

Document:-  
**A/CN.4/SR.2381**

**Summary record of the 2381st 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:-  
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thereby endorsing the unfair structure of international law and relations. In fact, if such inequalities did exist, it did not justify their codification by the Commission.

29. He agreed with the Special Rapporteur's position on the threat of aggression or intervention, for he had stated from the outset his reservations as to the inclusion of such vague acts. It was difficult to agree, on the other hand, that colonial or other forms of foreign domination should not be included in the list. Such domination was not a thing of the past and could resurface at any time. There might be a problem regarding definition or denomination, but foreign domination, colonial or otherwise, could amount to a serious crime. The Commission should therefore give further attention to the matter. The same applied to apartheid, which could still manifest itself, although perhaps under a different name.

30. The treatment of the crime of terrorism depended on whether it was committed by a State or by an individual or group having no connection with a State. State terrorism must certainly be included as a crime against the peace and security of mankind, but the Commission must specify the exact conditions in which an individual act of terrorism, without being linked to a State, could be regarded as such a crime. The solution might be to draft separate paragraphs for the two situations. The same applied to crimes connected with drug trafficking, for including them when they were committed by individuals might have the effect of watering down the concept of crimes against the peace and security of mankind. The Special Rapporteur's proposal to replace the present title of article 21 with "Crimes against humanity" was open to the objection that it could convey the impression some crimes not mentioned in the article were not crimes against humanity, for example, genocide.

31. Mr. LUKASHUK said that he had been following for many years the heroic struggle of the Special Rapporteur to establish peace and legality in international relations. On the whole, the draft Code, although of course not perfect, constituted a good basis for the Commission's work. It might be useful to amend the title of the Code to read "Code of crimes against universal peace and humanity". However, the main problem for the Commission was the harmonization of domestic and international criminal law. In that connection, it might be useful to amend the definition contained in article 1 to read "The crimes defined in this Code in accordance with international law and general principles of law constitute crimes against the peace and security of mankind". Furthermore, the first sentence of article 2 was too strong, and perhaps incorrect, and should be omitted. The correlation between domestic and international law must be made clear and the principle of *nulla poena sine lege* firmly established.

*The meeting rose at 11.35 a.m.*

## 2381st MEETING

*Friday, 5 May 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*later:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, 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. 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<sup>1</sup> (continued)** (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> 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. Mr. RAZAFINDRALAMBO said that the thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466) was a worthy successor to the previous reports and a model of conciseness and precision.

2. Speaking first of the thoughts prompted by his reading of the report, he joined the Special Rapporteur in deploring the fact that so few Governments had made known their views on the draft Code adopted on first reading. Still more worrying was the fact that no African or Asian country had done so. Those Governments that had remained silent would thus be ill advised to express surprise that, despite their countries' accession to sovereignty, the role historically played by the major countries, particularly of Europe, in originating and developing international law continued to be predominant, as, for example, in the case of the attitude towards the crime of colonial domination or the crime of apartheid. At all events, the Commission must take the fullest account of the developments that had taken place in recent years, namely, of the decisive contribution of the Security Council to the defence of human rights through the establishment of the International Tribunal for the former Yugoslavia<sup>3</sup> and the International Tribunal for Rwanda,<sup>4</sup>

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

<sup>2</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

<sup>3</sup> See 2379th meeting, footnote 5.

<sup>4</sup> *Ibid.*, footnote 11.

and also of its own contribution with the adoption at its forty-sixth session of the draft statute for an international criminal court.<sup>5</sup>

3. That remarkable progress in the field of positive law had both facilitated and complicated the task of the Special Rapporteur, who was able to draw heavily on texts he already had before him, but who also had had to ensure that the Code continued to have a genuine *raison d'être* and was truly useful. He thus announced at the outset of his report that he would abandon the draft articles on threat of aggression, intervention, colonial domination and other forms of alien domination and wilful and severe damage to the environment and that he was ready to forgo, not without reluctance, the draft articles on apartheid and on the recruitment, use, financing and training of mercenaries, at least as separate and independent provisions. He said that the other crimes salvaged from the first reading might be retained, subject to some amendments to take account of the observations of certain Governments.

4. In substantially cutting the list adopted on first reading, the Special Rapporteur had based himself on article 20 of the draft statute (Crimes within the jurisdiction of the Court).<sup>6</sup> he had retained the first four most serious crimes listed therein, which were common to both drafts, including genocide and aggression, had abandoned the unduly general wording of the latter and had kept the specific articles relating to international terrorism and illicit traffic in narcotic drugs. He could support the new proposals by the Special Rapporteur, except with regard to the crime of colonial domination and other forms of alien domination and that of wilful and severe damage to the environment. The glaring disparity between the political and economic situation of the States of the North and that of the States of the South forbade any premature optimism as to the final disappearance of all forms of colonial or neo-colonial domination. And in the case of wilful and severe damage to the environment, it was again the developing countries that were likely to suffer the adverse effects of a gap in the punishment of that type of crime. It was enough to recall certain criminal attempts illicitly to dump chemical or radioactive waste that was particularly harmful to their environment in the territory or in the territorial waters of those States.

5. He noted that article 47 of the draft statute (Applicable penalties) contained a special provision on applicable penalties and sanctions and that, for the purposes of the harmonization of the two drafts and with a view to achieving consistency, it would be advisable to reproduce the text of that article in the draft Code, subject to a few minor amendments.

6. He reserved the right to revert to that agenda item to make specific comments on the draft articles submitted.

*Mr. Pambou-Tchivounda took the Chair.*

7. Mr. MIKULKA said that, given the deep divergencies in the views of Governments, he could not but support the proposal of the Special Rapporteur to reduce the

list of crimes adopted on first reading to those whose status as crimes against the peace and security of mankind seemed difficult to contest. The Commission should, however, be under no illusion regarding the fate of the final draft, for, even in that form, it was not certain that States would hasten to adopt the draft Code, especially if it was to take the form of a convention.

8. It followed, as far as the method of work to be adopted was concerned, that the Commission must give priority to the crimes for which prosecution was provided by already well-established rules of international law and, customary rules whose application would not depend on the form of the future instrument and that it should confine itself to crimes of individuals whose characterization as a crime was independent not only of the internal law of States, but also of their ratification of an international convention establishing inter-State cooperation in the field of the prosecution of certain crimes. In other words, the Commission should include in the draft the crimes for which the perpetrators were directly responsible by virtue of already existing general international law and, above all, the crimes of individuals linked to the international crimes of States. In those cases where the criminal liability of the individuals who had taken part in the commission of the international crime of the State was only one of the consequences of that unlawful act of the State itself. Aggression was the best example.

9. Bearing in mind the criteria for inclusion of crimes in the Code that he had just mentioned, however, he thought that crimes such as international terrorism and illicit traffic in narcotic drugs had no place in the draft. He did not dispute the importance of combating those forms of criminal conduct, which had often taken on an international dimension, but, unlike the crimes of aggression, genocide and other crimes against mankind or war crimes which could be prosecuted on the basis of general international law, the criminal prosecution of international terrorism and of illicit traffic in narcotic drugs at the international level presupposed the existence of a convention, except perhaps in cases where those crimes were linked to other crimes punishable under general international law.

10. He endorsed the Special Rapporteur's proposal that the crimes of threat of aggression and intervention should be left aside for the time being because of their vague and imprecise nature, and which could, to a certain extent, be prosecuted as crimes of aggression.

11. He considered the Special Rapporteur's proposal on colonial domination and other forms of alien domination to be acceptable, since colonial domination was virtually extinct and there was no precise definition for alien domination, whereas criminal law required that a crime should be defined.

12. With regard to the crime of apartheid, which was fortunately a thing of the past, the Special Rapporteur's proposal that it should be rephrased as institutionalization of racial discrimination, merited the Commission's attention, but he did not think that purely hypothetical crimes should be included in the Code.

<sup>5</sup> Ibid., footnote 10.

<sup>6</sup> Ibid.

13. As to the recruitment of mercenaries, in so far as it involved the participation of agents of the State, the acts originally dealt with in article 23 (Recruitment, use, financing and training of mercenaries) could be prosecuted as crimes linked to aggression. Otherwise, he had the same objections with regard to that crime as he did to international terrorism and illicit traffic in narcotic drugs.

14. The list of crimes to be included in the Code should therefore consist only of crimes that were already part of positive law (*lex lata*)

15. Given that the Code's scope was limited both by the title of the instrument and the mandate given to the Commission as a result, the draft Code should cover not all crimes under international law committed by individuals, but only those that might threaten the peace and security of mankind or, in other words some "crimes of crimes", although no hierarchy should be established within that category of crimes. He therefore agreed with the Special Rapporteur's proposal that the crime of wilful and severe damage to the environment should be removed from the draft, on the understanding that that did not rule out the possibility of considering it as an international crime without necessarily characterizing it as a crime against the peace and security of mankind.

16. Since relatively few Governments had communicated their comments on the draft Code and the comments received could therefore not reflect the entirety of the views of Governments and, in particular, the main trends on various issues, the Commission must also take account of the views that States had expressed in recent years in the Sixth Committee and the comments they had made on the draft statute for an international criminal court, in which context the question of the list of crimes had also come up. At the same time, the Commission should retain some degree of independence in its thinking, not only because States had radically opposing views on certain issues, but also because they often changed their mind and adopted the opposing view owing to short-term political considerations or the outlooks of individual representatives or experts responsible for speaking for States.

17. Mr. YAMADA commended the Special Rapporteur for adopting a realistic approach and accommodating the observations made by Governments.

18. Commenting generally on the report, he commended the Special Rapporteur's courageous action in having slashed the number of crimes from 12, as contained in the draft adopted on first reading, to only 6, thus increasing the possibility of wider acceptance by Governments. He believed that the Code should deal with only the most serious of serious crimes and those with the gravest consequences. The list of crimes could be shortened still further and he would express his views on that subject when the draft Code was considered article by article.

19. Existing treaties on international crime often lacked the precision and rigour required by criminal law. As those treaties were designed to require Governments to establish national jurisdiction over the crimes defined in the treaties and to conduct trials of such crimes in

their courts, gaps in the definition of what constituted a crime and the specific penalties applicable could be filled by provisions in enabling national legislation. The Commission must, however, consider the possibility that crimes defined in the Code might be tried in an international criminal court. In the deliberations on the draft statute for an international criminal court in the Sixth Committee at the forty-ninth session of the General Assembly (A/CN.4/464/Add.1) and in the Ad Hoc Committee on the establishment of an international criminal court in April 1995,<sup>7</sup> the view had been taken that the principle of legality, as expressed by the maxim *nullum crimen sine lege, nulla poena sine lege*, was the cornerstone of international criminal justice and that a form of international criminal law that was as precise as national criminal law was required. The Code now being formulated must stand on its own and be sufficiently precise to be applied directly by an international court without recourse to any other source of law.

20. In his view, it was not necessary to provide a penalty for each crime. The Commission was dealing with the most serious crimes and, accordingly, the penalties must be severe. It would suffice to incorporate one article setting out the minimum and maximum limits for all the crimes in the Code, with the international criminal court being left to exercise its discretion within those limits.

21. As to the role of the Security Council in relation to the crime of aggression, he recalled that, under Article 39 of the Charter of the United Nations, the Security Council was entrusted with determining the existence of an act of aggression. Such a determination was a prerequisite to any trial for the crime of aggression, but that did not in any way undermine the independence of the judiciary. The principles of the independence of the judiciary and the separation of the judiciary from the executive were intended to protect the human rights of the accused by preventing arbitrary political intervention in the judicial process. On the other hand, the Council and the international judiciary must have the common objective of deterring and punishing such grave crimes as an act of aggression. He could not foresee, within the present framework of international law, how a trial for the crime of aggression could be initiated in the absence of a determination by the Council of the existence of aggression. On the other hand, there might well be a case when the court found the accused not guilty, even though the Council had made a determination of aggression.

22. Mr. VARGAS CARREÑO congratulated the Special Rapporteur on the new version of the draft Code proposed in his thirteenth report, which met two concerns: it took fullest possible account of the wishes of Governments as stated in their comments; and it retained in the Code only the most serious crimes, the "crimes of crimes", against the peace and security of mankind.

23. The purpose of the exercise undertaken by the Commission was to draft a convention which could secure approval by the international community and ratification by a large number of States. That purpose determined some of the criteria to be observed. The first

<sup>7</sup> See document A/AC.244/2.

criterion related to the realistic and non-Utopian nature of the text to be drafted, which must be consistent with existing practice and conventional or customary law. The text must contain many more elements of *lex lata* than of *lex ferenda*. Its wording must be sufficiently clear and precise to prevent conflicting interpretations. And it must not conflict with the aspirations, or disregard the legitimate objections, of States, especially in respect of the gravity of the offences constituting crimes against the peace and security of mankind.

24. Those criteria had induced the Special Rapporteur to delete some of the crimes which had appeared in the previous version. That was on the whole a sensible move and the reasons put forward by the Special Rapporteur to justify it were acceptable: insufficient existing practice or problems now solved, as in the case of colonial domination or apartheid. However, he wished to comment on two of the crimes removed from the list. While there was perhaps no justification for creating a special category for the crime of apartheid, there was no doubt of the continued existence of situations of institutionalized racial discrimination which the draft text should continue to address, for example in article 21 (Systematic or mass violations of human rights). Nor was there any doubt in the case of intervention that the principle of non-intervention remained a fundamental rule of contemporary international law which was asserted in numerous important international instruments and had been reaffirmed by ICJ, particularly in the *Corfu Channel case*<sup>8</sup> and the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,<sup>9</sup> and confirmed by several General Assembly resolutions, including resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty and resolution 2625 (XXV), the annex to which contained the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. However, it must be acknowledged that the principle was of limited scope, owing in particular to the decline in the number of situations, qualifying as internal affairs and to the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted. It therefore seemed right to delete article 17 (Intervention). But it must be explained that the principle of non-intervention itself remained a fundamental rule of contemporary law and some elements of the deleted text, in particular parts of paragraph 2, must be retained and incorporated, for example, in the articles on aggression and terrorism.

25. With regard to the six articles retained, he approved of the shortening of article 15 (Aggression) to two paragraphs of definition. However, it would be useful to state that a determination of aggression was made in accordance with international law, for that would avoid any debate about the possible function of the Security Council or the international criminal court or about the reference to General Assembly resolution 3314

(XXIX). That would leave very ample latitude. If the Council made a determination of aggression, it was obvious that the effects of such a determination would be binding on all States. The same would be true in the case of a determination of aggression by the international criminal court. He was in favour of retaining the present wording of paragraph 2, which was based on Article 2, paragraph 4, of the Charter.

26. With regard to genocide, he was grateful to the Special Rapporteur for not departing from the text of the Convention on the Prevention and Punishment of the Crime of Genocide.

27. As for article 21, he preferred the title adopted on first reading to the new title proposed by the Special Rapporteur. Some of the acts defined in the draft Code, such as genocide, terrorism or illicit traffic in narcotic drugs, were crimes against humanity. But it was in the protection of human rights that international law had made the greatest progress and the international community had achieved its greatest successes. Nor did he agree with the Special Rapporteur on the inclusion of "individuals" as possible perpetrators of the crimes in question. The international protection of human rights amounted fundamentally to commissioning a specific body to judge acts attributable to agents of the State. If the text spoke of "individuals", it would clearly not be referring to the situations with which the Commission should be concerned. Crimes committed by individuals were unfortunately commonplace occurrences: newspapers in all countries reported daily a large number of crimes, such as murder, torture and other crimes committed by individuals that did not constitute crimes against the peace and security of mankind. The article was concerned with acts, such as terrorism or deportation, for example, committed on behalf of a State. It was also necessary to retain the requirement of the mass and systematic scale of such acts, for an isolated act would not constitute a crime against the peace and security of mankind.

28. The list of crimes must be drafted clearly and precisely. He favoured the deletion of persecution, since it was not a generic act. On the other hand, certain omissions from the list of crimes must be made good. He had in mind primarily enforced disappearances, which constituted one of the most serious crimes of the second half of the twentieth century in some parts of the world. Pursuant to State policy, thousands of persons had disappeared after arrest. The press had published the confession of the current Chilean Commander-in-Chief who had acknowledged ordering the arrest and execution of thousands of people whose bodies had then been dumped at sea. Those were very serious violations of human rights which truly constituted crimes against the peace and security of mankind and should be mentioned in the draft Code. Institutionalized racial discrimination should also be included if the article on apartheid was deleted.

29. With regard to article 22 (Exceptionally serious war crimes), he endorsed the Special Rapporteur's excellent idea of basing the text on the statute of the International Tribunal for the Former Yugoslavia and on the Geneva Conventions of 12 August 1949 and the Protocol

<sup>8</sup> *Merits, Judgment, I.C.J. Reports 1949*, p. 4.

<sup>9</sup> *Ibid.*, 1986, p. 14.

additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

30. On the other hand, he was afraid that the difficulties to which the new version of article 24 (International terrorism) might give rise would prevent the Commission from reaching a consensus. The first cause of probable difficulty lay in the possible inclusion in the definition of terrorism of an act committed by a person "as an individual", as proposed by the Special Rapporteur. Secondly, the definition of terrorism should stand on its own and not be made by reference to subjective motives and to the objective of the terrorist act. Another cause of difficulty lay in the "international" character of terrorism. Referring to the recent attacks in Oklahoma City and Buenos Aires, for example, he wondered whether the fact was decisive that in the former the alleged perpetrators were United States citizens and in the latter they were foreigners. The Commission should discuss that point and endeavour to arrive at a consensus.

31. He agreed that article 25 (Illicit traffic in narcotic drugs) should be included in the draft Code. In his view, the basic element to be taken into account in both the version adopted on first reading and the new one was the scale on which such traffic was carried out.

*Mr. Sreenivasa Rao resumed the Chair.*

32. Mr. KABATSI said that it had all along been the Commission's task to produce not an international criminal code, but a code of the crimes that most outraged the conscience of mankind—the "crimes of crimes". But could it really be said that such "crimes of crimes" were confined to the six that had been included in the new list proposed by the Special Rapporteur? He had rightly started with the principle that it was necessary to defer to the political will of States, but it was important, at the same time, not to form an incomplete picture in that connection by basing it on the will of the few States that had given their comments on the draft Code. The silence of the States that had not made observations could equally be interpreted as an acceptance of the old list. There was nothing to suggest that those States would have agreed to the elimination of, for instance, colonial domination or wilful damage to the environment when whole communities, countries and even regions could suffer irreparable damage that originated in nuclear, chemical or bacteriological plants. With regard to apartheid, States seemed to feel not that that crime had no place in the draft Code, but, rather, that the positive changes in recent years meant that there was no longer any need to worry about a problem that would in any event be covered by article 21. On the other hand, while apartheid had disappeared in South Africa, the phenomenon perhaps existed elsewhere or could resurface in even more acute form. It would therefore be advisable to keep the crime of apartheid in the Code, possibly under the heading "Institutionalization of racial or sectarian discrimination". For the same reasons, the Special Rapporteur had been right to retain article 25.

33. With regard to the applicable penalties, it should suffice to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case. In that connection, it might be advisable

to follow article 47 of the draft statute for an international criminal court. As to the relationship between the role of the Security Council and the question of aggression, the probability that an act or a situation of aggression was not determined as such by the Council was perhaps unlikely in the immediate future, but it could not be entirely excluded. It was still not too late to warn against the risks of unjustified immunity that would follow if the Council found that, for political reasons, it lacked the capacity to determine that there had been aggression. It was never a good idea to leave the exclusive power to determine whether there had been a criminal act to a political body, even if it was the Security Council of the United Nations.

34. Mr. SZEKELY said that the mutilation done to the draft Code might even result in the Commission submitting to the General Assembly a draft resolution and not a draft Code. He favoured a list that was longer and a Code that was as comprehensive as possible. There was somewhat of a contradiction in the statement that, for an internationally wrongful act to become a crime under the Code, it was not enough for it to be of extreme gravity; it was also necessary for the international community to decide that it was so, and then to allow a small number of States to take that decision. The silence of the large majority of States—quite apart from the fact that it could be interpreted to mean "he who says nothing consents"—should act as an incentive to be imaginative and to find a way of ascertaining the views of a larger number of States. The Commission must certainly take care not to lose sight of political reality, but it would be running the greatest risk of doing so if it failed to do everything to secure the views of the majority of States. For instance, the crime of intervention, which it was hoped, apparently, to exclude from the list, was a contemporary fact of life and peoples suffered from it. And who could guarantee that colonial domination and apartheid were definitely a thing of the past? As for wilful and serious damage to the environment, they were a fact of life, not just now, but for future generations.

35. It would be regrettable if, as a result of the omission or negligence of the majority of States, the Commission had to restrict the scope of the Code unduly and to refrain from strengthening international law and international peace and security by drafting a Code that reflected the views of only some States. The basic mistake perhaps was to believe that it was a question of choosing between what should be included and what should be excluded, whereas it was rather a matter of knowing how to distinguish crimes of extreme gravity from those which were, in addition, a threat to the peace and security of mankind. The question of the characterization of crime (part one of the draft Code) and of the criteria applicable to that characterization must therefore be reviewed. It was by recognizing the highest threshold of the gravity and by defining the public interest it hoped to cater for in the Code that the Commission could more closely reflect the majority wish of the international community as to the crimes to be included in the Code.

*The meeting rose at 11.40 a.m.*