Document:-

A/CN.4/SR.1965

Summary record of the 1965th 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:-

1986, vol. I

1965th MEETING

Thursday, 12 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, 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/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf. Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART IV (General principles) *and*

PART V (Draft articles) (*continued*)

1. Mr. LACLETA MUÑOZ said that the elaboration of a code of offences against the peace and security of mankind was the first task that had been assigned to the Commission. The need at that time had been to confirm the decisions of the Nürnberg Tribunal, and above all to lay down the principle that offences against the peace and security of mankind did exist—in other words, to institutionalize the principle so that the rule *nullum crimen sine lege* could not be invoked to avoid punishing that type of offence. Yet to carry out that task properly, which naturally had to be undertaken within the framework of the international organization created after the Second World War, namely the United Nations, it had proved necessary to wait until the Organization, and more precisely the General Assembly, had defined the concept of aggression, which was tied in with the concepts of collective security and armed intervention against the perpetrators of aggression, the principle of decolonization, and so on.

2. Unfortunately, the draft under consideration did not mark any progress in that regard, but the Commission could not be blamed for that. The Commission had not been able to deal in the draft code with the responsibility of the State or provide a mechanism for implementation, in other words a jurisdiction, and was therefore reduced to performing a mere task of codification, precisely because of the observations that had been made by States and the guidelines given by the Sixth Committee of the General Assembly.

3. As to the draft articles submitted by the Special Rapporteur, a general observation was in order. Since the question of State responsibility had been set aside, the draft code was supposed to apply solely to individuals. However, in a number of provisions, it had not been possible to avoid using the formula "by the authorities of a State". Hence the acts in question were indeed attributable to the State.

4. Unquestionably, an offence against the peace and security of mankind was a universal offence, as stated in draft article 4; but it was difficult to see how it could be stated, in the second sentence of paragraph 1, that "Every State has the duty to try or extradite any perpetrator of an offence ... arrested in its territory". Only the words "alleged perpetrator" or "an individual suspected of having committed an offence" could be used. Nothing in the draft code made it possible to determine who the "perpetrator" was, something due partly to the fact that the draft was limited to enunciating the principle of universal competence, which was absolutely unsatisfactory, instead of providing for a jurisdictional mechanism.

5. Draft article 8 spoke of self-defence; but was it self-defence by the individual or self-defence by the State? There again the problem was the distinction between acts by the State and acts by the individual. Doubtless it involved a criminal act which was committed in the exercise of the State's right to self-defence and which, as such, lost its criminal nature. Nevertheless, that point had to be clarified.

6. Draft article 9 provided for the responsibility of the superior, which appeared to be a sound solution, one that was in any event preferable to retaining the concept of complicity. It was difficult to see how complicity could be considered for acts in which a superior and a subordinate were associated, especially when it was the conduct of organs of the State that was involved.

7. He had no objection to using the term "war crime" in draft article 13. Admittedly, war was unlawful and hence some people might have difficulty accepting that acts committed during actions which were themselves already outlawed and had been proscribed by the international community should be characterized as crimes; yet war was unfortunately a reality and could not be ignored. Furthermore, the traditional term "war crime" seemed preferable to the formula "crime in the case of an armed conflict". It would be sufficient to explain in the commentary to the article that the Commission realized that, at the present time, "war" was no longer a legal concept.

8. With regard to acts constituting crimes against peace, how, in the case of aggression, could the launching of an attack against the territory of a State be an act of persons other than the "authorities of a State" vested with decision-making power? Not every soldier in an army could be required to ask himself whether the order he was receiving was lawful, and whether he could carry it out without running the risk of being prosecuted for participating in an act of aggression. The same problem also arose in connection with other provisions.

---

[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 ... 1985*, vol. II (Part Two), p. 8, para. 18.

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

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

Generally speaking, not every individual could be expected to behave heroically and refuse to carry out an order which he believed was not in keeping with obligations that actually devolved upon the State under the provisions of the code. It was an extremely serious problem and must be taken into account, at least at the interpretation stage.

9. In draft article 11, the Special Rapporteur had simply reproduced the terms of the Definition of Aggression[4] and, wisely and logically, refrained from considering the procedure to be followed, and especially the means of action available to the Security Council in cases of aggression. Because of that, however, the interpretation and implementation of article 11 would raise difficulties and, since the judges of various States would, under the terms of draft article 4, be called upon to apply it, some very surprising results could well emerge. A situation might arise, for example, in which a judge sentenced a person on the basis of article 11, paragraph 5, whereas the Security Council might conclude that the act which had led to that person's conviction did not constitute aggression. Such an example showed how difficult it would be to implement the code before the question of jurisdiction was settled and the modalities for implementation of its provisions were established.

10. He had no objection to mentioning the "threat of aggression" in paragraph 2 of article 11. In paragraph 3 (*b*), however, the formula "exerting pressure ..." was very disturbing, for the conduct referred to in that subparagraph was completely normal. It was even an essential aspect of diplomacy. Every State exerted pressure at times in order to obtain a particular advantage from another State. The subparagraph should therefore be recast. Paragraph 4 as a whole was satisfactory and was the one that best brought out the concept of the responsibility of the individual. In paragraph 5, a breach of obligations arising from treaties in force should indeed be mentioned; but there, too, the question was who would apply that provision. The breach covered by that paragraph was committed by the authorities of a State acting in the context of State policy. That problem had not arisen at the Nürnberg trial, for the good reason that the country in question had been subdued by armed force. But when the code entered into force, who would determine and apply the penalties if the accused State had not been subdued and if the code did not at least stipulate that the State must hand over the guilty party or parties? Furthermore, even if a provision to that effect were incorporated in the draft code, the State, in the case covered in paragraph 5, would not abide by it, since the guilty party would have acted in the context of the policy that the State itself had defined.

11. Draft article 12 was limited to codifying generally accepted rules and therefore seemed acceptable. With regard to the definition of *apartheid*, in paragraph 2, he believed that the second alternative should be retained, but the reference to southern Africa should be removed, for *apartheid* was a crime that could be committed anywhere in the world.

12. As to war crimes, he was in favour of the second alternative of draft article 13, which expressly referred to the unlawful use of weapons. In his opinion, however, the Commission neither could nor should go any further. Although the use of a nuclear weapon was without any doubt a crime in moral terms, it could not be considered as such in legal terms, since unfortunately it was not yet prohibited by positive norms of international law.

13. In part IV of chapter II of the draft, the Special Rapporteur had not submitted any provisions relating to extenuating circumstances or exculpatory pleas, deeming them to have no place in a draft code that did not specify penalties (A/CN.4/398, para. 256). It was true that the effect of extenuating circumstances and exculpatory pleas was to modify the penalty applicable, but it should be possible to describe some of them without necessarily referring to penalties.

14. Mr. USHAKOV said that he was very disappointed with the draft articles, for they marked no progress over the 1954 draft code, which the Special Rapporteur had followed too faithfully. International law, legal thinking and State practice had evolved since 1954, and that evolution should have been taken into account.

15. The Special Rapporteur had even repeated the linguistic mistakes and translation errors contained in the French version of the 1954 text, which had originally been drafted in English. Thus the formula *Le fait, pour les autorités d'un Etat, de préparer... d'organiser ou d'encourager...*, contained in article 2, paragraphs (3) *et seq.*, of the 1954 draft, and which was now found in draft article 11, was a bad translation of the English formula "The preparation ... the organization, or the encouragement of the organization, by the authorities of a State ...". Similarly, in article 1 of the new draft, the expression *crimes de droit international*, a French translation of the English expression "crimes under international law", used in the 1954 text, was incorrect. The phrase should be *crimes en vertu du droit international*. Indeed, a "criminal offence" committed by an individual—in the Soviet Union the notion of "criminal offence" was used in contrast to a "civil offence" or an "administrative offence"—was a crime under international law, and not a crime of international law, which could be committed only by States and presupposed a breach of rules of international law.

16. Those errors, which affected only the form, were easy to correct. Unfortunately, the Special Rapporteur had also closely followed the 1954 draft in substance, something which was more serious. At the time, it had been clear that the international crimes covered by the draft code were crimes committed by individuals. The concept of international crime by the State had not yet entered into international law; the notion had emerged only in legal writings. The situation had now changed, however, and the Commission itself had distinguished, in article 19 of part 1 of the draft articles on State responsibility, between two categories of internationally wrongful acts, namely international crimes by States and international delicts by States. Thus, when the term "international crimes" was used, it was necessary to explain whether the crimes in question were crimes by States or the "criminal offences" of individuals. In its

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

present form, the draft code under consideration was a hybrid: it did not apply wholly to States or wholly to individuals.

17. The draft articles concerning general principles, which provided in particular that "Every State has the duty to try or extradite any perpetrator of an offence ... arrested in its territory" (article 4) and that "No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature" (article 5), as well as the provisions relating to other offences, and particularly conspiracy (article 14), obviously covered offences committed by individuals. The State, as such, could not be arrested, nor could it foment conspiracy.

18. On the other hand, draft articles 11, 12 and 13, concerning acts which constituted offences against the peace and security of mankind, had in almost all instances nothing to do with the conduct of individuals. For example, in article 11, paragraph 1, which specified that "The commission by the authorities of a State of an act of aggression" constituted a crime against peace, the act in question was necessarily an act of the State. The expression "the authorities of a State", which indeed was not defined anywhere in the draft code, certainly did not designate the entire body of State officials, or even the members of the Government, who could not be held responsible as State agents for an act of aggression committed by the State. In the case of ministers, for instance, one or more of them might not even have been informed of the launching of the aggression. Even the head of State might not have participated in initiating the act of aggression and might not have been informed of it: that depended on his functions and the extent of the powers he enjoyed.

19. The purpose of the draft code was not to deal with international crimes by States. If the Commission wished to draw up a list, whether ot not exhaustive, of international crimes by States—something which did not seem essential for the moment—it could do so only in the framework of the draft articles on State responsibility and on the basis of article 19 of part 1 thereof, which defined an internationally wrongful act by the State, an act that could be an international crime or an international delict.

20. If the draft code was to cover offences against the peace and security of mankind committed by individuals, as it ought to, it should specify the types of conduct and acts which fell within that category of offences, and the persons to whom those types of conduct or those acts could be attributed. No one could be answerable for anything other than his own acts. If the code was not sufficiently precise on that point, it would be impossible to prosecute, convict and punish the perpetrators of offences against the peace and security of mankind, for judges needed detailed rules indicating clearly which acts or conduct they should penalize.

21. At the Commission's previous session, he had proposed a draft article[5] the terms of which should be reproduced in the preliminary provision and paragraph 1 of draft article 11, as follows:

> "The following persons shall be recognized as responsible under international law for offences against the peace and security of mankind and shall be liable to punishment:
>
> "1. Persons planning, preparing, initiating or causing an act of aggression to be committed or a war of aggression to be waged by a State."

That text was based on a provision of the Charter of the Nürnberg Tribunal which expressly mentioned the conduct of "persons". If, however, it was clear that the act or conduct in question could not be that of an individual, the word "person" could be omitted.

22. Paragraph 2 of draft article 11 raised the same problem as paragraph 1. As now formulated, it could not apply to individuals, for "recourse by the authorities of a State to the threat of aggression against another State" could only be an act of the State. The paragraph also raised another problem: the expression "threat of aggression" was unsuitable and in reality had no meaning. Furthermore, the Charter of the United Nations spoke of "threats to the peace", not "threats of aggression". The threats used against a State were not threats of aggression. Accordingly, paragraph 2 should be modified, and the particular kind of conduct in question should be specified. The following formula might be used:

> "Persons, whether or not belonging to the authorities of a State, who threaten another State or cause it to be threatened, for example by the armed forces."

The Commission should scrutinize that notion of threat more closely and decide exactly what it covered. He himself did not yet have a firm position on the question.

23. Paragraph 3 of draft article 11, which spoke of "Interference by the authorities of a State in the internal or external affairs of another State ...", called for the same kind of comments. It dealt with acts of the State, and not acts of the individual. At the Commission's previous session, he had proposed a different formula for that provision,[6] and had suggested, in addition, that the intervention characterized as a crime should be "armed " intervention, in other words the most serious form of intervention. He had proposed the following text:

> "Persons planning, preparing, ordering or causing a State to engage in armed intervention in the internal affairs of another State."

24. Similarly, paragraph 4, concerning terrorist acts, applied only to the authorities of a State. If such a thing as State terrorism did exist and if it was to be made an offence, that form of terrorism was not attributable to State authorities as such, but to certain individuals among those authorities. For that reason, at the Commission's previous session, he had proposed[7] the following formula:

> "Persons planning, preparing, ordering or causing terrorist acts to be committed by a State against another State."

[5] *Yearbook ... 1985*, vol. I, pp. 61-62, 1886th meeting, para. 44.

[6] *Ibid.*, p. 62, para. 48.

[7] *Ibid.*, para. 49.

25. Alongside of State terrorism, there was terrorism committed by individuals who had no link with the State. In that regard, a distinction was made between national terrorism, committed by the nationals of a country against the authorities or the population of that country, and international terrorism, committed by the nationals of a country against, for example, the population or official representatives of another country. If the most serious acts of international terrorism were to be included among offences against the peace and security of mankind, something which could well be envisaged, the draft code would first have to cover the perpetrators of the terrorist acts themselves—with a very precise indication of the acts and conduct concerned—and only then the persons who aided or abetted them in committing such offences.

26. Again, paragraphs 5, 6 and 7 of draft article 11 did not deal with the conduct of the individual at any time. For that reason, at the previous session, he had also proposed[8] for those texts a formula which stressed that the actions and conduct in question were those of individuals and not of the State.

27. As to paragraph 8, relating to mercenarism, which in its present form covered only complicity or related offences, he had proposed the following text:[9]

> "Mercenaries who engage in armed attacks against a State which are so serious that they are tantamount to acts of aggression."

The paragraph should above all cover mercenaries: the agents of the State who recruited, organized, equipped and trained them—and who should be distinguished from State authorities as such—could be mentioned as a secondary consideration, for example as accomplices.

28. Like draft article 11, draft articles 12 and 13 related to acts nearly always committed by the State and not by individuals. That was true, for example, of subparagraph (*b*) (ii) of the second alternative of article 13, which dealt with the unlawful use of weapons, and particularly first use of nuclear weapons. The draft code should expressly refer to first use of that type of weapon, for the General Assembly had adopted resolutions to that effect; but there was no specific indication in article 13 of the types of conduct for which individuals could be tried, convicted and sentenced. He himself had proposed the following text:[10]

> "Persons planning, preparing or ordering the first use by a State of nuclear weapons."

29. Although international crimes by States should all be considered as offences against the peace and security of mankind, the same was not true of international crimes by individuals. Drug trafficking, for example, was an international "criminal offence", but it did not constitute an offence agianst the peace and security of mankind. Only the most serious international criminal offences should be placed in the category of offences against the peace and security of mankind.

30. He had as yet no firm position on the question whether or not the notion of offences by individuals against the peace and security of mankind should be defined, as an international crime by a State had been defined in article 19 of part 1 of the draft articles on State responsibility. On the one hand, a general definition would have the advantage of removing any ambiguity about the type of offence involved. It would make it possible to establish clearly that the types of conduct and the acts included in the draft code were those which incurred the criminal responsibility of individuals, not that of States. Furthermore, when new offences had to be added to the list of offences against the peace and security of mankind, they could be added on the basis of that definition. On the other hand, proper drafting of the articles listing the different acts and types of conduct in question, which were by far the most important—in other words a clear statement of the constituent elements of such acts and types of conduct —would mean that a general definition was not really indispensable. In any event, draft article 1 did not contain a general definition of an offence against the peace and security of mankind: it was limited for the time being to identifying the constituent elements.

31. In draft article 10, the Special Rapporteur distinguished three categories of offences against the peace and security of mankind, a distinction that did not appear to be well-founded. An act of aggression, for example, or rather the conduct of individuals who had planned, prepared, initiated or caused an act of aggression to be committed, was both a crime against peace and a crime against humanity. International terrorism by the State, or by individuals, was not only a threat to the peace, but also a danger for humanity. Mercenarism, or rather the conduct of mercenaries, had a place in all three categories. The same was true of war crimes, which were also crimes against peace and crimes against humanity. It would therefore be preferable to retain the general denomination "offences against the peace and security of mankind", which was applicable to all the acts and types of conduct covered by the draft code.

32. Contrary to what was said in draft article 8, self-defence in cases of aggression was not always an exception to the principle of the criminal responsibility of individuals. A situation could occur in which military personnel, or even civilians, committed crimes falling under the draft code while resisting armed attack by another State or during a civil war, in other words in the course of exercising the State's right to self-defence. Hence self-defence could not be invoked in all cases to preclude criminal responsibility. It was quite easy for an individual to violate the laws of war or commit inhuman acts while the State was acting in conformity with its rights. That should be taken into account in the draft article.

33. The most important thing for the time being was to draw up the list of offences against the peace and security of mankind and clearly state the constituent elements, in other words the acts and types of conduct by individuals that were unlawful and constituted such offences, so as to provide the courts with the requisite information to be able to try and punish the perpetrators. Only then could the introductory articles,

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*, para. 47.

as well as the provisions relating to conspiracy, complicity, attempt and other offences, be prepared.

34. In any event, if the code was to be truly useful, it should take account of the changes in international law, legal thinking and State practice, and of the various instruments and texts adopted on the subject by the international community, and should therefore avoid following the 1954 text too closely, which was the main defect of the draft articles submitted by the Special Rapporteur.

35. Mr. FRANCIS commended the Special Rapporteur for his fourth report (A/CN.4/398), which filled in the gaps in the earlier ones. It covered the topic more fully and, so to speak, brought it to life. At previous sessions, he had been among those members who had urged the Special Rapporteur to submit draft articles on general principles, something that had now been done, although not completely. It was none the less gratifying to have at least a preliminary draft of general principles that could be developed at a later stage. Since the draft articles themselves were not due for discussion at the present session, he would not comment on them except to illustrate certain points in his general remarks.

36. In his earlier reports, the Special Rapporteur had drawn attention to the test of seriousness to characterize offences against the peace and security of mankind. It was very important to ensure that that element had its proper place in the draft. One possibility was to embody it in a provision in part II of chapter I of the draft articles, dealing with general principles. An alternative course, which he himself favoured, was to insert a new article after article 1 to set out the notion of the gravity of the offence, the term "gravity" being preferable to "seriousness" because it reflected better the characteristics of the offence. Moreover, the notion of "gravity" appeared in the fourth preambular paragraph of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

37. Draft article 2 (Characterization) was based on Principle II of the Nürnberg Principles[11] and would be better placed in part II (General principles) of chapter I of the draft code. As far as the wording of article 2 was concerned, the first sentence conveyed the idea embodied in Principle II, albeit in somewhat too general terms, but the second sentence was open to criticism in that it could give rise to double jeopardy, as Sir Ian Sinclair (1964th meeting) had pointed out. His own suggestion would therefore be to revert to the more specific language in Principle II of the Nürnberg Principles.

38. It should also be stated somewhere in the draft that the provisions of the code were without prejudice to the attribution of criminal responsibility to States, a matter which the Commission had set aside for the time being, in the absence of instructions from the General Assembly.

39. No comment was required at the present stage on draft article 3. He voiced support for the Special Rapporteur's approach to draft article 4, which dealt with two important elements for the viability of the topic, namely the principle of the universality of the offence and the idea of the establishment of an international criminal jurisdiction. With regard to the principle of universality, he endorsed the suggestion by Sir Ian Sinclair (1960th meeting) to introduce into the article the idea expressed by the Special Rapporteur that, "in the term 'crime against humanity', the word 'humanity' means the human race as a whole and in its various individual and collective manifestations" (A/CN.4/398, para. 15). Accordingly, the first sentence of paragraph 1 could be reworded as follows: "An offence against the peace and security of mankind is an offence against all mankind" or "an offence against mankind as a whole". A formula of that kind would make article 4 more generally acceptable by taking the sting out of the concept of universality.

40. The idea of a universal jurisdiction was the ideal solution, but that would not be possible for quite some time. For lack of a better word, the jurisdiction that would prevail in the mean time could be said to be "multilateral". Mr. Arangio-Ruiz (1962nd meeting), by inviting the Special Rapporteur to comment on the feasibility of creating an international criminal jurisdiction and of a territorial State taking action to implement the code, presumably had been expressing a preference for the type of jurisdiction mentioned in paragraph 1 of draft article 4 and had been arguing that States were reluctant to submit to an international court. However, since the articles dealt not with States but with individuals, he himself believed that States would be less reluctant to allow their nationals to be tried by an international criminal jurisdiction, should the occasion arise. Sir Ian Sinclair (1964th meeting) had expressed his preference for an international criminal jurisdiction, and the Special Rapporteur had captured the mood of the times by providing for both possibilities in article 4. His own opinion was that it would be more difficult to execute judgments in the framework of an international criminal jurisdiction alone than in the framework of the type of jurisdiction mentioned in paragraph 1, which was none the less insufficient in itself. A national court was not the most appropriate forum for trying the head of State of another country, for example.

41. Article 5, concerning the non-applicability of statutory limitations, had a place in the draft. Admittedly, the 1968 Convention on that subject had not received as many ratifications as desired, but the situation should be given time to develop. Draft article 6, which was based on Principle V of the Nürnberg Principles, was acceptable, but the wording should be refined. Draft article 7 was clearly useful, but paragraph 2 called for further consideration when the Commission came to discuss the text of the draft articles at a future stage.

42. Another gap in the report concerned Principle IV of the Nürnberg Principles, regarding the order of a superior. The Special Rapporteur had treated that principle as an exception, in the terms set forth in draft article 8, subparagraph (*c*). In his view, however, the principle should be treated independently and set out in positive terms in the part of the draft relating to general principles.

[11] See 1958th meeting, footnote 4.

43. Important as the articles were, there was room for exceptions to the principle of responsibility, but the Commission should be selective in establishing them. He agreed with Sir Ian Sinclair's suggestion (*ibid.*) that the matter should be considered at a later stage and considered that the exceptions should be contained in a separate section of the draft.

44. Another concept to be taken into account was the one set forth in article VII of the Genocide Convention, namely that offences against the peace and security of mankind were not to be considered as political crimes for the purpose of extradition.

45. Lastly, referring to Mr. Ushakov's comment that the Special Rapporteur had relied heavily on the Nürnberg Principles in drafting the code, he pointed out that the Special Rapporteur could not have avoided doing so, although it was plain that one should not go too far in that direction. He hoped that the Commission would in the future be in a position to give more detailed consideration to the general principles.

46. Mr. JAGOTA, referring to the texts that had served as precedents for the preparation of part IV of the fourth report (A/CN.4/398), said that Principles I to V of the Nürnberg Principles as formulated by the Commission in 1950 had dealt with the responsibility of individuals for international crimes; the autonomy of international crimes; the liability of officials, including heads of State or Government; the non-applicability of the defence of order of a Government or of a superior, provided that a moral choice was in fact possible to the offender; and the right of an offender or accused person to a fair trial on the facts and law. No reference had been made in those principles to the questions of the non-retroactivity of criminal law or penalties and of statutory limitations, or to other defences or exceptions discussed in part IV of the report.

47. The draft code of offences prepared by the Commission in 1954 had concentrated on the criminal responsibility and punishment of the individual, the liability of responsible government officials, including heads of State, despite their official position or status, and the qualified non-applicability of the defence of order of a Government or of a superior.

48. With regard to exceptions to responsibility, the Commission had, in its work on part 1 of the draft articles on State responsibility, also examined extensively the question of circumstances precluding wrongfulness of an act or conduct of a State or attributable to a State, a matter which might also apply to the criminal responsibility of the State. That had been done in particular at the Commission's thirty-first (1979) and thirty-second (1980) sessions, when draft articles 29 to 34, dealing respectively with consent, legitimate countermeasures, *force majeure* and fortuitous event, distress, state of necessity, and self-defence, had been considered and adopted on first reading. Suitable exceptions had also been made concerning the protection of *jus cogens* and humanitarian law. In addition, in the matter of preclusion of wrongfulness, draft article 35 had dealt with the subject of compensation for damage.

49. The Commission had not yet studied at length the question of State responsibility for criminal offences, or prescribed any penalties, or considered exculpatory pleas and extenuating circumstances. Similarly, the question of the criminal responsibility of the individual for an act committed by the State, and exceptions thereto, had not been tackled in the Commission's work on State responsibility. It was against that background that the Commission had decided to examine the general principles, including exceptions, to be set out in the draft code of offences, both to maintain consistency and to take account of other concepts and principles that were relevant to the content and scope of the code. It had also decided to limit its consideration of the draft code to the criminal responsibility of the individual, keeping the question of the criminal responsibility of the State open for future development.

50. Bearing those considerations in mind, he had some specific comments to make on part IV of the report and draft articles 3 to 9. With regard to the juridical nature of offences and the nature of the offender, he agreed with the Special Rapporteur and endorsed the texts of draft articles 3 and 6. He also agreed with the Special Rapporteur about the two aspects of the application of criminal law in time, namely non-retroactivity and the non-applicability of statutory limitations. The question of the scope of non-retroactivity was a sensitive issue. In internal law, the limits were strictly adhered to. In the Constitution of his country, India,[12] article 20, paragraph 1, provided:

> No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

The term "law in force" had been given a strict, rather than broad, interpretation in the Indian courts. The same approach was adopted in draft article 7, paragraph 1, submitted by the Special Rapporteur. If an element of flexibility was considered desirable for international law, the wording of article 7, paragraph 2, might be made stricter by changing the phrase "according to the general principles of international law" to "according to the generally recognized principles and rules of international law". As to the non-applicability of statutory limitations, draft article 5 met with his approval.

51. On the question of the application of criminal law in space, dealt with in draft article 4, he would suggest, as he had already had occasion to do (1962nd meeting), that the Commission should postpone detailed consideration of the matter until a definite view had been expressed by the Sixth Committee of the General Assembly on the issue of an international criminal jurisdiction. The question of penalties and of exculpatory pleas and extenuating circumstances could be left to the competent courts.

52. Draft article 4 seemed to be based in particular on the corresponding provisions of the conventions on genocide and *apartheid*. It should stand as the residual position of the Commission if the establishment of an international criminal jurisdiction was considered

[12] A. P. Blaustein and H. Hecker, *India*, Constitutions of the Countries of the World, A. P. Blaustein and G. H. Flanz, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1986).

neither desirable nor possible for the present. In that connection, he supported the views expressed by Sir Ian Sinclair (1964th meeting) and hoped that they would be politically acceptable to a large section of the world community.

53. In regard to the question of exceptions to the principle of responsibility, which was the subject of draft article 8, the non-exceptions embodied in subparagraphs (*a*) and (*c*) should not cause many problems, since they were in conformity with the essence of the 1954 draft code. Matters of form would, of course, be settled by the Drafting Committee.

54. He also endorsed draft article 9 as a counterpart of article 8, subparagraph (*c*), or even independently, although its content would also be covered by the provisions relating to complicity. As to the other exceptions to responsibility, if the individual concerned acted as an official or agent of a State, the applicability of the circumstances precluding the wrongfulness of the act of that State would also have to be examined carefully with reference to each category of offences—crimes against peace, crimes against humanity and war crimes—despite the basic differences between the present topic and that of State responsibility, particularly in terms of their scope. One example was the defence of state of necessity as precluding the wrongfulness of an act of the State. The Commission had devoted much time to considering it in 1980 and had specified in article 33 of part 1 of the draft articles on State responsibility that state of necessity could not be invoked if the international obligation with which the act of the State was not in conformity arose out of a peremptory norm of general international law, or if the obligation was laid down by a treaty which explicitly or implicitly excluded the possibility of invoking state of necessity, such as a treaty dealing with humanitarian law, or if the State in question had contributed to the occurrence of the state of necessity. In the commentary to article 33, the Commission, referring to *jus cogens*, had said:

> ... The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation. ...[13]

State of necessity could therefore not be invoked in connection with crimes against peace and crimes against humanity, in view of the gravity of such crimes. Similar considerations applied to the idea of consent. No one consented to aggression, colonialism, genocide or *apartheid*, or the violation of any other rule of *jus cogens*. The exceptions arising from *force majeure*, fortuitous event or distress would also have to be examined carefully with reference to each category of offences. The qualified exceptions of coercion—both in relation to orders of a superior and in other circumstances—and error of law or of fact should pose no problems. No error of law or of fact could, however, be invoked in the case of a crime against humanity or a crime against peace, as the Special Rapporteur rightly affirmed in his report (A/CN.4/398, paras. 211 and 216).

55. The conditional application of the exceptions to responsibility in draft article 8, subparagraphs (*b*), (*c*), (*d*) and (*e*), was clearly stated, in the light of the indications given in the report (*ibid.*, para. 196). The conditions on those exceptions would thus preclude their application to crimes against humanity and crimes against peace, bearing in mind the proportionality of the interest sacrificed to the interest protected. The exception of self-defence in cases of aggression was not controversial and would be easier to draft if it formed the subject of a separate paragraph or article. The question of reprisals, referred to in the report (*ibid.*, paras. 241-250), called for further reflection.

56. The Commission would also have to consider whether certain well-known exceptions applicable to alleged offenders under national penal laws should be expressly mentioned in the draft code, particularly since it was to be confined for the time being to offences committed by individuals, whether as agents of the State or otherwise. The exceptions he had in mind were the age of the offender (in the case of a child or minor), unsoundness of mind or insanity, induced intoxication against the will of the offender or without his knowledge, the right of private defence of life and property, and consent of the alleged victim. If those defences or exceptions were to be applicable to the person concerned under the terms of draft article 6, which stated that "any person charged with an offence ... is entitled to the guarantees extended to all human beings", the point should be clarified in the commentary.

57. In conclusion, the Commission would need to spend more time reflecting on the content and scope of draft article 8, concerning exceptions to the principle of responsibility. However, he generally agreed with the conclusions reached by the Special Rapporteur with regard to justifying facts (*ibid.*, para. 254).

The meeting rose at 1 p.m.

---

[13] *Yearbook ... 1980*, vol. II (Part Two), p. 50, para. (37).

1966th MEETING

Friday, 13 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.