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2152nd MEETING

Friday, 4 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Filling of a casual vacancy in the Commission (article 11 of the statute)

[Agenda item 2]

1. The CHAIRMAN said that, regrettably, the Commission would in the near future have to fill the vacancy created by the death of Mr. Reuter. It was suggested that, in line with established practice, the Commission should request the Secretariat to issue, on 25 May 1990, a document containing a list of candidates and that the election should be held on 30 May 1990.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

2. The CHAIRMAN said that the Enlarged Bureau proposed that the Planning Group should be composed as follows: Mr. Barboza (Chairman), Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Roucounas, Mr. Thiam, Mr. Tomuschat and Mr. Yankov. The Group was not restricted and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/419 and Add.1,[2] A/CN.4/429 and Add.1-4,[3] A/CN.4/430 and Add.1,[4] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y[5] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*continued*)

3. Mr. THIAM (Special Rapporteur) said that he wished to clarify two points in order to speed up the Commission's work. First, the Commission should not dwell too long on methodological problems, although they were indeed important. He did not in fact attach too much importance to the method proposed in his eighth report (A/CN.4/430 and Add.1). Most penal codes contained a general part, but that part did not necessarily deal with complicity. Some codes reserved a specific place for complicity in the part concerning offences. The French Penal Code, to take one of many examples, did so in article 59. In the Commission's 1954 draft code, complicity was dealt with as an offence, in article 2, paragraph (13), and not among the general principles. Furthermore, the Nürnberg Principles[6] clearly characterized complicity as an international crime. There was, of course, a principle that an accomplice was to be treated as a principal perpetrator, but penal codes differed on that point too. The main thing, therefore, was that the Commission should deal with the issue of complicity; its place in the draft code was less important.

4. Secondly, his report perhaps went into too much detail about the very complex concept of complicity, which covered perpetrators playing various roles that were difficult to separate into such categories as direct or indirect perpetrator, accomplice or originator. Moreover, the greater the number of actors, the harder it became to define the concept, which had also evolved from the traditional situation involving an accomplice present during the commission of a crime to one where he took no direct part in it. A category had emerged—one not covered by the traditional concept—of leaders, planners or organizers of a crime who took no direct part in its execution.

5. The Nürnberg Tribunal had treated such persons, often senior civil or military officials and sometimes even judges, as accomplices. The question now was to decide how such accomplices should be prosecuted. Mr. Tomuschat (2150th meeting) had argued that it was impossible to prosecute a whole people, but in the case of the Third Reich the Nürnberg Tribunal had tried to bring as many accomplices as possible to justice. The Commission's definition must therefore list the various categories of accomplice, something that could best be done in the commentary rather than in the body of the text.

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 2150th meeting, para. 14.

[6] See 2151st meeting, footnote 11.

6. He agreed that the draft articles on international illicit traffic in narcotic drugs were not entirely satisfactory. He had submitted two separate articles on such illicit traffic as a crime against peace and as a crime against humanity because the Commission had long made that distinction and had, indeed, already elaborated draft provisions listing separately all crimes against peace and all crimes against humanity. Perhaps the matter could best be left to the Drafting Committee.

7. Mr. ROUCOUNAS said that the Special Rapporteur's clarification was very helpful, but the concepts of conspiracy, complicity and attempt still required further analysis. The Commission's limited goal when it had begun its work on the draft code had grown over the years to encompass a huge range of criminal acts, including terrorism and crimes against the environment. In fact, both the original aim and the substance of the topic had shifted with the evolution in the views of the international community. The Commission must keep that point in mind in its definition of concepts.

8. The Special Rapporteur had made extensive reference to national legislation in his eighth report (A/CN.4/430 and Add.1), but such legislation was decisive only if it presented a degree of uniformity and harmony. The Special Rapporteur's very detailed work showed in fact that the concepts were not very clear even in national codes.

9. The Charter of the Nürnberg Tribunal[7] referred to complicity ("conspiracy" in the English version and *complot* in the French) in the last paragraph of article 6, the aim being to establish the responsibility of persons participating in the formulation or execution of a common plan, and commentators had characterized that as an exclusion *a contrario* of complicity from the category of crimes by the individual. He agreed, incidentally, with the Special Rapporteur that in such matters as aggression, for example, an individual must necessarily participate in the crime together with a number of other persons. By convicting persons instigating the commission of a crime without being materially involved in its execution, the Nürnberg Tribunal had seemed to be following the general principle of criminal law concerning criminal participation. It might therefore be unwise to give too much weight to the Nürnberg precedents.

10. As the Special Rapporteur had just pointed out, the Nürnberg Principles formulated by the Commission in 1950 clearly established complicity as a crime in international law. But the content of those Principles and of article 2, paragraph (13), of the 1954 draft code had prompted some criticism of the Commission for not producing a more detailed definition of what the concept meant. Unless the provision was clear and widely understood, the Commission would be leaving it to judges to proceed in accordance with their interpretation of their own domestic legislation rather than with the code.

11. There was no doubt that, irrespective of whether complicity was assimilated to a crime, neither the Commission nor indeed the Nürnberg Tribunal had vested it with collective responsibility. Responsibility for an act committed by several persons, for example an act of terrorism, genocide or drug trafficking, remained individual responsibility. The Nürnberg Tribunal, even in matters of conspiracy, had reserved the right of prior assessment for itself and had not allowed other courts in various countries to rule *ratione loci* after the Second World War.

12. It would be recalled that the term "complicity" had been introduced in part 1 of the draft articles on State responsibility in 1978,[8] but it had quite rightly been removed in article 27 as provisionally adopted by the Commission.[9]

13. As to whether complicity or conspiracy should be dealt with separately or in the general part of the draft code, it should not be forgotten that other international instruments dealt separately with the international crimes covered by the draft code, for example genocide, drug trafficking and the taking of hostages. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide discriminated between degrees of participation and also characterized attempt as a crime. As far back as 1936, the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs had required States to make attempt and complicity separate offences under national law. More recently, attempt and complicity had been covered by the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 1 (*c*) (iii) and (iv)), although he noted that the word "conspiracy" appeared in the English version, whereas the word *complicité* was used in the French, which indicated that the two concepts were not altogether clear. The same Convention contained a reservation in the introductory clause to paragraph 1 (*c*) of article 3, reading "Subject to its constitutional principles...", which divested subsequent clauses of their force. Reference to complicity and attempt, couched in similar language, was also to be found in the 1979 International Convention against the Taking of Hostages (art. 1, para. 2) and in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 3, para. 2).

14. In view of all those conventions, which would continue to exist concurrently with the code, it might be appropriate to deal with complicity in the general part of the code. At the same time, in the interests of harmony with existing international law, a separate approach should be adopted to each of the crimes to be included in the code. He could not agree that there were principles of international law that provided a solution to problems relating to the coexistence of norms of international law, and the maxim *lex specialis* did not, in his opinion, provide an answer. The Commission's main concern should be the certainty of the law, and it was to that aspect of the matter that it should pay special attention.

[7] See 2150th meeting, footnote 9.

[8] See *Yearbook ... 1978*, vol. II (Part One), p. 60, document A/CN.4/307 and Add.1 and 2, para. 77 (draft article 25).

[9] *Yearbook ... 1978*, vol. II (Part Two), p. 99.

15. As to the draft articles themselves, draft article 15, paragraph 2, was not altogether necessary. Article 3 of the 1988 United Nations Convention was extremely detailed, and the Commission could draw on its terms for the elements of the serious crimes that should be treated as crimes against humanity.

16. Mr. BENNOUNA said that the Special Rapporteur's eighth report (A/CN.4/430 and Add.1) would considerably enrich the work already done on the draft code.

17. Commenting first on part I of the report, he said that, if the questions of methodology related solely to the place in the code of the concepts of complicity, conspiracy and attempt, he could agree to the matter being dealt with by the Drafting Committee. His difficulty regarding methodology was somewhat different, however, for he reacted not as an expert in national or criminal law but as an international lawyer. Accordingly, he had asked himself whether certain traditional categories of criminal law—complicity, conspiracy and attempt—were relevant to a code of crimes against the peace and security of mankind, which was concerned not with just any crime, but with crimes that were prejudicial to universally recognized values and were so grave that international co-operation was essential in order to punish them. He wondered whether treating complicity, conspiracy and attempt as separate crimes would not have the effect of considerably enlarging the scope of the definitions of specific crimes, or, at the very least, of giving extremely wide-ranging discretion to the courts—a discretion which was incompatible with the existing state of international society. States, after all, wanted to know what they were committing themselves to. If certain concepts of national criminal law—which was not even uniform—were simply to be transposed to international law, would that not, rather than clarify the issue, increase the confusion?

18. An effort had been made, in defining each of the crimes, to cover all the constituent elements of those crimes so as to avoid the broad interpretations that could prove prejudicial to the credibility of the code. If the concepts of complicity, conspiracy and attempt were tested by reference to the existing definitions, on a crime-by-crime basis, the unsuitability of those concepts—and the absurd consequences that could sometimes ensue—became apparent.

19. In his report, the Special Rapporteur pointed out with respect to complicity and conspiracy that "the content of these concepts changes as soon as they are transposed to international law, because of the mass nature of the crimes involved and the plurality of acts and actors" (*ibid.*, para. 26). Thus those concepts would, as it were, undergo a metamorphosis upon contact with international law, at any rate so far as crimes against the peace and security of mankind were concerned. One might therefore ask what benefit internal law could introduce in that particular field. The Special Rapporteur further noted that "complicity and conspiracy . . . are very similar and sometimes overlap" (*ibid.*, para. 62) and expressed concern that "The theory of attempt can be applied only to a limited extent in the area of the crimes under consideration" (*ibid.*, para. 66), after which he posed a number of questions concerning, for instance, attempted aggression, attempted *apartheid* and attempted genocide.

20. Since those concepts proved so problematic, why should they be included in the code at all? Was it simply because they appeared in certain national laws, or in the Nürnberg Principles[10] and the 1954 draft code? Municipal systems of law, however, were far from uniform, and the Commission was involved in something infinitely more advanced than the Nürnberg Principles and the 1954 draft code. It therefore seemed to him that the Commission should first take account of the specific nature of each crime and of the legal system that would apply—in the event, international law—and include or exclude the concepts of complicity, conspiracy and attempt accordingly.

21. The link between the crime and attribution to an individual had not yet been established, except in paragraph 1 of article 12 (Aggression), provisionally adopted by the Commission on first reading,[11] and then only on a provisional basis. In that connection, it was true to say that the time had come to adopt a general formula of the type appearing in paragraph 1 of article 12, defining the author of the crime before going on to related acts or secondary participants. It would be premature, in his view, for the Commission to take a decision on draft articles 15, 16 and 17 before it had a more definite idea of the general structure of the draft code and, above all, of the connection between crimes of the State and attribution to an individual.

22. Article 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, for example, did establish the necessary link between the recruitment of mercenaries and the offences under the Convention, and article 4 provided that complicity was an offence. Given the complexity of the crimes envisaged in the draft code, he favoured the establishment of such a link in each instance, and considered that the Commission should not rely on general concepts, since that would vest judges with excessive power. The Commission should proceed on a case-by-case basis, for, in the final analysis, complicity could be so broadly interpreted as to assimilate the accomplice and the principal offender in the matter of penalties. Would it be right and proper to enlarge the scope of a crime against the peace and security of mankind to that extent?

23. Turning to part II of the report, the Commission had been asked to make international drug trafficking a crime against the peace and security of mankind, something which involved a move beyond the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and hence a qualitative change that must necessarily give rise to a qualitative change in the definition of the crime. A crime against the peace and security of mankind could not be treated as an ordinary crime: indeed, were it otherwise, all work on the code might as well cease. On the contrary, the very special and grave character of the code must be retained and the conditions

[10] See 2151st meeting, footnote 11.

[11] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

for compliance with it must be strengthened. Consequently, the definition laid down in draft article X seemed to be too wide to achieve the objective, which was to punish not the small drug dealer but the major criminals who operated at the international level and whose budgets were sometimes larger than those of States. That was the type of crime the code should seek to cover, and the Commission should devise appropriate legal criteria to that end. In a recent television interview, Colombian judges had said that they were unable to try such criminals in their own country as the criminals were too powerful and the national courts were incapable of bringing them to justice. That was what had prompted the idea of punishing them at the international level. To bring such persons before an international court would be a major innovation in international law, and so the definition must be far more specific. The General Assembly expected something from the Commission over and above the 1988 Convention, and the Commission should endeavour to live up to that expectation.

24. Mr. BARSEGOV said that the issue of complicity, conspiracy and attempt was of fundamental importance to the effectiveness of the future code, to the cause of international justice and, by that token, to the strengthening of international legal order. The difficulty of finding a solution lay, on the one hand, in inherent differences between crimes, as pointed out by Mr. Tomuschat (2150th meeting), and, on the other hand, in the widely differing positions adopted by various national legal systems, as well as in the limited amount of international experience available.

25. As to Mr. Tomuschat's point that different crimes called for different solutions to the problem of complicity and conspiracy, the need to take account of the specific nature of the crime in deciding on the issue of responsibility in each particular case was not in doubt. One possible approach might consist in determining for each particular crime, or even for each of its constituent elements, whether complicity and conspiracy were possible and what forms they might take. Such an approach would make for the greatest clarity, but it would add to the time required to elaborate the draft code, and he wondered whether it was strictly necessary.

26. In certain cases, such as aggression, genocide and *apartheid*, the principal act could not be committed by one single individual. While some crimes could be committed individually, virtually all the crimes covered by the draft code involved some form of complicity, and some were inconceivable without it.

27. If it was found that certain specific crimes did not, in principle, allow of complicity or conspiracy, and if some members of the Commission objected on those grounds to complicity or conspiracy being recognized as punishable in the code, one approach could be to elaborate a general rule and indicate exceptions to it; or, alternatively, an enumeration might be provided of the crimes in which complicity or conspiracy were possible. Personally, however, he would not favour such a solution.

28. He agreed with the Special Rapporteur's general view that, in the case of crimes against the peace and security of mankind—or at any rate the majority of such crimes—the issue of complicity could assume decisive importance. He noted that the Special Rapporteur had expressed that view in his eighth report (A/CN.4/430 and Add.1, para. 55) and had even mentioned the conflict between two forms of responsibility—collective and individual. It was an issue whose importance went beyond the scope of the draft code. In his own view, criminal responsibility was always personal in nature, and only individuals who had committed a specific crime or had been an accomplice to that crime could be held answerable under criminal law; in other words, criminal responsibility could not be applied according to the principle of collective responsibility. As Mr. Tomuschat had rightly said, an entire nation, as such, could not be brought to court for criminal responsibility, yet he felt bound to refer to those instances in the history of mankind, as well as in contemporary times, in which entire nations, with the exception of only a few of their citizens, had participated in the commission of crimes such as genocide. Collective responsibility for crimes against the peace and security of nations, such as genocide, aggression and *apartheid*, fell under the international responsibility of States, whether legal (on the basis of international law), political, material or other. The responsibility of a State for an act of genocide might take the form of that State's being deprived of the exercise of power over the people against which the crime had been directed, as well as of the corresponding territorial rights. For example, the responsibility of one State for aggression committed during the Second World War had been reflected in the establishment of new frontiers intended to deprive that State of the opportunity of taking an aggressive course, as it had already done twice within a generation.

29. At the same time, in determining the possible criminal responsibility of individuals, it would be a mistake to ignore such characteristics of punishable international crimes as the mass and systematic nature of acts committed by the persons perpetrating those crimes. Consequently, in cases such as genocide or *apartheid*, where the crime was committed by a large number of persons and where a correct legal definition of the crime had to be based on the totality of the acts committed by all those persons and not on isolated individual crimes, responsibility had to be determined on the basis of the participation of all the perpetrators of the crime in collective acts. Each of the persons brought to account was responsible for his own acts, but those acts were regarded as part of interrelated acts committed by all the perpetrators of the crime. That, too, was the approach adopted in practice, as evidenced not only by the *Pohl* case referred to by the Special Rapporteur (*ibid.*, para. 53), but also by the *Eichmann* and *Barbie* cases and others.

30. The question naturally arose as to how to determine who was an accomplice, and whether a distinction should be drawn between leaders, organizers, instigators and other kinds of accomplices. In that connection, he referred to the last paragraph of article 6 of the

Charter of the Nürnberg Tribunal,[12] article 5 (*c*) of the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)[13] and article II, paragraph 2, of Law No. 10 of the Allied Control Council.[14] He also referred to the categorization of acts of complicity proposed by the Special Rapporteur in his report (*ibid.*, para. 7).

31. In Soviet criminal law, complicity was defined as deliberate joint participation by two or more individuals in the commission of a crime, and as a form of crime involving several persons uniting their efforts in order to reach a criminal result; it was accordingly considered to be an aggravating circumstance. A distinction was drawn between two forms of complicity: simple complicity, in which all co-perpetrators took a direct part in committing a criminal act, and complex complicity, in which the various perpetrators performed different functions, some being the immediate perpetrators of the act and others acting as abettors, organizers or other accomplices. The latter form of complicity was generally described as complicity proper, since in that case one or more individuals participated in a crime directly committed by another individual. The perpetrator, organizer, instigator and abettor were all accomplices in the crime and were defined as specific kinds of accomplices, depending on the actual role they performed. The basis for the accomplices' criminal responsibility was culpable participation in the commission of a socially dangerous act falling within the definition of a particular crime. The perpetrator's acts were directly connected with the result of the crime. As for the acts of the other accomplices, they were connected with the criminal result through the perpetrator: the abettor assisted the perpetrator in achieving the criminal result, the instigator incited him to commit the crime, and the organizer guided the actions of other individuals in committing the crime.

32. Punishment for complicity was to be determined within the limits of the penalty laid down for the crime in question, for example life imprisonment. In pronouncing sentence, the court took account of the degree and nature of participation in the crime by each accomplice.

33. Conspiracy was a secret agreement between a number of individuals concerning organized joint acts falling within the definition of crimes. It was important to note that, in internal law, conspiracy was generally taken to mean an activity directed against the State, such as seizure of power. In international criminal law, conspiracy was understood to be a form of commission of certain international crimes. According to the Charters of the International Military Tribunals, participation in a common plan or conspiracy with a view to the preparation, initiation or waging of a war of aggression were punishable. In the Special Rapporteur's eighth report, conspiracy was defined as "participation in a common plan with a view to committing a crime against the peace and security of mankind" (*ibid.*, para. 40). Conspiracy to commit genocide was punishable under article III (*b*) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Hence it was appropriate that such a form of commission of crimes as conspiracy—a secret agreement to participate in a common criminal plan—should be included in the draft code.

34. The question had been raised whether a person who committed acts after the principal offence (for example, offering the principal offender refuge or concealment or otherwise assisting him to escape punishment) should be considered an accomplice in the crime, or whether such an act constituted a separate criminal offence. If such acts were committed prior to or concomitant with the crime, they were undoubtedly acts of complicity. The same was true of acts committed after the event but based on an agreement or plot entered into before or during the event. The situation was more complicated in the case of acts committed after the event and without previous agreement. In that connection, he referred to the concept used in Soviet criminal law to define an act which, although associated with a crime, did not constitute a circumstance determining the commission of the crime, for example promise of concealment. He wondered whether a similar concept was to be found in other national penal codes.

35. Another question was the point in time at which an act of aggression, genocide or *apartheid* should be considered to have ended. The beginning of the act was generally easy enough to establish, but was an act of genocide, for example, ended when the killing stopped or should it be regarded as still continuing so long as refugees or deportees were prevented from returning to their homes? The matter deserved further thought in the particular context of complicity, conspiracy and attempt.

36. As to part II of the report, on international illicit traffic in narcotic drugs, his first point concerned the definition proposed by the Special Rapporteur. The international element of the crime appeared only in the title of part II and not in the text of draft article X. In his view, the reference to the conventions in force was insufficient. His second point concerned the classification of the crime. The grounds for classifying an act as a crime against peace, a crime against humanity or a war crime were, of course, merely relative. It seemed indisputable, however, that international illicit traffic in narcotic drugs, on the basis of its many characteristics, clearly fell within the category of crimes against mankind, since it was aimed against all the peoples of the world and its physical result was the destruction of human life in all countries, i.e. of mankind.

37. Mr. McCAFFREY said that, in a thorough eighth report (A/CN.4/430 and Add.1), the Special Rapporteur had provided the Commission with considerable food for thought, demonstrating once again his responsiveness to the requests of the Commission and the Sixth Committee of the General Assembly.

[12] See 2150th meeting, footnote 9.

[13] *Documents on American Foreign Relations*, vol. VIII (July 1945-December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*

[14] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

38. He wished to apologize for not following the Special Rapporteur's advice to avoid a discussion on methodology, but one point was crucial. As he had already stressed in the past, it was essential that, for each substantive crime, the link between the individual perpetrator and the act or practice that constituted the crime should be clearly indicated. For example, genocide was an internationally wrongful act of the highest order, but it could not be committed by an individual acting alone. The question therefore arose as to how, through a process of "reverse attribution", it was possible to identify an individual, or individuals, who could be tried for the crime, bearing in mind that it was one characteristically regarded as committed by a State.

39. None of the concepts of attempt, complicity and conspiracy could be dealt with in the abstract: each of them had to be examined in the context of every individual substantive crime so as to determine what constituted, for example, attempted aggression or attempted genocide. Mr. Tomuschat (2150th meeting) had suggested that the definition of the principal perpetrator of a crime could largely solve that problem. The terms of the definition could indeed eliminate the need to go into the question of conspiracy or complicity, for anyone who planned or organized a crime was a perpetrator, and hence there was no need to speak of complicity. Yet it was clear that the punishment of the individuals could vary with the degree of their involvement. All of them were perpetrators of a crime, but the severity of the punishment would differ, depending on whether they were leaders or subsidiary participants. It had also been pointed out during the discussion that, as far back as 1985, Mr. Ushakov had proposed formulas for "individualizing" various crimes under the code. He himself was in complete agreement with Mr. Ushakov on that point.

40. It was in fact necessary to look at each separate crime in order to see whether, and in what way, complicity, conspiracy and attempt formed part of the crime, instead of saying in the abstract that complicity, conspiracy and attempt constituted crimes. He for one did not believe that they were separate autonomous crimes; as noted by Mr. Calero Rodrigues (2151st meeting), they were aspects of the definition of participation by individuals in the substantive crimes. The suggestion that complicity, conspiracy and attempt should be mentioned in the general part of the draft code would have the drawback of implying that they did constitute separate crimes—a doubtful proposition in the context of a code that dealt solely with the most serious widespread acts and practices which undermined the very foundations of international peace and security.

41. In short, it would prove necessary to try to determine precisely whether and how an individual could be regarded as an accomplice in the commission of each crime or be held to have conspired or attempted to commit the crime. The task could not be tackled without concrete proposals from the Special Rapporteur on each substantive crime, proposals stating whether the crime would form the subject of complicity, conspiracy or attempt and providing some indication of what would constitute, for example, an attempt to commit genocide.

42. On the question of international drug trafficking, he strongly supported the suggestion by Mr. Calero Rodrigues that the element of extreme seriousness, or trafficking on a massive scale, should be introduced, perhaps in paragraph 2 of draft article X. Otherwise, the words "any traffic" in that paragraph would cover not only the drug baron, but also the small-scale dealer. The dealer could, of course, be regarded as an accomplice, but the draft code was concerned only with the most serious international crimes, namely crimes against the peace and security of mankind. Some forms of complicity might not rise to that level.

43. Lastly, he agreed with members who felt there was no need for two draft articles on drug trafficking, although it was difficult to find the right place for the provision. Drug trafficking exploited human beings and could be considered as a crime against humanity, yet it also destabilized Governments and undermined entire societies, something which appeared to make it a candidate for consideration as a crime against peace.

44. Mr. OGISO said that he welcomed the efforts of the Special Rapporteur, in his excellent eighth report (A/CN.4/430 and Add.1), to take due account of types of crimes and general principles embodied in the criminal codes of various countries in defining the concepts of complicity, conspiracy and attempt for the purposes of an international code. However, he did not share the view that complicity, conspiracy and attempt could constitute separate offences independent from crimes against peace, crimes against humanity and war crimes. He was concerned that such an interpretation could stem from the inclusion of complicity, conspiracy and attempt in chapter II of the draft code rather than in the general principles in chapter I. In Japan, the Criminal Code defined the concepts of complicity and attempt in the part dealing with general principles and further provided for complicity or attempt on a crime-by-crime basis in the part relating to specific crimes. He believed that such an approach was taken in most national penal legislations.

45. The concept of conspiracy was not found in all national codes, except for the offence of conspiracy against the State, and he had serious doubts whether it could be said to have become a part of the general theory of international law.

46. Having made those general comments, and proceeding to specific observations, he noted that the Special Rapporteur, in explaining why he had decided to deal with the concept of complicity in the part dealing with the crimes themselves, stated: "It is no doubt axiomatic that the accomplice incurs the same criminal responsibility as the principal." (*Ibid.*, para. 6.) That was an acceptable remark if it meant that both the principal and the accomplice should be punishable. For his own part, however, he expressed some reservations as to the possible implication that both of them should bear the same criminal responsibility in the case of every crime defined in the draft articles. The extent to which complicity should be punished varied from one crime to another. Indeed, in some instances complicity might not be punishable at all; for example, the principal perpetrator of an act of aggression was punishable, but

low-ranking members of the armed forces who had participated in the aggression should not be punishable on the basis of alleged complicity.

47. On the subject of conspiracy, the Special Rapporteur had submitted two alternatives for paragraph 2 of draft article 16, explaining that the first was based on the idea of collective criminal responsibility and the second on the idea of individual criminal responsibility. Actually, the Special Rapporteur appeared to favour collective responsibility, for he argued:

> Today, [there is an] ever-greater need to deal more and more with the continuing growth of collective crime and with the new problems to which it gives rise... The law therefore responds to this new dimension of crime by providing a new definition of criminal responsibility, which in the cases in question takes a collective form, since it is becoming increasingly difficult to determine the role played by each participant in a collective crime. (*Ibid.*, paras. 54-55.)

In that regard, he wished to emphasize what he had said at the Commission's thirty-eighth session, in 1986, namely that individual responsibility should, as far as possible, be treated as a general principle in the case of war crimes. The concept of conspiracy, if the Commission decided to include it in the draft code, should apply only to crimes against peace, as well as to genocide, as already provided in article III (*b*) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

48. In general terms, he agreed with the Special Rapporteur's definition of attempt as "any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention" (*ibid.*, para. 65). As he had pointed out at the thirty-eighth session, however, mere preparation, not followed by execution, should not be interpreted as a criminal act. The Special Rapporteur's present definition of attempt, which referred to "commencement of execution", would contribute to making fairly clear the borderline between attempt and preparation.

The meeting rose at 12.45 p.m.

2153rd MEETING

Tuesday, 8 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/419 and Add.1,[2] A/CN.4/429 and Add.1-4,[3] A/CN.4/430 and Add.1,[4] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y[5] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*continued*)

1. Mr. BEESLEY said that he had certain points of principle and substance to make.

2. So far as principles were concerned in the case of the topic under consideration, it was apparent that it was very difficult for any special rapporteur, however able and hard-working, as in the present case, to reconcile the various national legal systems in one text. In his view, therefore, the Commission should explore the possibility of seeking the technical assistance of experts in international criminal law.

3. With regard to substantive questions, it was clear from the discussion that, if the Commission was to make progress, it had to avoid dogmatism. It must attempt, on the basis of national criminal systems, to find the means that would enable a court that was to be created or an existing court to apply the future code harmoniously without the fundamental principle of justice being affected by any differences as to law and procedure. In that regard, the Commission must venture into new fields and approach the problem with an open mind. It seemed ready to do so.

4. Given the evolution in thinking with regard to national criminal law and to international criminal law in so far as it existed, it would be advisable to consider the reasons for that evolution. The fact that a particular act was criminalized in some national jurisdictions and not in others, or was subsequently criminalized in a jurisdiction in which it previously had not been, suggested that its eventual characterization as an offence reflected principles of public policy. For example, some jurisdictions criminalized one or both of the acts of complicity and conspiracy. Those acts had no *actus reus*, *per se*, and were often attributed the *actus reus* of the underlying offence. It might be, therefore, that they were characterized as criminal where deterrence was warranted for reasons of public policy. That seemed to be the case with the offence of conspiracy in Canada. In other cases, the criminalization of complicity or conspiracy might be the only means of addressing effectively the underlying offence.

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 2150th meeting, para. 14.