be impossible to refer to the Drafting Committee the text of article 4, which enumerated the acts constituting an offence against the peace and security of mankind, since it was necessary to reconsider the definitions of aggression, terrorism, etc. He intended to examine the comments made by members of the Commission very carefully, with a view to improving the substance of the texts he had proposed for article 4, it being understood that in his next report he would pursue the study of other acts constituting an offence against the peace and security of mankind. He therefore requested that he be allowed some time for reflection.

28. The CHAIRMAN thanked the Special Rapporteur for his comprehensive statement and his proposals concerning the Commission's future work on the topic under consideration. He noted the Special Rapporteur's conclusion that article 4 was not yet ripe for referral to the Drafting Committee, but that article 1, article 2 (first alternative) and article 3 (second alternative) should be referred to the Committee for consideration in the light of the discussion in the Commission and of the Special Rapporteur's remarks.

29. Mr. USHAKOV said he believed that draft article 4, on acts constituting an offence against the peace and security of mankind, was the most important article, and that the Commission should begin at once to determine some concrete acts which might be regarded as such offences. If the Special Rapporteur agreed, article 4 could also be referred to the Drafting Committee, together with the other articles.

30. Mr. THIAM (Special Rapporteur) said that, if the Commission so desired, he saw no objection to referring the whole of article 4 to the Drafting Committee. He was sure that the improvements he intended to make to that article could equally well be made by the Drafting Committee. The Commission could either leave him time for further reflection on the acts constituting an offence against the peace and security of mankind, or refer article 4 to the Drafting Committee, of which he was a member in any case.

31. Sir Ian SINCLAIR said that, in principle, he had no objection to article 1, article 2 (first alternative) and article 3 (second alternative) being referred to the Drafting Committee, but he was opposed to any proposal to refer article 4 to the Committee. Even with the suggestions made during the debate, the list of offences in article 4 was not ripe for consideration by the Drafting Committee. The long discussion on the various acts in that list and on their relationship with the general principles bore out that conclusion.

32. Mr. USHAKOV said that there was nothing to prevent the Special Rapporteur from engaging in further reflection and submitting concrete proposals to the Drafting Committee. Certain crimes, such as aggression and the crimes against peace tried by the Nürnberg Tribunal, really raised no difficulty as to substance. They attracted some degree of consensus and could well be examined by the Drafting Committee.

33. Mr. CALERO RODRIGUES said that it would be premature to refer article 4 to the Drafting Committee at the present stage. He strongly opposed the idea that proposals for amending the list in article 4 should be left to the Drafting Committee. Any such proposals or suggestions should be made in the plenary Commission, where they could be discussed by all its members, including those who were not members of the Drafting Committee. Lastly, he did not think that the Drafting Committee would be able to do much about articles 1, 2 and 3; he would not oppose their referral to the Committee, though it did not seem really necessary.

34. Mr. THIAM (Special Rapporteur) repeated that he would leave it to the Commission, which could accept Mr. Ushakov's proposal and refer the text of article 4 which it had examined to the Drafting Committee; but he himself intended to submit to the Commission, at its next session, a somewhat modified version of article 4. As to the general principles, he would study them at the time he considered most appropriate.

35. Mr. REUTER observed that the Special Rapporteur was inclining towards a definition *ratione personae* of the offences, which meant that they would always be committed by a person who, even if he was not an official, was an agent of the State, that expression being understood in its widest sense. In other words, if the Commission endorsed that approach, as he did, it would be confining itself to offences in which the State was always the instigator. He noted that the Special Rapporteur was therefore inclined to leave aside certain offences, encouragement of which by the State would be difficult to establish, such as those connected with the illicit traffic in narcotic drugs. The question raised by the Special Rapporteur concerning the adaptation of his work to that of the Special Rapporteur for the topic of State responsibility was most important in that context. For in its work on the draft code the Commission would have to examine offences that were committed by individuals, but behind which there was always a State crime; and a number of members of the Commission had pointed out that all the subject-matter of the draft code to some extent duplicated that of State responsibility. The Special Rapporteur had asked the Commission to settle the question of the relationship between his topic and the

topic of State responsibility. He would therefore ask the Special Rapporteur, and the Commission if it accepted the Special Rapporteur's view, when the question of that relationship would be settled. If the Commission referred article 4 to the Drafting Committee forthwith, it seemed that the question would be settled at once. He would therefore like the Special Rapporteur to explain his position on that point. It was a question of method, which could not be avoided.

36. Mr. THIAM (Special Rapporteur) said that he had not yet finished his study of acts constituting an offence against the peace and security of mankind. In explaining the meaning he attached to the second alternative of draft article 2, he had asked the Commission to accept that approach provisionally, as he would have to go further into the question of the scope *ratione personae* of the draft when he took up crimes against humanity. All the offences listed in draft article 4 so far were offences that could be committed only by State agents, except perhaps terrorism by individuals. For the time being, before the Commission settled the question whether the Special Rapporteur for the topic of State responsibility or he himself should deal with crimes against humanity, he would like to continue his study of those crimes so as to be able to take a definitive position.

37. At the outset, he had considered that offences against the peace and security of mankind could be committed only by State agents or by individuals with the participation of State agents. He was still concerned, however, about the problem of individuals acting alone. If the Commission decided to identify the offences according to their author, the topic would be very wide; but if it decided to identify the offences according to their nature, some of them would be set aside. Drug trafficking, for example, was a crime by individuals, and if it were included in the draft code it would not be permissible to leave aside other crimes that could be committed by individuals. He was still considering that question and waiting to examine crimes against humanity before fixing his position. He would certainly do so in his next report, in which he would take up the question of crimes against humanity.

38. Mr. YANKOV stressed that the list of acts constituting an offence against the peace and security of mankind contained in draft article 4 was still incomplete. He also pointed out that the indivisibility of the notion of the peace and security of mankind, which the Special Rapporteur had emphasized, was valid not only for crimes against peace, but also for two other categories of crime: war crimes and crimes against humanity. He thought the Commission would do better to wait until it had a clearer idea of article 4 before referring it to the Drafting Committee. Moreover, in view of the volume of work with which that Committee was faced, he urged that only articles 1, 2 and 3 should be referred to it.

39. Mr. BARBOZA agreed that draft article 4 should be reserved, because the Special Rapporteur had so recommended and, in the light of the discussion, would be able to submit to the Commission a text of that article on which the Drafting Committee would really be able to work.

40. It seemed to him that the general discussion was not closed and that it was in the context of that discussion that the Commission should decide whether the Special Rapporteur for the draft code of offences against the peace and security of mankind or the Special Rapporteur for State responsibility should deal with the question of criminal responsibility.

41. That being so, it would be preferable to reserve articles 1, 2 and 3 as well as article 4, because in fact the Drafting Committee would have very little work to do on article 1 and on the first alternative of article 2, which did not raise any particular difficulties and were generally accepted, and because the second alternative of article 3 did not seem to have secured unanimity or even a large consensus in the Commission.

42. Mr. LACLETA MUÑOZ noted that the discussion in progress, on a question which was really one of procedure, showed that the Commission's efforts always to secure a consensus sometimes resulted in appreciable loss of time, whereas the question could easily be settled by an indicative vote.

43. He endorsed the comments made by previous speakers, particularly those of Mr. Barboza. He too believed that articles 1 and 2 could be referred to the Drafting Committee; but he had doubts about article 3, on which all opinions had not been taken into account and which might provoke a new discussion. He himself had already said (1888th meeting) that, like other members of the Commission, he did not think it wise to include as a separate article in the body of the draft a definition of an offence against the peace and security of mankind, because of the difficulties of interpretation and the uncertainty it might create, and he had added that such a definition might possibly have a place in the preamble.

44. With regard to article 4, he agreed that it would be premature to refer it to the Drafting Committee, which, moreover, was not short of work.

45. Mr. FRANCIS said that it would be most unfortunate if the Commission did not comply with the Special Rapporteur's recommendations and refer articles 1, 2 and 3 to the Drafting Committee. The Commission must be seen to be making progress on the topic. He agreed that article 4 should not be referred to the Drafting Committee, in particular for the reasons given by Mr. Yankov.

46. Mr. USHAKOV said he was still convinced that the Commission should directly attack the real problem, which was that of the list of concrete acts constituting an offence against the peace and security of mankind; the Special Rapporteur had already drawn up part of that list. It would be curious if the Commission, after considering the subject for three years, could not specify a single concrete crime. Moreover, there was one crime which was universally recognized as such and there were others listed in the Charter of the Nürnberg Tribunal,[11] on which there was also unanimity. If the Commission was to make any progress, it must refer article 4, which was the most

[11] See 1879th meeting, footnote 7.

important and really crucial, to the Drafting Committee.

47. Mr. McCAFFREY said that he thought the Special Rapporteur had been wise to suggest that only those draft articles which he regarded as ripe for consideration should be referred to the Drafting Committee. But if the Commission decided not to refer any of the articles to the Drafting Committee, he would have no objection.

48. The CHAIRMAN said that, in the light of the discussion, he would propose referring article 1, article 2 (first alternative) and article 3 (both alternatives) to the Drafting Committee. As to article 4, he would propose that section A (acts of aggression) be referred to the Drafting Committee for consideration, if time permitted, in the light of the Commission's discussion. Any text which the Drafting Committee might recommend could be examined at the current session and be included in the Special Rapporteur's fourth report.

49. Mr. McCAFFREY asked whether that meant that article 4 was to be treated differently from the other draft articles.

50. The CHAIRMAN said that the Drafting Committee would be requested to examine articles 1, 2 and 3 and to prepare drafts in the light of the discussion, for such action as the Commission deemed appropriate. Any text that the Committee might draft for article 4 would certainly help the Commission in its work, but there would be no question of adopting it at the current session.

51. Mr. REUTER said he understood that the Chairman's proposal was that the Drafting Committee be asked to hold an exchange of views on section A of article 4 to help the Special Rapporteur and the Commission in their work, it being understood that that would not affect the Commission's traditional method of work in any way. If that were so, he supported the proposal; otherwise he must oppose it. It was quite clear that the Special Rapporteur's rights remained intact, that the time he had requested for reflection would be granted to him, that he retained his full freedom and that the Commission did not lose any of its rights either. Those were two important legal points; the Special Rapporteur had rights and the Commission had rights, and those rights must be preserved.

52. Mr. THIAM (Special Rapporteur) said that he hoped the Commission would adopt the Chairman's proposal.

53. Mr. REUTER, invited by the CHAIRMAN to state his preference, said that he always gave way to the views of a Special Rapporteur on questions of procedure.

The Chairman's proposal was adopted.

The meeting rose at 6.15 p.m.

1890th MEETING

Wednesday, 29 May 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

State responsibility (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc. 3)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/389).

2. Mr. RIPHAGEN (Special Rapporteur) said that the sixth report consisted of an introduction and two sections. Section I contained commentaries to draft articles 1 to 16, which constituted part 2 of the draft articles, and section II dealt with the possible content of part 3 of the draft.

3. Draft articles 1 to 16, which had been submitted in his fifth report (A/CN.4/380), read as follows:

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

Article 2

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

---

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

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*