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Summary record of the 2379th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

(Programme, procedures and working methods of the Commission, and its documentation).

It was so agreed.

The agenda (A/CN.4/463) was adopted.

Filling of a casual vacancy (article 11 of the statute) (A/CN.4/465 and Add.1)[1]

[Agenda item 1]

7. The CHAIRMAN, responding to suggestions by Mr. EIRIKSSON, Mr. YANKOV and Mr. JACOVIDES, suggested that, before suspending the meeting to enable the Enlarged Bureau to meet, the Commission should proceed to fill the casual vacancy created by the election of Mr. Vladlen Vereshchetin to ICJ. As of 21 April 1995, the name of one candidate had been submitted: Mr. Igor Ivanovich Lukashuk, of the Russian Federation, whose curriculum vitae had been circulated (A/CN.4/465/ Add.1, annex).

8. Mr. YANKOV said he warmly supported the candidacy of Mr. Lukashuk, who had established a law school in Kiev. Many of its graduates now held important positions in the field of international law. Mr. Lukashuk's personal qualities and high intellectual and professional qualifications were such that the Commission would greatly benefit from having him among its members.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to elect Mr. Lukashuk to fill the casual vacancy created by the election of Mr. Vereshchetin to ICJ at the forty-ninth session of the General Assembly.

It was so agreed.

The meeting was suspended at 12.05 p.m. and resumed at 12.50 p.m.

Organization of the work of the session

[Agenda item 2]

10. The CHAIRMAN announced that the Enlarged Bureau had decided to recommend that the Commission should consider the topic of the Draft Code of Crimes against the Peace and Security of Mankind from 3 to 16 May. The period from 17 to 25 May would be given over to the new topic on State succession and its impact on the nationality of natural and legal persons. The topic of State responsibility would be considered from 29 May to mid-June followed by international liability for injurious consequences arising out of acts not prohibited by international law. In late June, the Commission would take up the new topic of the law and practice relating to reservations to treaties.

11. Mr. YANKOV (Chairman of the Drafting Committee) announced that consultations would be carried out with a view to determining the composition of the Drafting Committee as soon as possible, to enable it to begin its work. In establishing the Committee's membership, due attention would be paid to the desirability of having one group of members concentrate on the Draft Code of Crimes against the Peace and Security of Mankind and on State responsibility, while the remainder would focus on the issue of international liability.

12. Mr. PELLET suggested that, for even greater flexibility, separate subgroups of the Drafting Committee should be designated to focus on the Draft Code and on State responsibility.

13. Mr. YANKOV (Chairman of the Drafting Committee) said that that comment would be taken into account in determining the composition of the Drafting Committee.

The meeting rose at 1.10 p.m.

2379th MEETING

Wednesday, 3 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. THIAM (Special Rapporteur), introducing his thirteenth report (A/CN.4/466), said that, since the Commission was working on its second reading of the draft articles, he did not intend to launch a general, theoretical discussion. He was proposing two types of changes: first, in the content *ratione materiae* of the draft articles; and, secondly, more specific changes in either the sub-

[1] Reproduced in *Yearbook... 1995*, vol. II (Part One).

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1995*, vol. II (Part One).

stance or the form of the articles. With regard to the content *ratione materiae* of the draft Code of Crimes against the Peace and Security of Mankind, he recalled that there had long been a divergence of opinions within the Commission between a maximalist trend, favouring incorporation of a great number of offences, and a more restrictive tendency that wanted the scope of the Code to be as narrow as possible. In the end, and in the light of the comments and criticisms made, he had tried to restrict the Code's scope to crimes whose designation as crimes against the peace and security of mankind could hardly be disputed. The number of crimes retained had thus been reduced, perhaps provisionally, to six. The decision to abandon some of the offences originally included had been motivated by the reservations, and even opposition, expressed by the Governments that had transmitted their observations on the draft Code, though it should be noted that third world countries had generally not expressed their views.

2. Turning to the specific changes he was proposing for the draft articles, the first involved the definition of aggression (art. 15). The original wording, which had been virtually copied from the Definition of Aggression,[3] had been deemed to be too political and lacking the necessary legal precision and rigour. That wording had thus been revised. The new version was better, though still not fully satisfactory.

3. As to genocide (art. 19), although a number of changes had been suggested, he considered it preferable not to depart from the text of the Convention on the Prevention and Punishment of the Crime of Genocide, for it had won the greatest consensus among Governments.

4. On crimes against humanity (art. 21), the Commission, through its Drafting Committee, had formulated a new draft article entitled "Systematic or mass violations of human rights". Upon reflection and after an analysis of the relevant legal doctrine and case law, he was proposing that the Commission should revert to the earlier title of "Crimes against humanity", which corresponded to an expression used both in international law and in domestic law, because the justification for the change and particularly the requirement that the crime should be "massive" in nature were highly debatable. According to numerous authorities, including Paul Reuter, even a crime perpetrated against a single victim could constitute a crime against humanity on the basis of its perpetrator's motives and its cruelty.

5. With regard to war crimes (art. 22), the reason for the proposed definition was that any listing was unsatisfactory, as it could never be exhaustive. The definition was drawn from the text proposed by the Security Council[4] for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,[5] which was based on the distinction between "grave breaches", defined restrictively, and serious violations of the laws of war, which were the subject of a non-restrictive listing.

6. The advisability of including an article on international terrorism (art. 24) had been questioned by some members of the Commission who feared that consensus would never be reached on a general definition of terrorism and believed that the international community should instead continue to elaborate specific treaties such as the International Convention against the Taking of Hostages or the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. That approach was feasible, but it did not preclude trying to find a general definition of international terrorism and devoting an article to that concept.

7. He had retained the article on illicit traffic in narcotic drugs (art. 25) largely because of the arguments advanced by the Government of Switzerland. Referring to what was known as "narcoterrorism", that Government had stressed the harmful effects of international drug trafficking on health and well-being, its destabilizing effect on some countries and the fact that it was an impediment to harmonious international relations. All of that justified describing such activities as a crime against the peace and security of mankind.

8. Mr. EIRIKSSON said that, in general terms, he agreed with the approach taken by the Special Rapporteur, which was to continue efforts to restrict the Code's contents to the most serious crimes and to ensure maximum acceptability of the draft. He therefore deferred to the Special Rapporteur's judgement in proposing the deletion of a number of articles, with the exception of article 26 (Wilful and severe damage to the environment), and would support a proposal that the work of the Drafting Committee should be confined to a study of articles 15, 19, 21, 22, 24 and 25—although article 26 should be included as well.

9. On article 15 (Aggression), he agreed with the Special Rapporteur's idea of limiting the substantive portion of the text essentially to paragraph 2 of the version adopted on first reading. He sympathized particularly with the view that the Definition of Aggression was not suitable for the purposes of the Code, and did not think that the concept of a "war of aggression" should be introduced. On a minor point, the new version of paragraph 1 proposed by the Special Rapporteur no longer referred to an individual who "committed" an act of aggression. That change highlighted the possible inconsistency between the acts of individuals and those of States, and should be re-examined.

10. On article 19 (Genocide), he, like the Special Rapporteur, would advocate staying as close as possible to the definition in the Convention on the Prevention and Punishment of the Crime of Genocide, but he did not think that it was necessary to include paragraph 3 of the new text proposed by the Special Rapporteur on the crime of "incitement to commit genocide". The question of "attempts" had been dealt with in paragraph 3 of article 3 (Responsibility and punishment), adopted on first reading. It had been decided at that time that a decision on the crimes which it would be an offence to attempt to commit should be taken only at the stage of the

[3] General Assembly resolution 3314 (XXIX), annex.

[4] See Security Council resolution 827 (1993) of 25 May 1993.

[5] Hereinafter the "International Tribunal for the Former Yugoslavia". Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

consideration of the various crimes. It would be preferable to return to that issue after the definitive list of crimes had been established.

11. On article 21 (Systematic or mass violations of human rights), he was in favour of the title adopted on first reading, which was, in his opinion, not the same as "Crimes against humanity". As to whether acts must be "massive", the version adopted on first reading, requiring that certain acts—the first four mentioned in the text—should be committed either in a systematic manner or on a mass scale, was more appropriate than that proposed by the Special Rapporteur in his thirteenth report. The crime should not be confined to perpetrators who were agents or representatives of States, not even in the case of torture, as provided for in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The idea of having a general category of "all other inhumane acts" should be scrutinized very carefully. He would not object to a definition of torture as proposed by the Special Rapporteur in square brackets, although he considered that the second part of that definition was not necessary. In all other respects, he could generally support the text as adopted on first reading.

12. As for draft article 22 (Exceptionally serious war crimes), he continued to believe that the Commission should develop what had been called a new category of crimes, distinct from "serious breaches" of the Geneva Conventions of 12 August 1949, and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The situation is different from that of the drafters of the statute of the International Tribunal for the Former Yugoslavia, who had been confronted with the pre-existing law in the former Yugoslavia. Moreover, it would be difficult to say whether the definition used was of a tautological nature since it incorporated the important qualification of "violation of the principles and rules of international law applicable in armed conflict". It is for that reason that the future work should be based on the text adopted on first reading.

13. On article 24 (International terrorism), he agreed with the Special Rapporteur's proposal that the scope of the crime as defined in the text adopted on first reading should be expanded to cover acts of individuals who were not serving as agents or representatives of a State. He noted, however, that the Special Rapporteur's new text still referred to acts directed against "another State", and that required further thought. In principle, he would be prepared to consider other refinements proposed by the Special Rapporteur, such as a reference to "acts of violence". But, in general terms, he thought work should focus on the text adopted on first reading.

14. He agreed that article 25 (Illicit traffic in narcotic drugs) should be retained. The changes proposed by the Special Rapporteur were concerned primarily with drafting and could be considered along with the text as adopted on first reading.

15. Article 26 should be retained, but the Drafting Committee should, of course, consider the observations on that article made by Governments.

16. Lastly, he expected the Drafting Committee to review the question of applicable penalties, which had been left open in the draft adopted on first reading.

17. Mr. PELLET said that he intended to take up three points one after the other: the list of crimes and the criterion or criteria for drawing up the list; the question of applicable penalties; and the definitions proposed by the Special Rapporteur for the six crimes which he had included.

18. On the first point, the Commission had been requested to draft a code, that is to say, a set of systematic rules, but a code dealing exclusively with one category of crimes, crimes against the peace and security of mankind. It was not a question either of enumerating all the internationally defined offences which could bring the international responsibility of the individual into play or of drafting an international criminal code, but rather of selecting the crimes against the peace and security of mankind which truly met the Commission's definition of such crimes. The definition appeared in draft article 1, which the Commission had considered at its forty-sixth session and referred to the Drafting Committee.[6] Two conclusions must be drawn from the definition. First, a crime against the peace and security of mankind was an act committed by an individual and an act which posed a serious and immediate threat to the peace and security of mankind. Secondly, according to article 1, paragraph 2,[7] the list of crimes defined in the Code was not necessarily restrictive. The task was not therefore to reopen the debate on the definition of a crime against the peace and security of mankind, but to determine the criteria for distinguishing between the crimes to be included in the Code and those which should be left out.

19. The Special Rapporteur's approach had been to ask what was today generally acceptable to States, that is to say, basically to reflect the views of the "international community as a whole". That approach was justified in theory because it was consistent with the definitions of notions close to the notion of crime against the peace and security of mankind, such as the notions of *jus cogens* (art. 53 of the Vienna Convention on the Law of Treaties) and of international State crime (art. 19 of part one of the draft articles on State responsibility).[8] The approach was also politically wise because it reflected the emerging consensus in international society concerning a minimum of international public order. The members of the Commission were codifiers and not legislators while the function of progressive development did introduce a degree of flexibility. But States had the last word and one of the great merits of the work done by the Commission lay in the constant interaction between political and legal matters, between the possible and the desirable.

20. In the draft Code adopted on first reading, a fairly large number of wrongful acts had been described as crimes against the peace and security of mankind, but many States had expressed the opinion in their written comments on the draft text or in the debates in the Sixth Committee that some of the crimes should not have been

[6] See *Yearbook ... 1994*, vol. II (Part Two), para. 96.

[7] Ibid., para. 110.

[8] *Yearbook ... 1976*, vol. II (Part Two), p. 75.

included. The Special Rapporteur had been wise to invite the Commission to defer to that view and not to "codify" certain offences which it had till then regarded as crimes against the peace and security of mankind. The Commission must in fact stick to the most serious crimes at the extremity of a continuum beginning with the international delicts covered in part one of the draft articles on State responsibility,[9] then embracing crimes regarded by the international community as a whole as violations of an obligation essential to the protection of fundamental interests, and ending with crimes which posed a serious and imminent threat to the peace and security of mankind. He would have preferred to retain, for example, colonial or foreign domination, perhaps apartheid, probably terrorism and certainly aggression, but the Commission must not act against the wishes of what would be a large number of States representatives of the international community as a whole; that also applied to deliberate and serious harm to the environment, a prime example of a crime which was not a crime against the peace and security of mankind. The Special Rapporteur ought perhaps to have pursued his reasoning to the end by drawing the same conclusions from the reluctance of States to include terrorism and drug trafficking; the question of aggression was slightly different, since the reluctance of States seemed in that case to stem from misunderstandings.

21. The Special Rapporteur regretted the silence of Governments on the question of applicable penalties and the fact that the draft statute for an international criminal court should determine the applicable penalties when that would normally have been a matter for the draft Code. The dividing line between the two texts—Code and Court—was certainly not easy to draw, but it did not seem that there was any "normality" in the matter, since the idea that the Code would be a kind of "criminal legislation" which the court would have to apply was only one of several possibilities and an increasingly improbable one. In the case of the draft statute for an international criminal court[10] or the statute of the International Tribunal for the Former Yugoslavia or that of the International Tribunal for Rwanda,[11] it seemed that the statutes of the international criminal jurisdictions created or to be created dealt or would deal with the crimes and their definitions and the applicable penalties. In that sense, the Code might seem pointless, unless it was regarded as a "beacon" providing guidance for actions by States and international jurisdictions, especially in its first part, which defined the juridical regime governing the crimes, whereas the purpose of part two was to provide legal codification of the "crimes of crimes", the ones included in the list. In the circumstances he proposed, first, that the Commission should refrain from defining the penalties crime by crime and that the array of penalties should be dealt with in a general provision to be included in part one and, secondly, that it should be stated in substance that the applicable penalties should be established in accordance with the maximum penalties applicable in the State in which the crime had been committed or on the basis of such maximum penalties. In article 19, paragraph 1, the Commission might also use the language of the Convention on the Prevention and Punishment of the Crime of Genocide and say that States must provide "effective penalties for persons guilty of" crimes against the peace and security of mankind.

22. Turning to the various draft articles, he welcomed the changes proposed by the Special Rapporteur, which generally moved in the direction of greater conciseness. He would himself have favoured a much more radical measure, which would have been to dispense with the definition of the crimes included in the draft Code. As in the case of applicable penalties, the statutes of the existing or future international jurisdictions contained or would contain their own definition of the crimes to be punished. Since it was possible that the Commission might not agree with him on that point, he wished to give his opinion about the new proposals by the Special Rapporteur.

23. With regard to article 15, the comments of Governments on the draft Code gave only a partial idea of the very great reluctance, even resistance, prompted by the very idea that individual perpetrators (or leaders or organizers) of the crime of aggression could be prosecuted. That resistance even raised the question whether aggression should be retained in the list of crimes against the peace and security of mankind, for the criterion of *opinio juris*, which the Special Rapporteur rightly took as the criterion for selection, ought apparently to result in the exclusion of the crime of aggression. But in fact the States opposed to the inclusion of aggression in the list were making an analytical error and were basing their position on a confusion of concepts. They argued that aggression could be committed only by a State, which was in principle true, and that genocide, apartheid or war crimes, still in principle, could also be committed only by States. However, there was no opposition to the possibility of punishing individuals responsible for the latter crimes. Crimes against the peace and security of mankind were such serious crimes that the legal person on whose behalf they were committed, generally a State, became "transparent" and action could be taken against individuals through that person. The responsibility of such individuals could be invoked directly even when the perpetrator, from the legal standpoint, was a State. Not to include aggression among the crimes against the peace and security of mankind would, moreover, constitute a serious regression in international law, if only in relation to article 6, subparagraph (*a*), of the Charter of the Nürnberg Tribunal.[12] Aggression was therefore in fact the most obvious candidate for classification as a crime against the peace and security of mankind.

24. Some States which were today hostile to the inclusion of aggression in the list in the Code had been wondering in 1991, following the invasion of Kuwait by Iraq, about the possibility of bringing Saddam Hussein and his collaborators, internationally and in person, before an international jurisdiction, a proposition whose

[9] *Yearbook... 1980*, vol. II (Part Two), pp. 26-63.

[10] *Yearbook... 1994*, vol. II (Part Two), para. 91.

[11] Security Council resolution 955 (1994) of 8 November 1994, annex.

[12] Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

implicit, but necessary, precondition was that those States did in fact believe that they were faced with a crime against the peace and security of mankind. The actual, but hidden, cause of all such resistance must therefore be sought elsewhere, for instance, in the lack of a suitable definition of aggression, since that given by the General Assembly[13] could in no way be regarded as suitable. The Special Rapporteur was opposed to the idea of dispensing with a definition and was seeking one which might be acceptable; however, his proposed definition was not satisfactory in all respects, for at least two reasons. First, it spoke of an "act of aggression", a term which did not have a clear legal meaning and was broader than the terms used in other texts which reflected positive law in the most unambiguous manner possible, speaking either of "war of aggression" (Charter of the Nürnberg Tribunal) or of "an armed attack" (Art. 51 of the Charter of the United Nations). Secondly, paragraph 2 of the new text proposed by the Special Rapporteur defined aggression as any use of armed force inconsistent with the Charter of the United Nations, which went beyond the boldest definitions of aggression.

25. The solution seemed therefore to lie elsewhere. For want of a generally accepted definition, an act of aggression could at present be only an act which the Security Council designated as such. Such a definition "by default" was in fact consistent with the fundamental notion of crimes against the peace and security of mankind, in that they were regarded as such by the international community as a whole. The acceptable reflection of the international community was the Security Council, to which the States Members of the United Nations had entrusted primary responsibility for the maintenance of international peace and security (Art. 24 of the Charter) and which could give its determination as to an act or situation of aggression only if no permanent member used its veto and if six other members (including the non-aligned countries if they acted in unison) were not opposed. Fears of possible retroactive determinations were the result of a confusion of ideas. Aggression was undoubtedly a crime and the punishment of the organizers of such a crime remained subject to the judgement of a jurisdiction. The assessment of the political organ, the Security Council, merely interposed itself between the two; there was nothing objectionable in that in view of the peculiar nature of such crimes. Article 15 could therefore state in substance that an individual who committed or ordered the commission of an act of armed aggression, branded as such by the Security Council, was guilty of a crime against the peace and security of mankind.

26. He fully shared the views of the Special Rapporteur on draft article 19.

27. With regard to draft article 21, the amendment of the title proposed and explained by the Special Rapporteur was indeed welcome. However, he wished to point out in passing that the definition contained in article 5 of the statute of the International Tribunal for the Former Yugoslavia, which was based more directly and closely on article 6, subparagraph (*c*), of the Charter of the Nürnberg Tribunal, was more satisfactory than what was now proposed and he suggested that the Commission should simply use the same wording. That would answer many of the criticisms made by Governments, for it was understood that the definition of crimes against humanity contained in the Charter of the Nürnberg Tribunal and the statute of the International Tribunal for the Former Yugoslavia applied only in time of war and not in time of peace, as would be the case with the text under consideration, and that, as far as peace time was concerned, genocide supplied a sufficient correction for that apparent defect with regard to crimes which were crimes against the peace and security of mankind and not merely international crimes.

28. Draft article 22 raised a certain number of problems. When it had been adopted on first reading, he had been among those who had wanted the Commission to confine itself to "exceptionally serious" crimes, since, by definition, crimes against the peace and security of mankind were exceptionally serious. He understood the difficulties to which that idea gave rise, however, and which had been brought out in the observations of the Government of Switzerland, in all their varying degrees, very clearly. But he had reservations about some of the drafting innovations introduced by the Special Rapporteur and considered that it would be wise, in that case as well, to follow articles 2 and 3 of the statute of the International Tribunal for the Former Yugoslavia and article 3 of the statute of the International Tribunal for Rwanda very closely. It would also be advisable to deal with the question in two separate articles, namely, with "serious crimes under international humanitarian law", which would be the subject of article 22, and with "violations of the laws and customs of war", which would be the subject of an article 22 *bis*. Personally, he had always objected to the wording of article 2 of the statute of the International Tribunal for the Former Yugoslavia which referred expressly to the Geneva Conventions of 1949, and for two reasons. In the first place, he did not see why, in the case of acts that were international crimes, reference should be made, suddenly, to a particular convention, regardless of whether the State or States concerned had ratified that convention. What made an act criminal was that it involved not the violation of a convention, no matter how severe, but the violation of a general principle of law, namely, the principle of respect for international humanitarian law. Secondly, he did not see why reference was made to the Geneva Conventions of 1949 and not to the Additional Protocols of 1977. Could it be in order to humour some countries which had not ratified Protocol I? At all costs, in his view, it would be far better to replace the words, in paragraph 1, "Grave breaches of the Geneva Conventions of 1949" by the words "Grave breaches of humanitarian international law". The rest would remain unchanged or would, rather, simply repeat the provisions of article 2 of the statute of the International Tribunal for the Former Yugoslavia.

29. With regard to article 24, he welcomed the Special Rapporteur's proposal that the definition should no longer be limited to crimes committed by an agent of the State. Even so, he did not think that the Special Rapporteur altogether met the wider concerns expressed by Governments. He genuinely felt, though at the same time personally regretting it, that the only way to take account

[13] See footnote 3 above.

of those concerns, which were evidence of the marked division on the matter within the international community, would be to refrain from dealing expressly with terrorism in the draft Code.

30. He would, however, draw attention to the inconsistency displayed by Governments, which, on the one hand, endeavoured to prevent—albeit, in general, indirectly—terrorism being included in the list of crimes covered by the Code and, on the other, adopted the very well-known and hotly disputed Security Council resolution 748 (1992) of 31 March 1992. The Council made reference to acts of terrorism—particularly abhorrent ones, since it had dealt with the attacks on the Union de transports aériens flight 772 and Pan Am flight 103[14]—which constituted, three years after their occurrence, a threat to international peace and security. At the same time, he doubted whether it was possible, at present, to characterize terrorism as a crime against the peace and security of mankind and whether it was in any event possible to find a generally acceptable and unifying definition of terrorism, as yet, among the few instruments that existed. He therefore proposed that, for the time being, terrorism should be deleted from the draft Code, which should cover only crimes ready to be characterized as crimes against the peace and security of mankind.

31. He was absolutely opposed to the inclusion in the draft Code of article 25. Drug trafficking was unquestionably a loathsome activity, but almost all of the States that had expressed an opinion were opposed to its characterization as a crime against the peace and security of mankind. That was sufficient reason—and for the very reasons the Special Rapporteur had given in the introduction to his thirteenth report when he had referred to the criteria for the selection of crimes—for not keeping it. Furthermore, he sincerely believed that the reservations expressed by Governments were justified. No matter how contemptible the crime, it was only likely to endanger the peace and security of mankind in the very special cases in which it was "coupled" with other crimes and, in particular, with crimes against humanity. There was no need to make it a self-contained crime against the peace and security of mankind. That certainly did not mean the Special Rapporteur had been wrong to write that some Governments might be justified in wishing drug trafficking to be the subject of international control. That, however, was another problem: it was not necessary for such a crime to be characterized as a crime against the peace and security of mankind in order for it to be controlled at the international level. It was entirely conceivable for an international court, permanent or ad hoc, to have jurisdiction to try such crimes without being obliged on that account to affirm, contrary to all reason, that such a crime endangered the peace and security of mankind. On that point, the Special Rapporteur's reasoning seemed to be mistaken: basically, he said that, for illicit trafficking in narcotic drugs to be controlled internationally, it must be characterized as a crime against the peace and security of mankind. That was not correct, however, for, any crime could be the subject of international control if States so wished, without any need to include it among the crimes that constituted an immediate danger to the peace and security of mankind.

[14] Security Council resolution 731 (1992) of 21 January 1992.

32. In his view, the Code would have meaning only if it were truly strictly confined to the most serious crimes, namely, to those that posed a serious and immediate threat—as provided in article 1, the spirit of which had been approved by the Commission at its forty-sixth session,[15] and to which the Special Rapporteur made reference in the introduction to his thirteenth report—to the peace and security of mankind, the whole of mankind, and if the international community as a whole recognized that fact. The Commission must act prudently, reasonably and responsibly.

33. Mr. BENNOUNA said that, according to Mr. Pellet, aggression was a matter for the Security Council—the sole voice of the international community which was empowered to state the law in the matter. He therefore wondered what role an international criminal court and the Commission could really play and if that meant that the permanent members of the Security Council would never be found guilty of aggression.

34. Mr. ROSENSTOCK thanked the Special Rapporteur for taking account in his thirteenth report of the views expressed in particular by Governments, for submitting the report promptly so that the members of the Commission had time to study it and for presenting it in a succinct and clear form.

35. The Special Rapporteur had removed the impenetrable political barrier which, in the past, had made it difficult to take the draft Code seriously. In order for any progress to be made, substantial surgery had been necessary. To a large extent, that had been done and the Commission could now look forward to the successful completion of its task.

36. Problems remained, however. One, which it was not for the Commission to determine definitively, was to decide whether the Code was necessary or useful. The draft statute for an international criminal court[16] and the creation of International Tribunals for the Former Yugoslavia and for Rwanda not only established that a court did not imply the existence of a code, but also perhaps raised the question whether the problems involved in the creation of a code did not outweigh the benefits.

37. A second problem—and one that it was also not for the Commission to determine definitively—was whether the Code implied a court and whether it was useful and conducive to peace, security and justice to create a code for application by national jurisdictions.

38. Thirdly, it was impossible to draft a code that would be generally regarded as exhaustive. Much credit was due to the Special Rapporteur for having pruned the list of crimes, in his thirteenth report, down to a list that would, it was to be hoped, be accepted by the international community.

39. A fourth problem concerned the need for and wisdom of attempting to define aggression. Thus far, neither the General Assembly nor any other body had entirely dismissed the conclusions reached by a former Special Rapporteur on the topic, Jean Spiropoulos, who had con-

[15] See footnote 1 above.

[16] See footnote 10 above.

cluded that "the notion of aggression is a notion *per se*, a primary notion, which, by its very essence, is not susceptible of definition".[17] It was in part for that reason that it was recognized that Article 39 of the Charter of the United Nations conferred a special role on the Security Council. Even if Mr. Spiropoulos had been pessimistic, there were overwhelming technical problems. The easy way out would be to equate aggression with any violation of Article 2, paragraph 4, of the Charter. But that seemed simplistic and unwise. There were situations that some would regard as violations of Article 2, paragraph 4, of the Charter and that few members of the Commission would regard as "aggression", much less as an international crime. That was the case, for instance, with the pre-emptive use of force in self-defence, the rescue of hostages, and humanitarian intervention to put an end to genocide. While the definition of aggression laid down by the General Assembly was not very helpful, it did differentiate clearly between aggression and a war of aggression, in that aggression created international responsibility, while only a war of aggression gave rise to personal criminal responsibility. It remained to be seen whether the notion of a war of aggression was a way of enlightening the Commission and of guiding it as to the content of the Code. In some ways, it was anachronistic in its reference back to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact); and it was difficult to know how to use it properly.

40. The fifth question concerned the inclusion of international terrorism in the Code. The global political evolution, which had enabled the adoption of the Declaration on Measures to Eliminate International Terrorism,[18] along with the efforts of the Special Rapporteur, had combined to eliminate impenetrable political obstacles. That did not mean that there were no technical problems or even that it would be possible to go any further. It was necessary, however, to avoid weakening the text. Terrorism was unjustifiable and the question of its inclusion in the Code did not necessarily prevent the Security Council from taking measures in response to a specific situation affecting peace and security throughout the world.

41. Lastly, it was questionable whether illicit trafficking in narcotic drugs could be regarded as a threat to the peace and security of mankind. The advisability of including it in the Code should therefore be examined in more detail when the Commission considered the draft, article by article.

42. He looked forward with interest to that discussion, which would enable the Drafting Committee to get to grips with its task, with the benefit of the views of the Commission as a whole.

43. Mr. PELLET, reverting to what Mr. Bennouna had said, pointed out that applying the law did not consist of endless moralizing directed at States. The fact was that international society was not egalitarian and that the least unsatisfactory way that had been found of maintaining international peace and security had been to set up the United Nations. That inequality was reflected within the United Nations itself, since there was an imbalance between the General Assembly and the Security Council inasmuch as primary responsibility for the maintenance of international peace and security had been entrusted to the latter; and in the very composition of the Security Council, which included only five permanent members. The fact was regrettable but also indisputable, and it had to be accepted that that was how matters stood. The question—and that was perhaps the idea on which Mr. Bennouna's objection was based—was whether a political organ could decide on a legal question, whether it could intervene in a legal or jurisdictional process. It was clear that it could intervene in a legal process, for the law was not made by and for lawyers, but by politicians, in order to settle problems, which were partly legal, and in the present case it was reflected by legal rules. In a jurisdictional process, that posed a problem and it might be asked whether it was for a political organ to characterize a situation, since that characterization might lead to the conviction of a person. It must be clearly understood that the functions of the Security Council and those of an international criminal court were quite different. The Council would have to give its view on a political situation and the court would have to act accordingly. Admittedly, that had never been done before, but it was perfectly possible.

44. Moreover, to give a more specific answer to the question put by Mr. Bennouna, it was a fact that the members of the Security Council could never be designated aggressors and would thus escape conviction because such was the system established by the Charter adopted in 1945, because no better system existed and because, even if it was detestable, that system at least had the virtue of existing and the Commission was unable to alter it.

45. Mr. VILLAGRÁN KRAMER said that the Commission had not been asked to place itself outside the framework of the Charter. It was clear that its work must be conducted in the framework of existing legal realities. It must not be forgotten, however, that the question of increasing the number of permanent members of the Security Council was on the agenda. If the Charter were amended, it was possible that an agreement or settlement might be reached with regard to the right of veto, for at present it was the veto that constituted the key problem. Nevertheless, the Commission did not have the right to interpret the Charter and could not propose that it should be amended. It must act within the framework of the Charter adopted in 1945. At present, then, it was difficult for it to debate a question that was essentially political. However, he did not rule out the possibility that the establishment of the new international order, which might entail a change in the status of the Security Council, might make it possible to tackle the question, but it would not be for the Commission, but for representatives of Member States in the General Assembly, to do so.

46. Mr. de SARAM said that the questions that had been raised were not purely legal in nature. They touched on sensitive matters pertaining to provisions of the Charter of the United Nations. When dealing with those provisions, one needed to be extremely careful and precise. The questions raised would, of course, be con-

[17] *Yearbook... 1951*, vol. II, p. 69, document A/CN.4/44, para. 165.

[18] General Assembly resolution 49/60, annex.

sidered carefully when members addressed the Commission in their principal statements in the debate. He would be doing so. Yet there were certain observations of a general nature which he would like to make at the current stage, in the light of some of the observations already made.

47. First, it should be noted that the Commission had been entrusted with the task of formulating a draft Code of crimes against the peace and security of mankind and not of crimes against the peace and security of mankind recognized as such by one organ or another of the United Nations. Secondly, the question of the relationship between the two functions of the Commission, namely, codification, on the one hand, and progressive development of the law, on the other, had preoccupied its members for a long time, indeed going back almost to the inception of the Commission, and he did not think the codification or progressive development consideration in itself should be a determining factor for the present or any other topic on the Commission's agenda. Thirdly, a question to which Mr. Bennouna had referred also arose with regard to the relationship between the Security Council, the international criminal court, the General Assembly and the Commission. One last important question concerned the relationship between positive law and the jurisdiction entrusted with its application. All those questions were very complex and must be studied in depth and formulated very precisely.

48. Mr. EIRIKSSON said he thought that, despite the realities referred to by Mr. Pellet, a legal purist might reverse the roles he attributed to the international criminal court and the Security Council, respectively, by acknowledging that it was perhaps for the court to characterize a situation and for the Security Council to decide on the measures to be taken in consequence.

49. Mr. ROSENSTOCK said that, as the Commission had accepted the idea that the intervention of an international criminal court was subordinate to a decision by the Security Council and had reaffirmed that idea at its last session when considering the draft statute for an international criminal court, *inter alia*, in article 23, paragraph 2, of the draft statute,[19] on which there had been consensus, he doubted that there was any point in reopening the debate on that question, even though it was clearly important.

50. Mr. BENNOUNA said that he disputed the truth of the assertion that article 23 of the draft statute had commanded consensus. It had been debated at great length and had been rejected by a number of representatives in the General Assembly. It posed an extremely complex problem which was likely to jeopardize the adoption of the draft statute as a whole. That key article had been the subject of passionate debate in the Commission and the question had certainly not been settled. It would inevitably be raised again. It was not in the interests either of the United Nations, or of the Commission, or of any court of justice to mix power politics and law, that is to say the immorality and cynicism of politics and the application of the rules of law by a court. The Security Council was a political organ that decided on political matters and not on problems of a legal nature, in which justice must play an essential role, especially when the conviction of persons was involved. If one were to restrict oneself to the scenario put forward by Mr. Pellet, under which it was for the Security Council to determine that there had been an act of aggression and thus to point to the possible culprits, with the court confining itself to acting on the basis of that decision, one might wonder what margin for manoeuvre the court would have. It should not be forgotten that the decisions of the Security Council did not prevail over international law or treaties. Only the Charter took precedence over those treaties. The Commission had no competence to reform the Charter. Its role was to concern itself with law, justice and the application of the law by the courts.

51. Mr. MAHIOU said he seemed to recall that several members of the Commission had declared that they did not endorse article 23, paragraph 2, of the draft statute and he felt that it would be difficult to avoid reopening the debate on that specific point, which lay at the heart of an extremely important problem, both legal and political, on which every member of the Commission must have the opportunity to express himself and give his opinion.

52. Mr. EIRIKSSON said he thought that there was no incompatibility between what the Special Rapporteur proposed and what the Commission had decided at its forty-sixth session with respect to the international criminal court. In article 20 of the draft statute, subparagraph (*b*), on the crime of aggression, did not specify that what was referred to was the crime of aggression recognized as such by the Security Council, but it was clear that article 23, paragraph 2, which made the bringing of a complaint of an act of aggression conditional on the determination of the aggression by the Security Council, was a source of difficulties. He nevertheless thought that solution, which was the one accepted by the Commission, was preferable to an explicit reference to the crime of aggression determined by the Security Council in accordance with General Assembly resolution 3314 (XXIX).

Election of officers (*concluded*)

Mr. Villagrán Kramer was elected Rapporteur by acclamation.

Organization of the work of the session (*continued*)

[Agenda item 2]

53. Mr. YANKOV (Chairman of the Drafting Committee) said that, for the topic of the "Draft Code of crimes against the peace and security of mankind", the Drafting Committee would be composed of Mr. Al-Baharna, Mr. Crawford, Mr. Eiriksson, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Szekely, Mr. Vargas Carreño, Mr. Villagrán Kramer and Mr. Yamada.

54. For the topic of "State responsibility", the Drafting Committee would be composed of Mr. Al-Baharna,

[19] See footnote 10 above.

Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely and Mr. Yamada.

55. For the topic of "International liability for injurious consequences arising out of acts not prohibited by international law", the Drafting Committee would be composed of Mr. Al-Baharna, Mr. Bowett, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely and Mr. Villagrán Kramer.

56. For practical reasons and bearing in mind the schedule of work drawn up by the Commission for the period until the conclusion of its current term of office, the Drafting Committee would assign priority to the draft Code of crimes against the peace and security of mankind and to State responsibility, devoting a maximum of 14 meetings to each of those two topics, while not neglecting the topic of international liability for injurious consequences arising out of acts not prohibited by international law, to which it would devote 6 meetings at most. The members of the Commission who were not members of the Drafting Committee would be able to attend the meetings of the latter and would be authorized to take the floor on those occasions, on the understanding that they would speak in moderation.

57. The Drafting Committee would submit to the plenary Commission its report on each of the topics it was considering, if possible, by the first week of July and, at the latest, by the second week of July.

58. Mr. PAMBOU-TCHIVOUNDA (Chairman of the Planning Group) proposed, following the consultations he had held, that the Planning Group should be composed of Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Vargas Carreño and, in an *ex officio* capacity, former chairmen of the Commission.

It was so agreed.

59. Mr. ROSENSTOCK asked whether an additional meeting could be devoted to general observations on the draft Code before it was considered article by article or by clusters of articles. That method, which had been adopted at the forty-sixth session, had proved extremely valuable. It should also facilitate the work of the Drafting Committee.

60. Mr. YANKOV (Chairman of the Drafting Committee) found the proposal by Mr. Rosenstock very pragmatic, and he invited the other members of the Commission to accept it, for such a way of proceeding should indeed facilitate the smooth running of the Drafting Committee's work.

61. The CHAIRMAN said that it would be best for those members of the Commission wishing to speak on that topic to begin by making general observations on the draft Code. They could then take the floor whenever they so wished in order to make more detailed comments on particular articles. If he heard no objection, he would take it that the Commission accepted that suggestion.

It was so agreed.

The meeting rose at 1 p.m.

2380th MEETING

Thursday, 4 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members to resume consideration of the thirteenth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466). As far as was possible, the Commission should conclude its comments on the articles as a whole before taking up specific articles, which could then be dealt with in turn.

2. Mr. BENNOUNA said that it was high time that the Commission concluded its work on a topic that had occupied it for much of its history. In the present troubled times, some more unified approach to the question than the current unsatisfactory system of ad hoc tribunals was called for. Formulation of a Code, in as succinct a form as possible, would thus give the international community a very important instrument with which to address highly politicized issues.

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[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).