

Document:-  
**A/CN.4/SR.2386**

**Summary record of the 2386th 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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and that, in the interim period, human life continued. There could therefore be problems concerning nationality which, although not resulting directly from the change of sovereignty as such, nevertheless deserved the Commission's attention.

46. Turning to continuity of nationality, he said he wished to make three points. First, the rule of the continuity of nationality was a part of the regime of diplomatic protection. Secondly, neither the practice nor the doctrine gave a clear answer to the question of the relevance of that rule in the event of involuntary changes in nationality brought about by State succession. There were good reasons to believe that, in the case of State succession, that rule could be modified. Lastly, since the problem of continuity of nationality was closely associated with the regime of diplomatic protection, the question arose whether it should be brought within the scope of the current study.

47. Mr. IDRIS expressed his congratulations to the Special Rapporteur on his extremely detailed and thought-provoking first report, as well as on his excellent introduction. Before the Commission entered into the debate, he would like two things to be clarified in connection with General Assembly resolution 49/51. First, the resolution included the words "on the understanding that the final form to be given to the results of the work will be decided after a preliminary study is presented to the General Assembly". It was therefore clear that the Commission's work would involve a preliminary study. The Special Rapporteur, however, had referred to a report as opposed to a study. He would like to know how the Special Rapporteur envisaged such a report.

48. Secondly, in its resolution 49/51, the General Assembly requested the Secretary-General to invite Governments to submit materials including national legislation and decisions of national tribunals. Since a preliminary study, and not a preliminary report, was involved, it would be useful to know how much material had been compiled.

49. Mr. MIKULKA (Special Rapporteur) said he had deliberately said very little about the final form to be given to the results of the Commission's work. He had a number of ideas on that subject, of course, but, before outlining them, he wished to give members of the Commission an opportunity to discuss the topic itself. He saw no contradiction between the preparation of a preliminary study and the drafting of a report. Any preliminary study carried out by the Commission could in any case be transmitted to the General Assembly only as part of its report. The Commission could apply the solution used for the draft statute for an international criminal court: the report of the Working Group on a draft statute for an international criminal court had been submitted to the Commission and then annexed to the Commission's report to the General Assembly.<sup>25</sup> In order to comply with the wishes of the General Assembly, the Commission could transmit a summary outlining possible approaches and various positions and options in order to

enable the Sixth Committee to advise the Commission about the preferences of States.

50. The final form to be given to the results of the work could not be decided on before the preliminary study was submitted to the General Assembly, even though the Commission could express its preferences in that regard.

51. Turning to the second point made, he noted that relatively few States had submitted documentation on their national legislation, but that those States included several that had recently undergone territorial transformation: in other words, successor States. The secretariat had also made a number of documents available to him. But a great many cases of State succession were covered neither by recent documents nor by older ones and nothing could be done but to await the replies of Governments. If the Commission decided to set up a small working group on the topic, however, its members would have access, with the secretariat's assistance, to all the documents that had been available to him.

52. Mr. LUKASHUK said that, after having carefully studied the first report of the Special Rapporteur, he found that it clearly outlined all aspects of the topic. The Special Rapporteur faced a particularly arduous task, since he had to establish a link between two important yet distinct problems: State succession and nationality not governed by international law. In that connection, he wished to make two comments.

53. In the first place, nationality was the legal link between an individual and a State, but that did not really make matters very clear. Moreover, the link had undergone significant changes in connection with the protection of human rights. At present, nationality might be regarded as the attribute of a member of the organization of a State.

54. Secondly, the right of the individual to nationality was recognized at both the international and the national levels: hence, arbitrary treatment or absolute sovereignty of the State was excluded. In that connection as well, State succession must be analysed with due regard for the relationship between nationality and human rights.

*The meeting rose at 12.55 p.m.*

## 2386th MEETING

*Thursday, 18 May 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Ro-

<sup>25</sup> *Yearbook* . . . 1993, vol. II (Part Two), document A/48/10, annex.

senstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

that, by thinking things through together, the members could reach agreement.

**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. THIAM (Special Rapporteur), summing up the discussion of his thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466), expressed his thanks to the members of the Commission for the many cogent arguments they had advanced. His task in summing up would be a difficult one, for he would have to reconcile differing opinions expressed on certain issues and respond to certain criticisms levelled at his report.

2. The thirteenth report had been faulted for not taking into account the views of those Governments—mainly of developing countries—that had chosen not to react to the draft articles adopted on first reading and submitted for their comments. He himself had expressed regret at the lack of response from those Governments, but given that lack of response, what should he have done? He could hardly have reflected non-existent comments in his report.

3. It had been said that the report had too radically reduced the number of crimes that were to figure in the Code and that it relied too heavily on the contents of existing treaties and conventions. Yet from the very start of the drafting exercise, members of the Commission had exhorted him to use such instruments as the basis for his work. He had questioned the validity of that approach, in the belief that progressive development of the law meant going beyond existing legal instruments—looking into General Assembly and Security Council resolutions, for example. In fact, he was deeply convinced that most of the crimes in the draft Code constituted violations of *jus cogens*. It was therefore incorrect to assert that he had relied unduly on existing treaties.

4. Again, his approach had been faulted for being excessively prudent. Members of the Commission apparently wanted him to push forward vigorously in the development of international law, even where there was no consensus within the Commission itself. Yet that was not the role of a Special Rapporteur. His job was not to force certain solutions on the Commission, but faithfully to reflect the pros and cons of a particular hypothesis so

5. As to the draft articles themselves, a consensus had clearly developed in favour of including at least four of the crimes—aggression, genocide, war crimes and crimes against humanity.

6. The definition of aggression needed to be further refined, but the role of the Security Council had been over-emphasized in that connection. The Council had no authority over individuals; it could only determine whether an act of aggression had been committed. The demarcation line between the Council's competence and that of any court that applied the Code would emerge gradually, as specific cases were considered, but there was no way the Council could take over the functions of a court. That was why he had proposed a very general definition of aggression, one that deliberately made no mention of the Security Council or of General Assembly resolution 3314 (XXIX). If the Commission wished to go beyond that general definition, it should by all means do so.

7. None of the members of the Commission had opposed the inclusion of the crime of genocide in the draft Code. Furthermore, war crimes had been sufficiently dealt with in conventions or internal laws, so that there was no debate as to the wisdom of incorporating an article on them.

8. For crimes against humanity, he had originally proposed replacing that expression by "systematic or mass violations of human rights". It had been argued, however, and his own further research into the literature had shown, that a violation of human rights need not be "massive" in order to be a crime against humanity. A single atrocity committed against a sole individual could be so shocking as to constitute an offence against mankind as a whole. The need for a crime to be "massive", therefore, was questionable, and that was why he had reverted to the original wording for the title. It was ultimately for the Commission to decide which title should be kept.

9. There were a number of crimes whose inclusion in the draft Code had not generated widespread enthusiasm. Although many Latin American writers thought that intervention must be characterized as a crime against the peace and security of mankind, that view was not widely shared. Intervention was not pernicious in all instances. It could be benign—even salutary. For example, when a country attempted, by judicious means, to dissuade another from a politically or militarily dangerous venture, that was intervention—but it was not criminal. Armed intervention, of course, must not go unpunished, but it could be qualified as aggression, which was already covered in the draft Code. None of the Drafting Committee's efforts to produce a suitable definition of the threat of aggression had ever met with the approval of Governments, and he felt it was time to abandon the notion. Recruitment of mercenaries had been a burning issue some years back, but with the perspective afforded by the passage of time it could be seen that all the elements of the crime could be placed under the crime of aggression. As no strong arguments had been advanced in their favour, there would seem to be ample grounds for deleting from

<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).

the draft Code the articles on intervention, threat of aggression and recruitment of mercenaries.

10. A number of crimes remained controversial, and they were the ones the Commission should focus on at the present stage. Apartheid had been a source of outrage in the past, especially on the African continent, but the very term, synonymous with the practice of a particular African country, had now been consigned to the annals of history. If the phenomenon should ever re-emerge, a new term would have to be devised. One Government had suggested "institutionalization of racial discrimination". The Commission should give serious consideration to that phrase, and an article defining it, in the draft Code.

11. Colonial domination could also be said to be a thing of the past. The recent Iraqi invasion of Kuwait notwithstanding, in today's world it was highly unlikely that one country would dare to use its superior force to take over another. As the crime dated back principally to the sixteenth and seventeenth centuries, its perpetrators could never be brought to justice now. Colonial domination was defined in article 19 of part one of the draft on State responsibility as an international crime.<sup>3</sup> Was that not enough? If not, the Commission should set about drafting a better definition of the crime than he had been able to achieve.

12. He had proposed a general definition of international terrorism that had been criticized by a number of Governments on the grounds that the crime should not be subject to prosecution in general terms, but rather in specific cases and on the basis of conventions covering specific manifestations of terrorism. If the crime was to be kept in the draft Code, therefore, a more acceptable definition would have to be drafted. It appeared that there was very little support for including illicit traffic in narcotic drugs. Many writers viewed it as an international crime, but not as a crime against the peace and security of mankind. The Commission might therefore wish to exclude it.

13. Accordingly, on those four crimes—racial discrimination, colonial domination, international terrorism and illicit traffic in narcotic drugs—a further round of consultations should be instituted, with a view to determining which of them should be kept in the draft Code.

14. The CHAIRMAN thanked the Special Rapporteur for his summing up and suggested that, in order to facilitate the consultations and ensure a truly frank exchange of views, the Commission should hold an informal meeting.

*The meeting rose at 10.50 a.m.*

<sup>3</sup> See 2384th meeting, footnote 10.

## 2387th MEETING

*Friday, 19 May 1995, at 10.30 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, 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 (*concluded*)

1. The CHAIRMAN noted that the articles covered in the Special Rapporteur's thirteenth report (A/CN.4/466), namely, articles 15 to 25, were not currently before the Drafting Committee and that the Commission had to take a formal decision on them. Taking into consideration the consultations he had held, he suggested that the Commission should adopt the following decision:

"The Commission refers to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary, on the understanding that, in formulating those articles, the Drafting Committee will bear in mind and at its discretion deal with all or part of the elements of the draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism)."

2. As to any other articles, it was his intention, subject to the Commission's agreement, to conduct informal consultations to determine the best way to deal with them.

<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).