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Summary record of the 2382nd 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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2382nd MEETING

Wednesday, 10 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. 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. Mr. JACOVIDES said that the topic under consideration, and the related questions of an international criminal jurisdiction and the definition of aggression, had a long history in the United Nations dating as far back as 1947. The present phase had commenced following the achievement of a consensus on General Assembly resolution 3314 (XXIX), adopted in 1974, which laid down, in the annex, the Definition of Aggression. Subsequently, in 1981, the General Assembly had given an indication of what it expected of the Commission when it had invited it by resolution 36/106, to examine the draft Code of Offences against the Peace and Security of Mankind with the "required priority", and to take account of the results achieved by the process of the "progressive development" of international law. The draft Code of Crimes against the Peace and Security of Mankind had ultimately been adopted on first reading in 1991. He very much hoped that the final lap had now been reached, at least so far as the Commission was concerned, and that, before its mandate ended in 1996, the Commission would have discharged its duty to the General Assembly by submitting a legal document that was comprehensive but lean and designed to ensure the widest possible acceptability and effectiveness.

2. His only comment with respect to the Special Rapporteur's twelfth report[3] pertained to article 5 (Responsibility of States) which, in his view, should be retained, since he felt strongly that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them.

3. The Special Rapporteur was to be commended on the well-reasoned approach taken in his thirteenth report (A/CN.4/466) and for honouring his promise to limit the list of crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. He had had difficult choices to make and, on the whole, had made them wisely. As the Special Rapporteur had himself rightly pointed out, had he decided to proceed on the basis of the 12 crimes adopted on first reading, the draft Code might have been reduced to a mere exercise in style. The Commission was not drafting a general international penal code but was concentrating on a list of the most serious international crimes against the peace and security of mankind and one that the international community would be able to approve and ratify. Inevitably, therefore, the choice was considerably restricted.

4. Though it was unfortunate that so few States had responded with their written observations on the draft Code as adopted on first reading, that did not, in his opinion, reflect a lack of interest on the part of the international community. There were many other ways in which States could manifest their will, not least by the positions taken during the consideration of the report of the Commission by their representatives in the General Assembly. There were practical considerations, too, to be borne in mind, particularly in the case of small States with limited resources, and there was the fact that, for the past three years, the focus had been on the draft statute for an international criminal court rather than on the draft Code. Lastly, silence could be construed as consent.

5. At all events, many thought that, notwithstanding the arguments in favour of retaining certain crimes included in the draft Code adopted on first reading, the Code would have to be restricted to the most serious crimes having grave consequences for international peace and security: it was a concession dictated by political reality.

6. It was only partly true to say that the Commission was a codifier, not a legislator. While the Commission must not fall out of step with the political will of States—the legislators—it had responsibility under its statute for the progressive development of international law. That applied in particular, in the light of General Assembly resolution 36/106, to the topic under discussion, though where codification ended and progressive development of international law began was a controversial and subjective matter.

7. In view of those considerations and despite some misgivings, he believed that the Special Rapporteur had been wise to cut back sharply on the number of crimes to be covered by the Code. At the same time, he trusted that no further drastic surgery would be necessary. The draft Code's substance must be preserved so that the final text was a robust and living instrument, with reasonable prospects of being acceptable to the international community as a whole.

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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).

[3] *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/460.

8. The omission of certain crimes from the list in the Code should not imply that the crimes in question were unimportant. True, threat of aggression and intervention, for example, lacked the rigour required by criminal law, but those crimes, and indeed mercenarism, could come under the general rubric of aggression or terrorism. Non-intervention, of course, was a cardinal principle of international law enshrined in treaties, decisions of ICJ such as those in the *Corfu Channel* case[4] and the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*),[5] as well as in United Nations resolutions. It was a principle that remained wholly valid. While colonial domination and other forms of alien domination were abhorrent, colonial domination was, he hoped, a thing of the past and therefore had no realistic chance of being accepted if it was included in the Code. There was also no need for a separate section on the environment, since damage to the environment, such as wilful nuclear pollution or the poisoning of vital international watercourses, would, if it affected international peace and security, be punishable as an international crime under other rubrics of the Code such as aggression, war crimes and international terrorism. Again, there was no need to include apartheid in the Code, particularly since apartheid had been superseded by political developments in South Africa. On the other hand, an appropriate form of wording should be incorporated in one or other of the rubrics of the Code to make institutionalized racial or ethnic discrimination, which still persisted in some parts of the world, a criminal act. The aim would be to prevent its continuation, or even emergence, in other contexts.

9. Of the six crimes now proposed by the Special Rapporteur for inclusion in the Code, aggression was unquestionably of crucial importance. The adoption by consensus, after long and painstaking effort, of General Assembly resolution 3314 (XXIX) which laid down the Definition of Aggression in the annex, had removed any pretext for not proceeding with work on the Code. In his thirteenth report, the Special Rapporteur indicated that Switzerland rightly stated in its written observations that the proposed definition of aggression rested mainly—and with perfect justification—on that contained in General Assembly resolution 3314 (XXIX). That definition therefore formed the basis of article 15 (Aggression), adopted on first reading in 1991. On the other hand, the United Kingdom stated that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. That view had received wide support from a number of Governments which had, however, also participated in and consented to General Assembly resolution 3314 (XXIX), in the knowledge that the whole exercise had been undertaken in the context of the Code and with a view to supplying the missing link, namely, the Definition of Aggression.

10. In the circumstances, it would be interesting to know whether the Security Council, at any stage in the exercise of its functions under Article 39 of the Charter of the United Nations, had ever relied expressly on that resolution. In the one situation with which he was most familiar and which had involved the massive use of force, it had not done so. At all events, on the clear understanding that Assembly resolution 3314 (XXIX) would retain its validity, he would be prepared to go along with the Special Rapporteur's proposed new wording, which defined aggression by reference to article 1 of the Definition of Aggression. The latter article was itself based on Article 2, paragraph 4, of the Charter and, according to the prevalent view, provided the clearest instance of *jus cogens* and was therefore difficult to dispute.

11. The closely related matter of the functions of the Security Council under Article 39 of the Charter in determining the existence of an act of aggression and of the international criminal court in deciding the issue of the criminal responsibility of individuals was important in terms of the effectiveness of the Code and of the prospect of its acceptability. In legal terms, the matter was important in that it raised questions as to separation of powers between the political and judicial organs and of the equality of the States represented on the Security Council, and more particularly of its permanent members. Should there be five such members, as at present, or more? In practical terms, it could mean that individuals not only from the permanent members of the Council, with the power of veto, but also from their allies and protégés, would be exempt from criminal responsibility since, as stated in paragraph (8) of the commentary to article 23 of the draft statute for an international criminal court:[6]

> Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter of the United Nations to make.

The saving clause in the fourth preambular paragraph of the Definition of Aggression (". . . nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations") could also serve a useful purpose in that context. The whole point, really, was whether there was a willingness to sacrifice sovereign equality and justice for all as the price for political acceptability.

12. He agreed that the distinction between "acts of aggression" and "wars of aggression" no longer applied, particularly in view of the adoption of the Charter of the United Nations and earlier instruments that outlawed war. Such acts of aggression as invasion or annexation of territory were sufficiently serious to constitute not just wrongful acts but crimes under the Code.

13. Genocide, of the crimes covered by the draft Code, was the one that presented the least difficulty, since there was broad agreement in that respect in the international community as reflected in the Convention on the Prevention and Punishment of the Crime of Genocide. In that connection, the written observation by the Government of the United Kingdom, as contained in the thirteenth report of the Special Rapporteur, on the relationship

[4] See 2381st meeting, footnote 8.

[5] Ibid., footnote 9.

[6] See 2379th meeting, footnote 10.

between the Code and article IX of the Convention was a welcome reminder of the need for the acceptance of compulsory third party settlement in all multilateral law-making conventions. Subject to any necessary drafting changes, therefore, the Special Rapporteur's proposed text was acceptable.

14. Article 21 proposed by the Special Rapporteur for inclusion in the draft Code was entitled "Crimes against humanity". Actually, the reference in the previous title of the article to "mass" violations was meant to indicate the gravity of the offence. The Drafting Committee might therefore wish to reconsider the matter. Personally, he had no strong views and could in fact accept the new title. The definition of torture which appeared between square brackets, was not really necessary and upset the balance of the draft article. On the other hand, the reference to "all other inhumane acts" was in keeping with other similar instruments and should be retained, as should the reference to "deportation or forcible transfer of population". The article could perhaps be expanded to cover institutionalized racial or ethnic discrimination, as a consequence of the omission of apartheid from the Code. Consideration should likewise be given to the inclusion of a reference, as suggested by the Government of Australia, to the practice of systematic disappearance of persons, which was indeed of major humanitarian concern in many parts of the world.

15. Article 22 proposed by the Special Rapporteur entitled "War crimes" reflected the Special Rapporteur's conclusion that the reservations expressed with respect to the new concept of exceptionally serious war crimes, as referred to in the draft adopted on first reading, were valid; hence, it was difficult in practice to establish a precise dividing line between the "grave" breaches defined in 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), on the one hand, and the "exceptionally grave breaches" referred to in the draft adopted on first reading, on the other. That conclusion raised some difficult issues for the Commission on which it would be interesting to hear members' views. During the debate on the Commission's report in the Sixth Committee, a strong preference had been voiced for the wording used in draft articles 21 and 22 of the draft Code as adopted on first reading in 1991. In particular, paragraph 2 (*b*) of article 22 had given rise to no objection. A solid foundation for that provision was also to be found in article 85, paragraph 4, of Protocol I. Consequently, while he appreciated that paragraphs 1 (*g*) and 2 (*d*) and 2 (*e*) of the proposed text went some way to meeting the point, he would strongly urge that the reference to the establishment of settlers in an occupied territory and changes in the demographic composition of an occupied territory, as adopted on first reading, should be retained.

16. On the basis of the observations of States and his own views, the Special Rapporteur had expanded the scope of article 24 (International terrorism) so that the perpetrators included not only agents or representatives of States but also private individuals acting on behalf of groups or associations. Bearing in mind the instances of international and also of national or internal terrorism (from the New York World Trade Centre bombing to those in Buenos Aires and Oklahoma City), that would seem to be the right approach. Since there was as yet no generally acceptable definition of terrorism, in practical terms the piecemeal approach to identifying specific categories of acts that the entire international community condemned such as aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage taking, theft or unlawful use of nuclear material could lead to some progress in combating terrorism. None the less, in a Code such as the one on which the Commission was engaged, common rules applicable to all forms of terrorism should be included in order to suppress and punish them. The present text might not be perfect, but was aimed in the right direction.

17. Some very valid points were made in the written observations of Governments, notably by Australia and Switzerland concerning article 25 (Illicit traffic in narcotic drugs). Indeed, more detailed work needed to be done on the relationship between that draft article and existing conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, working out methods for mutual assistance between States in the prosecution of offenders and prevention of money laundering, and on the relationship between the jurisdiction of national legal systems and the proposed international jurisdiction under the Code. The fact was that "narco-terrorism" could have a destabilizing effect on some countries, notably those in the Caribbean, which strongly advocated including it in the Code. Drug trafficking, whether by agents of a State, individuals or organizations, could adversely affect international relations. The Special Rapporteur was right to say that many small States were unable to prosecute perpetrators of such traffic when carried out on a large scale in their own territory. He was also right in proposing to add the words "on a large scale . . . or in a transboundary context" to the text.

18. Lastly, on the issue of penalties, the best course seemed to be, considering the gravity of the crimes encompassed by the Code, to stipulate a maximum penalty of life imprisonment, subject to the discretion of the international criminal court to specify such other terms as the particular circumstances of the case might require. In any case, that issue had been dealt with by the Commission in the context of article 47 of the draft statute as recently as 1994.[7] As he had repeatedly said, if it was to be an effective and complete legal instrument, the Code had to include the three elements of crimes, penalties and jurisdiction. So, whether the issue of penalties was dealt with in the context of the Code (list of crimes) or in the context of the international criminal court was not of great practical importance.

19. It was his fervent hope that, as far as the Commission was concerned, it was now about to finalize a major project, providing the international community with an instrument which Governments could in good conscience adopt and apply, thereby taking an important step forward towards international legal order during the United Nations Decade of International Law.[8]

[7] Ibid.

[8] Proclaimed by the General Assembly in its resolution 44/23.

20. Mr. ROSENSTOCK said that, as he recalled events, Mr. Jacovides' remark that General Assembly resolution 3314 (XXIX) on the definition of aggression had been part of an effort in connection with the draft Code was not quite correct. When the exercise of drafting a Code had been abandoned for lack of a definition of aggression, a committee had been established to decide when the matter should be reverted to—a committee whimsically referred to by some as the "propitiousness committee", because every time it met after a lapse of some years it had been determined that the time was not yet propitious to resume the attempt to draft a definition of aggression in the context of the Code. Then, in the late 1960s, the Soviet Union had made an annual proposal to the General Assembly—often agitation propaganda in some respects—that an attempt should be made to define aggression. That attempt constituted a separate exercise from the one launched in the context of the draft Code. When the exercise had been concluded with the drafting of a text entitled "Definition of Aggression" and without unduly bitter political fallout, no one involved seriously supposed that the text would be of use in criminal law or that it could be related to the draft Code in any immediate sense. Rather it had been thought to constitute some measure of political guidance for the Security Council, without prejudice to the Council's discretion under Article 39 of the Charter of the United Nations. Against that background, it was quite understandable that the definition of aggression produced by the General Assembly was not very helpful.

21. Mr. PAMBOU-TCHIVOUNDA said that the Commission was now in the second week of its consideration of the thirteenth report, a foretaste of which it had received during the presentation of the report by the Special Rapporteur at the 2379th meeting. The presentation had been sober and concise, like the report itself, though it lacked the density of the latter, something which had been commented on by a number of previous speakers. It was a concrete, practical report, and thus one intended to meet the expectations of the Commission itself and of the General Assembly. That important quality had been stressed, and he did not dispute it.

22. What, then, remained to be said with regard to the thirteenth report at the present juncture? It was certainly a prudent and skilful report, which reflected the lofty attachment to the idea that the Special Rapporteur was at the service of the Commission. For example, on the question whether the list of crimes should be expanded or pared down still further, the Special Rapporteur replied in the report that that would be for the Commission to decide. Similarly, with regard to the question whether a scale of penalties should be established, leaving it up to the courts concerned to determine the applicable penalty in each case, his reply was that, given the silence of Governments on the matter, it was now for the Commission to choose which course to follow. In both of those cases, the Commission would perhaps have been grateful to the Special Rapporteur if, without necessarily adopting too bold an approach, he had offered some clarification. However, the Special Rapporteur had instead donned the sumptuous cloak of some Governments' observations, otherwise referring only to a few existing legal instruments, hand-picked to support his cause. That method deprived the thirteenth report of both vision and breadth.

23. Why did the thirteenth report lack vision? In what respects did draft articles 15 to 25 lack breadth? To begin with, he noted that the report was based on what was intended to be an exclusively realistic approach: the Special Rapporteur confined himself to the existing state of affairs as reflected in the observations of Governments and in the existing legal instruments. The Special Rapporteur's reasoning could be summed up as being that, in order to be included in the Code, crimes against the peace and security of mankind must meet two prerequisites: their status must be the subject of consensus in the international community, and they must be regulated at the international level by means of conventions. It was a way of ensuring that the Code would be subject to the principle of legality, which was stricter in criminal law matters than in any other system. The principle of *nullum crimen sine lege, nulla poena sine lege* would thus be fully met. That reasoning had led to the drawing up of the short catalogue of crimes that embodied the Special Rapporteur's preference for the restrictive approach. He endorsed all the criticisms levelled at that approach by earlier speakers, for it was vitiated in three respects. First, it seemed to have a tactical dimension in its intention, albeit understandably, to finalize the draft Code at any cost, thereby meeting the expectations of the international community. Taken to extremes, however, the approach verged on opportunism, so limited were the sources of the guidelines provided by the international community which the Special Rapporteur had selected, in a process that seemed unjustifiable in view of the many reactions expressed by the delegations of a number of States in the Sixth Committee.

24. Secondly, the approach seemed to echo, or simply replicate, the approach adopted in the draft statute for an international criminal court, which included, as an annex, extracts from international legal instruments which, instead of defining the crimes in question, gave illustrative examples of one or another category of crimes. Even so, such a panorama had the attraction of inviting a synthesis with a view to providing a concrete but general definition of the concept of a crime against the peace and security of mankind. Perhaps, moreover, such a definition did exist, in which case it would have been worth including in the thirteenth report. Yet from indifference the Special Rapporteur had made no response. Furthermore, one could not but regret the fact that, when examining the thirteenth report, the Commission had not considered the idea of setting up a special mechanism responsible for harmonizing the provisions of the draft Code and of the draft statute with a view to achieving a more coherent and integrated structure.

25. Thirdly, the Special Rapporteur's attachment to *lex lata* had led him into a great error, which was manifested in two ways: to begin with, in an unequal treatment of the crimes under consideration, in the light of existing legality. Thus, aggression was singled out for special treatment, whereas apartheid was eliminated, and wilful damage to the environment was shelved indefinitely. That approach allowed substantive problems to remain unresolved—problems that were not necessarily questions of competence. Again, and more important, that

error was manifested in a weakening of the task of codification: *lex lata* generated by conventions had given rise to different systems, systems which, in the terminology used by ICJ, were self-sufficient. The drafting of a Code of Crimes against the Peace and Security of Mankind belonged to quite a different field than that of codification within the meaning of article 15 of the Commission's statute. In the present instance, if one restricted oneself to the definition of the task of codification contained in article 15 of the Commission's statute, one was bound to wonder what had become of the "extensive State practice, precedent and doctrine" allowing for "the more precise formulation and systematization of rules of international law". Indeed, those rules—rules that would set forth the relevant criteria whereby the judge could identify a crime or category of crimes for which they provided—must be defined. There was no conflict or incompatibility between the Code and the systems existing elsewhere. The task of drafting a Code could be accomplished without the Commission being doomed to adopt either excessive or insufficient realism.

26. As to the results achieved by the Special Rapporteur in his thirteenth report, the outcome of his low-profile approach was a list of crimes substantially shorter than that adopted by the Commission on first reading in 1991. Regrettably, it had to be said that that result was very middling—not only because the proposed list lacked the references and general definition one might have expected to find but also because it was deficient in content. It was in those two respects that, in his view, the result lacked breadth.

27. At what level in the structure of the Code should a general definition be situated? He would confess that he did not know. In any case, it was less a question of form than one of substance. A general definition of the category of crimes constituting crimes against the peace and security of mankind was not merely necessary, but indispensable, as a sort of common denominator on the basis of which the Code itself could specify those crimes. Previous speakers had pointed the way forward; and he endorsed the approach advocated by Mr. Mahiou (2380th meeting) in that regard. Furthermore the general definition should be immediately followed by an equally general proposal, setting forth the principle of the applicable penalty. There were two reasons: first, to bring the draft Code and the draft statute into line, since the latter specified a maximum penalty of imprisonment; secondly, because, as the Special Rapporteur pointed out in his report, it would be difficult, in the Code, to stipulate different penalties for offences which were uniformly considered to be extremely serious.

28. The principle of legality made the need for a general definition, together with a definition of each crime, indispensable. The Code would be a mandatory point of reference for the courts responsible for applying it, foremost among them the international criminal court. It was not the role of the judge, in criminal matters, to establish crimes, but rather to apply a penalty to the perpetrators, in a case falling within his jurisdiction. Common sense dictated that the Code must play a leading role in the proceedings of the international criminal court, either under the heading of applicable law and/or competence. Nor should there be any misconception about the question of characterization, an exercise that constituted a comparison between a previously defined category and a specific case. In other words, the definition fell within the area delimited by the drafting of the Code, and the characterization played its part when the Code was applied, thus making it the exclusive concern of the judge. It was for the Commission to propose to States a complete body of rules, without the need for recourse to a United Nations body, political or otherwise. To give such a body responsibility for defining a crime or for characterizing a given situation as equivalent to that crime for the purposes of trial proceedings in a judicial body would necessitate a revision of the Charter.

29. He appealed to the Commission to face up to its responsibilities, one of the foremost being the task of redrafting, in a more expanded form, the list of crimes against the peace and security of mankind now proposed by the Special Rapporteur. The restrictive approach could not be justified. Mankind was an evolving, dynamic concept. So, too, was time: for when it came to celebrating the fiftieth anniversary of the United Nations, it was more than likely some bold delegations would assert that the system was outmoded and that it should be reformed. That remained to be seen, but it was the law's ineluctable task to adapt both to mankind and to time, in other words, to anticipate the terms and limits of their development, thereby contributing to the process of inventing itself and transcending itself.

30. Utopia or reality? The question of the peace and security of mankind showed that Utopianism was now a thing of the past. The world was engaged in ploughing a new furrow, that of a new world order. Could that new world order be anchored in the prerogatives of sovereignty? He doubted it, for, to cite just one example, sovereignty had lost control of the means of mass destruction that posed a major threat to mankind. That new world order would have as its anchor, not sovereignty, but mankind.

31. Mr. THIAM (Special Rapporteur) said he wished to respond to Mr. Pambou-Tchivounda on two matters. On the question of a general definition of crimes against the peace and security of mankind, Mr. Pambou-Tchivounda had participated in the meetings of the Commission and of the Drafting Committee for a number of years and had never once proposed a general definition in either body. Instead of wasting time talking for the sake of talking, he should come up with some specific proposals, which the Commission could then discuss.

32. It had not previously been customary for members of the Commission to engage in personal attacks against one another. He was not an opportunist, nor did he base his reports on tactical considerations. On the contrary, he said what he thought, out of respect for the law. He urged all members to consider his report objectively, without becoming embroiled in pointless considerations.

33. Mr. PAMBOU-TCHIVOUNDA said his comments on the report had certainly not been intended to distress the Special Rapporteur, and if they had done so, he offered his most heartfelt apologies to the Special Rapporteur and to the Commission as a whole.

34. Mr. FOMBA said that the principle of *nullum crimen sine lege, nulla poena sine lege* raised a number of difficulties in terms of the interrelationship between international law and domestic law. The Commission had to decide whether to adopt a flexible or rigid interpretation of that principle.

35. A rigid interpretation of *nullum crimen sine lege, nulla poena sine lege* would have several consequences for the elaboration of the draft Code. The Commission would have to take up a list of offences, scrutinize the relevant legal texts and weed out those that were not as rigorous as domestic law demanded. The result would necessarily be a restrictive approach to drafting the Code. With a flexible interpretation of that principle, it would be acknowledged that the international community was different from national society, that international law differed from national legislation, and that it was not possible to go too far in drawing any analogies between them. Accordingly, the Code would include all crimes on which legal texts, whatever their inadequacies, were extant. The result would be an extensive approach. The Commission's task was to find the happy medium.

36. In applying the *nullum crimen sine lege, nulla poena sine lege* principle to the Code, the Commission should make up a list of all the crimes it proposed to include; send the list to all States; ask them which they considered to be the most serious crimes, both intrinsically and in their sociopolitical dimensions; identify those that were already covered by legal texts; evaluate the relevant legal texts in both their domestic and international ramifications, and especially in terms of the requirements of criminal law; and propose texts where none already existed and submit them to States.

37. As to the concept of crimes against the peace and security of mankind, a number of linguistic and substantive issues still had to be cleared up. For the practical application of the concept, the Commission must pinpoint the most objective and relevant criteria possible for identifying offences that had truly serious implications for the peace and security of mankind. It should then bring all those criteria together and draw up the list of crimes accordingly.

38. The Commission's mandate was viewed from a number of different standpoints in the relevant international instruments, by the Commission itself and by States. Undoubtedly, the Commission's role was to analyse legal texts, evaluate whether they could be accepted by States, identify their failings and propose changes. At some point it would have to determine whether its mandate involved the codification or the progressive development of international law, or both. It could not overstep its bounds, however: States were the ultimate arbiters of its efforts, and it must discern and reflect their intentions. Where a large majority of States desired changes of form or substance in the Commission's drafts, the Commission must be responsive to their wishes. It must not be afraid to innovate if such a course was in the general interest of States.

39. With regard to the draft Code, and specifically article 15, the only existing definition of aggression was found in General Assembly resolution 3314 (XXIX). That text was politically oriented, however, and it was questionable whether it could fulfil a juridical function. Mr. Mahiou had made a number of interesting remarks in that regard.

40. The Commission had three options on the matter of aggression. It could mention it without defining it—which was surely not the best course of action, as it would force any international court considering a case of aggression to create jurisprudence by specifying the acts that constituted the offence. Alternatively, the Commission could confine itself to a general definition, which would not be as bad a solution. Finally, the definition could be accompanied by a non-exhaustive listing, which would leave the door open for the law to evolve. That, too, would be preferable to having no definition at all.

41. The discussion on whether punishment should be meted out for acts of aggression or for wars of aggression was spurious, and he felt no inclination to enter into it. Wars were made up of acts, after all, and how could one differentiate between isolated and non-isolated acts or quantify the gravity of breaches of the laws of war?

42. On the matter of the role of the Security Council in the maintenance of international peace and security and in the application of penalties, the question was whether a flexible or rigid approach should be taken to the principle of separation of powers between the various institutions of the international community. He was for a rigid approach, because legal considerations should prevail over political ones.

43. He did not agree with Mr. Tomuschat (2380th meeting) that the new paragraphs 3 and 4, proposed for article 19 (Genocide), should be deleted. Incitement to commit genocide and attempts to commit genocide were realities in the world today. One could argue that they were implicitly covered by the phrase "ordered the commission of", in paragraph 1 of the new text proposed by the Special Rapporteur. According to that argument, an order that had been carried out would be equivalent to the commission of an act, while an order not carried out would constitute incitement or attempted genocide.

44. The example of Rwanda, and the situation developing in Burundi, pointed all too clearly to the need to go beyond the Convention on the Prevention and Punishment of the Crime of Genocide by making incitement and attempted genocide punishable offences. In the comments made by Governments mentioned in the thirteenth report, Australia had requested the Commission to reexamine the question of the applicable penalty and had warned that the penalty to be specified in article 19 might be inconsistent with the Convention. That problem had arisen in Rwanda, where the Government had favoured the death penalty in accordance with domestic criminal law, while article 23 of the statute of the International Tribunal for Rwanda[9] had only provided for imprisonment. There was a real danger that individuals who were to be tried by domestic criminal courts—the lesser criminals, in fact—would be subject to the death penalty, while the major culprits would incur only sentences of imprisonment because they were tried by an in-

[9] See 2379th meeting, footnote 11.

ternational tribunal. The same problem had apparently arisen in connection with the former Yugoslavia.

45. The United Kingdom had raised the issue of State responsibility for genocide. In Rwanda, where he had served as Rapporteur for the United Nations commission of inquiry, some officials had accused certain foreign countries of having participated in genocide. He had informed them that the only legal basis for bringing action against such countries was article IX of the Convention. No jurisprudence had yet been developed from that Convention, though a case involving the former Yugoslavia was pending before ICJ.

46. Mr. VILLAGRÁN KRAMER said that, as the United Nations had been established before the Nürnberg Tribunal had handed down sentences for the heinous crimes of the 1940s, the Charter of the United Nations carried no trace of that judgement. In the years since the United Nations had been established, the need for an international criminal court and for a Code of Crimes against the Peace and Security of Mankind had become glaringly apparent. There could be no better way of marking the Organization's fiftieth anniversary year than for the Commission to submit to the General Assembly a finished text of the draft Code.

47. While the Commission was working on that text, States were already making their own laws on the domestic impact of international crimes—an example of "creeping jurisdiction". Some States, including the United States and Canada, had extended their civil, though not criminal, jurisdiction to cases involving torture committed in other countries. A Paraguayan government official had been convicted of torture by a United States court and sentenced to pay compensation to the victims. Similarly, a United States court had convicted a former Minister of Defence of Guatemala of torture and other crimes against humanity and ordered him to pay compensation. Thus, national courts were taking initiatives to fill the gap where there was no international criminal court or penalties for international crimes. Accordingly, the Commission's task of completing the work on the draft Code took on special importance.

48. With regard to article 15, he thought that General Assembly resolution 3314 (XXIX) provided a conceptual framework which any deliberative organ, including the Assembly itself, would use in determining the nature of aggression. The Assembly had adopted the Definition of Aggression in order to provide a framework for the performance of the Security Council's functions. At the time of the adoption of the resolution several members of the Commission had found it unsatisfactory. However, it had been negotiated by the Assembly, with a major contribution from the big Powers, and represented the best achievable balance at that time of ideological confrontation. The consensus had certainly been very fragile, and the resolution had been presented to the General Assembly with a "take it or leave it" attitude. Everyone had noted that it was the small countries which could be prosecuted for aggression, while the big ones were protected by the power of the veto.

49. The Commission might recall that, in 1967, El Salvador had occupied Honduran territory and had been threatened with recourse to the Security Council for committing an act of aggression, which was indeed a powerful threat. Subsequently, General Assembly resolution 3314 (XXIX) had been incorporated by OAS as positive law in the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). Within that legal framework the definition had been accepted by a large number of American States. General Assembly resolution 3314 (XXIX) should not, therefore be dismissed as a hopeless solution. In his opinion, the Special Rapporteur had made a big sacrifice by reducing the scope of the concept of aggression and removing threats of aggression from the list of crimes.

50. As to article 17 (Intervention), he took the same pragmatic approach as did the Special Rapporteur. However, the possibility of stipulating punishment for intervention seemed like a horizon which moved further away or came in closer, in step with the Commission's approach to or retreat from the problem. The main question was what recourse should be provided in the event of intervention. In his opinion, intervention should be classified as a wrongful act rather than as a crime against the peace and security of mankind, and it would thus involve only the international responsibility of States. In practice, intervention often involved the use of mercenaries; if the Commission decided to delete intervention from the draft Code it might consider adjusting the balance of its treatment, in article 23 (Recruitment, use, financing and training of mercenaries), of the use of mercenaries. He would not accept the removal of intervention from the list with any enthusiasm, but the trend in the Commission seemed to be headed in that direction.

51. As to article 18 (Colonial domination and other forms of alien domination), the world was certainly changing and the Security Council was tending to use its powers under Chapters VI and VII of the Charter more frequently. It was not clear how the problem of foreign domination would be handled in the twenty-first century, but there would still certainly be peoples that were economically, politically and militarily expansionist. If intervention was not included in the list of crimes, what deterrent would be offered to foreign domination? He would ask the Special Rapporteur to seek an alternative to the deletion of article 18. If foreign domination was not classified as a crime against the peace and security of mankind, it should at least be defined more clearly as a wrongful act.

52. The Special Rapporteur had made a valuable effort with respect to article 19. Mass murder could be regarded as genocide or as systematic or mass violations of human rights. In the case of the destruction of a national, ethnic, racial or religious group the crime was genocide, but in the absence of a national, ethnic, racial or religious element the crime became systematic or mass violations of human rights. The problem of penalties seemed impossible to solve unless the national power of sanction was terminated, leaving only international sanction. As Mr. Fomba had pointed out, persons tried for genocide in a national court could be sentenced to death, while an international court would impose only a prison sentence. The Drafting Committee should make a big effort to solve that problem.

53. With regard to article 20 (Apartheid), he would point out that the International Convention on the Suppression and Punishment of the Crime of Apartheid had a specific territorial scope and that the term "apartheid" did not signify any specific crime in the case of, say, Latin America. What the Commission should be concerned about was economic, political and cultural discrimination and it should try to produce an article characterizing such discrimination as a crime.

54. It was understandable why the Special Rapporteur had proposed changing the title of article 21 to "Crimes against humanity", but the proposal prompted an objection to the form, although not to the substance, of the article. The draft was to be called "Code of Crimes against the Peace and Security of Mankind", a category which contained several elements rather than just one, namely crimes against humanity. The question arose whether the article should cover only one modality of crimes against humanity or whether "systematic or mass violations of human rights", the original title of the article, could provide another modality.

55. The Special Rapporteur had put forward convincing arguments on article 22 (Exceptionally serious war crimes), and was right to try to bring the article into line with the statute of the International Tribunal for the Former Yugoslavia.[10] There was no need for the Commission to engage in any wider exercise; it should concentrate on the elements contained in the present text.

56. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, referred to in the commentary to article 23,[11] had not received very many ratifications. At the time of the adoption of the article, the use of mercenaries, for example in Nicaragua and parts of Africa, had been a topical problem, but interest in the matter had since declined. However, it must be remembered that huge numbers of mercenaries from Europe had volunteered to fight in Africa not just for money but also for ideological reasons, as a means of preserving a model of colonialism. That ideological aspect of mercenarism led him to think that article 23 should be retained.

57. In regard to article 24, he had been struck during the consideration of the subject in the Sixth Committee, at the forty-ninth session of the General Assembly in 1994, by the long list of instruments punishing acts of terrorism at the national level and by the serious approach taken by many delegations to the issue of terrorism, particularly delegations from countries where it was a big problem. No State was free from the risk of the commission of acts of international terrorism in its territory, and it was always difficult to prosecute terrorists. It had been suggested in the past that an international criminal court could provide a solution to the thorny problem of acts of terrorism involving countries experiencing serious tensions in their relations, for example the United States and the United Kingdom in their relations with the Libyan Arab Jamahiriya. An international criminal court might provide a political solution to the problem of jurisdiction, but what law would it apply if the Commission provided a detailed definition of the crime of terrorism? The Commission should therefore not only work with the format proposed by the Special Rapporteur but also review existing instruments on terrorism and decide whether to name them in the proposed text in order to classify the acts covered by such instruments as serious international crimes.

58. The question of the illicit traffic in narcotic drugs (art. 25) should certainly be included in the draft Code, unlike the question of wilful and severe damage to the environment (art. 26), which should be excluded. It must be remembered that small countries could not bring international drug traffickers to justice; the international cartels could destroy small States and have a disastrous impact on the big States. The Commission's aim, therefore, should not be just to establish an international criminal court to try such criminals but also to strengthen the *opinio juris* that the illicit traffic in narcotic drugs should be classified as an international crime. It should try in fact to "put more muscle" into the content of article 25.

59. Mr. ROSENSTOCK said that, with regard to the definition of aggression contained in the thirteenth report, he was yet to be convinced that the conclusion of a previous Special Rapporteur, Mr. Spiropoulos, was wrong.[12] The present definition presented a number of problems. First, it sought to encompass all violations of Article 2, paragraph 4, of the Charter of the United Nations and thus went well beyond where the international community ought or wanted to go in criminalizing individual conduct. The traditional term used in that context was "war of aggression", which showed that considerably more than a violation of Article 2, paragraph 4, was contemplated. The Commission should take due account of the weight of the concept of a war of aggression, at least in terms of indicating the magnitude of the conduct in question. Perhaps it should look again at Mr. Pellet's suggestion (2379th meeting) that there was a prior role for the Security Council in determining the existence of aggression, with the international criminal court then determining whether a particular individual had committed aggression.

60. Another approach would be to recognize that aggression was the least suitable crime for national courts to handle and should instead be dealt with only by an international court, whose statutes would almost certainly contain a compromise formulation along the lines of article 23 of the draft statute for an international criminal court.[13] That approach might help the Committee with the problem of what acts should be classified as crimes.

61. There would in any event be several drafting problems with the present text of article 15. "Leader or organizer" seemed to point to Adolf Hitler and perhaps no one else! That was wrong because even in a one-man dictatorship a number of people were involved in taking decisions. Furthermore, if the Commission was trying to draft criminal law applicable to individuals, it needed to clarify what "sovereignty" meant in paragraph 2, apart

[10] Ibid., footnote 5.

[11] Initially adopted as article 18. See *Yearbook... 1990*, vol. II (Part Two), p. 29.

[12] See 2379th meeting, footnote 17.

[13] Ibid., footnote 10.

from the territorial integrity or political independence of a State. However, the Commission was still far from securing a satisfactory definition in terms of criminal responsibility. It would help things if the Commission could decide whether a prior determination by the Security Council was a necessary precursor to a legal finding of guilt and if it decided that the crime of aggression should be tried only by an international criminal court.

The meeting rose at 12.55 p.m.

2383rd MEETING

Thursday, 11 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, 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. 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. Mr. DE SARAM, commenting in general on the draft Code of Crimes against the Peace and Security of Mankind, said that the question of the crimes to be regarded as crimes against the peace and security of mankind had always been enthusiastically debated, whether in the Commission, the Sixth Committee of the General Assembly or other deliberative bodies, and it was always likely to be a matter of some controversy. That was not surprising, since the words "against", "peace", "security", and "mankind", which appeared in the title of the draft Code, were difficult to define and open to subjective interpretation. The draft Code, unlike the other topics on the Commission's agenda, touched on some of the most sensitive aspects of relations between States, some of the most fundamental principles and some of the most important provisions of the Charter of the United Nations. It also contained non-legal or quasi-political components that fell outside the field of competence of the Commission's members.

2. Yet the time had come for the Commission, which had so far been divided as to a "minimalist" or a "maximalist" approach, to take a firm stand on the scope *ratione materiae* of the draft Code if it wanted to submit the result of its work to the General Assembly within a short time. Obviously, the decisions to be taken by the Commission in that respect should be arrived at by way of a consensus and the Commission's overall objective should be to agree a consensus text. It was apparently with that in mind that the Special Rapporteur had endeavoured to put forward proposals that could command the support of all members of the Commission, notwithstanding their individual concerns, so that the General Assembly could quickly be provided with a text that it could adopt by a large majority. In his view, those proposals provided an extremely constructive basis for discussion and should enable the Commission's work on the draft Code to proceed. It was important, however, for the Commission to make it quite clear in its report that its objective had been to agree a text that was the subject of a clear consensus. That search for a consensus showed that the Commission was contributing to the progressive development of the law. Obviously, however, a code that was the result of decisions by consensus could not be regarded as comprehensive and definitive. It should therefore be made clear, perhaps in a preamble to the Code, that the scope of the Code could be enlarged in the future by way of amendments as and when further possibilities for consensus emerged. Accordingly, it would be necessary to record in the Commission's report ideas and views that had been expressed but not adopted in order not to stand in the way of a consensus.

3. The most difficult question concerned the general nature and purpose of the Code, on which opinions were apparently sharply divided. In the view of some members of the Commission, the purpose of the Code was to declare that some acts were so fundamentally outrageous that they must be characterized as crimes and appear as such in a code of crimes against the peace and security of mankind, the principal purpose of which was to "declare" that they must be the object of worldwide condemnation. Other members considered that the purpose of the Code was to lay down precise rules for application by national or other criminal courts when they had to try particular individuals being prosecuted for crimes. A code that performed both functions, namely, that would at the same time be a general declaration, albeit in the form of a convention, and contain precise provisions for application in criminal proceedings, might be confusing—and that would diminish its effectiveness. Consequently, if the Code was to be a meaningful instrument, its provisions must be applicable in the prosecution of individuals. It was therefore necessary to formulate the provisions very precisely and, in so far as possible, on the basis of existing general international law, that is to say mainly treaty law and such other rules as "were evidence of a general practice accepted as

[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).