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Summary record of the 1957th 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:-
1986, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

54. A number of members took the view that the 12-month period before which the procedures laid down in draft article 4 would take effect was too long. Nevertheless, the effect of article 4, read in conjunction with article 2, paragraph 1, was that, even if countermeasures were taken, the possibilities for a peaceful solution to the dispute as provided for in Article 33 of the Charter should be explored. That, of course, would require a considerable amount of time and, in his view, article 4 was sufficiently flexible to permit a practical solution. The compulsory jurisdiction of the ICJ, as provided for in article 4, subparagraphs (a) and (b), had also been criticized, but the Court would exercise jurisdiction over a very limited field. It was also important to remember that *jus cogens* was an important element in all treaty relations; as such it was relevant to the international community as a whole and should therefore be dealt with by the judicial organ of that community.

55. As Mr. Reuter had noted, the annex to part 3 differed somewhat from the annex to the Vienna Convention on the Law of Treaties. In the first place, paragraphs 3 and 4 of the former did not figure in the annex to the Vienna Convention. It was not, however, a substantive point and could be discussed in the Drafting Committee. The second difference lay in the cost of the conciliation proceedings. It was clear that the parties, not the United Nations, would have to meet those costs. That point, too, could be examined later.

56. Mr. Sucharitkul (1954th meeting) had referred to article 12 of part 2, which dealt with *jus cogens* and the position in regard to diplomatic immunities, and had asked whether other similar rules existed. For his own part, he had been unable to find any, but possibly other instances might be found and made known to the Drafting Committee. Mr. Sucharitkul had also pointed out that Article 33 of the Charter mentioned resort to regional agencies or arrangements, such as ASEAN, as a means of settling a dispute. That point was covered by the reference in draft article 3, paragraph 1, to Article 33 of the Charter.

57. Mr. Ogiso (*ibid.*) would like part 3 to be far more comprehensive; but it was not possible to establish a system for compulsory settlement of disputes that would cover each and every case. In particular, he had understood Mr. Ogiso to say in connection with draft article 5 that, in the event of reprisals, the dispute must always be submitted to conciliation. There again, it was extremely doubtful that States would be willing to accept such an idea.

58. He believed he had covered most of the main issues raised during the discussion and apologized for not having been able to deal with the more detailed points, owing to lack of time. The Commission might wish, as an expression of its overall agreement with the approach adopted, to refer draft articles 1 to 5 of part 3 to the Drafting Committee, although there would not, of course, be time for it to deal with them at the present session.

59. After an exchange of views in which Mr. FRANCIS, Mr. BARBOZA, Mr. DÍAZ GONZÁLEZ, Sir Ian SINCLAIR and Mr. JACOVIDES took part, the

CHAIRMAN suggested that the Commission should refer part 3 of the draft articles on State responsibility to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

1957th MEETING

Monday, 2 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam.

Draft Code of Offences against the Peace and Security of Mankind¹ (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPporteur

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report (A/CN.4/398) containing a set of draft articles which read:

CHAPTER I. INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.

Article 2. Characterization

The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.

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 ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and penalty

Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

Article 4. Universal offence

1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudice the question of the existence of an international criminal jurisdiction.

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Article 6. Jurisdictional guarantees

Any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trial on the law and facts.

Article 7. Non-retroactivity

1. No person shall be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. The above provision does not, however, preclude the trial or punishment of a person guilty of an act or omission which, at the time of commission, was criminal according to the general principles of international law.

Article 8. Exceptions to the principle of responsibility

Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

(a) The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility;

(b) Coercion, state of necessity or *force majeure* do not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(c) The order of a Government or of a superior does not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(d) An error of law or of fact does not relieve the perpetrator of criminal responsibility unless, in the circumstances in which it was committed, it was unavoidable for him;

(e) In any case, none of the exceptions in subparagraphs (b), (c) and (d) eliminates the offence if:

(i) the fact invoked in his defence by the perpetrator is a breach of a peremptory rule of international law;

(ii) the fact invoked in his defence by the perpetrator originated in a fault on his part;

(iii) the interest sacrificed is higher than the interest protected.

Article 9. Responsibility of the superior

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

CHAPTER II. OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 10. Categories of offences against the peace and security of mankind

Offences against the peace and security of mankind comprise three categories: crimes against peace, crimes against humanity and war crimes or [crimes committed on the occasion of an armed conflict].

PART I. CRIMES AGAINST PEACE

Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

(a) Definition of aggression

(i) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;

(ii) *Explanatory note.* In this definition, the term "State":

(a) is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(b) includes the concept of a "group of States", where appropriate.

(b) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression, without this enumeration being exhaustive:

(i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(iii) the blockade of the ports or coasts of a State by the armed forces of another State;

(iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(vi) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(vii) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

(c) Scope of this definition

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

(ii) Nothing in this definition, and in particular subparagraph (b), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

2. Recourse by the authorities of a State to the threat of aggression against another State.

3. Interference by the authorities of a State in the internal or external affairs of another State, including:

(a) fomenting or tolerating the fomenting, in the territory of a State, of civil strife or any other form of internal disturbance or unrest in another State;

(b) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

4. The undertaking, assisting or encouragement by the authorities of a State of terrorist acts in another State, or the toleration by such authorities of activities organized for the purpose of carrying out terrorist acts in another State.

(a) *Definition of terrorist acts*

The term "terrorist acts" means criminal acts directed against another State or the population of a State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

(b) *Terrorist acts*

The following constitute terrorist acts:

- (i) any act causing death or grievous bodily harm or loss of freedom to a head of State, persons exercising the prerogatives of the head of State, the hereditary or designated successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
- (ii) acts calculated to destroy or damage public property or property devoted to a public purpose;
- (iii) any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;
- (iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

5. A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of:

- (i) prohibition of armaments, disarmament, or restrictions or limitations on armaments;
- (ii) restrictions on military preparations or on strategic structures or any other restrictions of the same kind.

6. A breach of obligations incumbent on a State under a treaty prohibiting the deployment or testing of weapons, particularly nuclear weapons, in certain territories or in space.

7. The forcible establishment or maintenance of colonial domination.

8. The recruitment, organization, equipment and training of mercenaries or the provision to them of means of undermining the independence or security of States or of obstructing national liberation struggles.

A mercenary is any person who:

- (i) is specially recruited locally or abroad in order to fight in an armed conflict;
- (ii) does, in fact, take a direct part in the hostilities;
- (iii) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (iv) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (v) is not a member of the armed forces of a party to the conflict;
- (vi) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

PART II. CRIMES AGAINST HUMANITY

Article 12. Acts constituting crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) killing members of the group;
- (ii) causing serious bodily or mental harm to members of the group;
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children from one group to another group.

2. FIRST ALTERNATIVE

Apartheid, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2. SECOND ALTERNATIVE

Apartheid, which includes similar policies and practices of racial segregation and discrimination to those practised in southern Africa, and shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) denial to a member or members of a racial group or groups of the right to life and liberty of person:
 - (i) by murder of members of a racial group or groups;
 - (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

3. Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

PART III. WAR CRIMES

Article 13. Definition of war crimes

FIRST ALTERNATIVE

(a) Any serious violation of the laws or customs of war constitutes a war crime.

(b) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(a) *Definition of war crimes*

Any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime.

(b) *Acts constituting war crimes*

The following acts, in particular, constitute war crimes:

- (i) serious attacks on persons and property, including intentional homicide, torture, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;
- (ii) the unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of nuclear weapons).

PART IV. OTHER OFFENCES

Article 14

The following also constitute offences against the peace and security of mankind:

A. FIRST ALTERNATIVE

Conspiracy [complot] to commit an offence against the peace and security of mankind.

A. SECOND ALTERNATIVE

Participation in an agreement with a view to the commission of an offence against the peace and security of mankind.

B. (a) Complicity in the commission of an offence against the peace and security of mankind.

(b) Complicity means any act of participation prior to or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators.

C. Attempts to commit any of the offences defined in the present Code.

2. Mr. THIAM (Special Rapporteur) said that his fourth report (A/CN.4/398), which covered the whole of the topic, consisted of five parts devoted, respectively, to crimes against humanity, war crimes, other offences, general principles, and the draft articles.

3. Originally, as in the Charter and Judgment of the Nürnberg Tribunal,⁴ the concept of a "crime against humanity" had been linked with war crimes, but it had subsequently developed into an absolutely autonomous

concept. It was none the less a very wide concept, charged with moral and philosophical considerations, and difficult to encapsulate in a definition. The meaning of the word "humanity" changed, depending on the way in which the problem was viewed. It might, for example, designate the whole of the human community, culture and humanism, human dignity, or the individual as the custodian of fundamental human rights and the basic ethical values of human society.

4. The answer to the question whether a "crime against humanity" must necessarily be a mass crime depended on the meaning given to the term. In that regard, major differences were to be found among writers. Some considered that it was precisely the values inherent in the human being that had to be protected and that the mass nature of the crime should not be taken into account in the definition, whereas others took the view that a crime against humanity implied the mass element.

5. The decided cases, too, were far from being consistent. The Constance Tribunal, ruling in application of Law No. 10 of the Allied Control Council for Germany, had declared that "the legal good protected by that Law is the individual with his moral value as a human being, possessing all the rights that all civilized peoples clearly recognize he possesses" (*ibid.*, para. 14). The same idea was found in a decision of the Supreme Court of the British Zone, which stated that "Law No. 10 is based on the idea that, within the sphere of civilized nations, there are certain standards of human conduct ... which are so essential for the coexistence of mankind and the existence of any individual that no State ... has the right to abandon them" (*ibid.*) and concluded that any serious breach of those standards should be regarded as a crime against humanity, even if it was not a mass crime. The United States Military Tribunals, on the other hand, had held that the mass element formed an integral part of a crime against humanity and that the definition should not cover isolated cases of atrocities or cruelty (*ibid.*, para. 45).

6. The Legal Committee of the United Nations War Crimes Commission, for its part, had stated that "Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime ... into a crime against humanity ..." (*Ibid.*, para. 33.)

7. The International Law Commission seemed, at the present stage, to consider that the mass nature was a necessary element of the crime, since article 19 of part 1 of the draft articles on State responsibility⁵ provided, in paragraph 3 (c), that:

... an international crime may result, *inter alia*, from:

...

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being ...;

8. The definition of the word "crime" also caused difficulty. In internal law, whether offences were divided into two categories (correctional and criminal offences)

⁴ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

⁵ *Yearbook ... 1976*, vol. II (Part Two), p. 95.

or into three (petty, correctional and criminal offences), the word “crime” always related to the most serious offences.

9. In international law, however, the word *crime*, in the phrase *crime contre la paix et la sécurité de l’humanité* (“offence against the peace and security of mankind”), had originally been a generic expression synonymous with “offence”. In the Charters of the Nürnberg and Tokyo International Military Tribunals, as well as in Law No. 10 of the Allied Control Council, the word “crime” covered all offences, from the most petty to the most serious. In that connection, reference might be made to a decision of the Supreme Court of the British Zone, made on appeal against a judgment which, by reason of the light penalty imposed, had wrongly described the act as an “offence against humanity”. The Court had declared that the word “crime” in the expression “crime against humanity” was a general term covering acts of different degrees of gravity (*ibid.*, para. 18).

10. Later, the Commission had decided that the term “crime” should apply only to the most serious offences.⁶

11. As to the various categories of crimes against humanity, the distinction made between genocide and other inhuman acts in the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 was entirely justified. For unlike other inhuman acts, the purpose of genocide was necessarily to destroy a human group, in whole or in part. Hence, because of the specific nature of genocide, a separate paragraph should be devoted to it. It would also be useful to retain the words “national, ethnic, racial or religious” used in the 1954 draft code, for they expressed notions which, although they might overlap, were not identical. A national group, for example, often comprised several different ethnic groups, and a racial group was not to be confused with an ethnic group. The ethnic bond was essentially cultural, based on cultural values and characterized by a way of life, a way of thinking and the same view of life, whereas the racial element related more to common physical traits.

12. Since 1954, new offences condemned by the whole of the international community had emerged to add to those listed in article 2, paragraph (11), of the 1954 draft code; one of them was *apartheid*, a specific crime that was based on a system of government and should therefore be the subject of a separate paragraph.

13. The same applied to serious damage to the environment, a matter to which he proposed to devote a separate paragraph drafted along the lines of article 19, paragraph 3 (d), of part 1 of the draft articles on State responsibility, which sought simply to enunciate a primary rule, since specific questions relating to the environment were already governed by various international conventions.

14. The concept of a “war crime” raised problems of terminology, substance and method. In regard to terminology, the term “war” was perhaps no longer appropriate, since war, formerly a right and a manifesta-

tion of sovereignty, had become a wrongful act. Unfortunately, the prohibition of war had not made it disappear. The Commission therefore had a choice: it could retain the term “war”, altering the definition and explaining that it should be taken to mean any armed conflict, whether international or not; or it could replace the term “war” by the expression “armed conflict”, which was used by some writers and appeared in various international instruments.

15. The problems of substance lay in the fact that it was not always easy to distinguish between a “war crime” and a “crime against humanity”: one and the same act could be both. That dual characterization was not without advantages, however, since characterization as a crime against humanity made it possible to punish acts that could not be classed as war crimes. Nevertheless, the two offences differed in scope. A war crime could be committed only in time of war, between the belligerents, whereas a crime against humanity could be committed in time of peace or war. Moreover, a war crime could be committed only against foreigners, whereas a crime against humanity could be committed against fellow nationals.

16. The last kind of problem related to the method to be adopted. Should the Commission make an exhaustive or only an indicative list of war crimes, or should it simply draft a general definition? In 1919, the Preliminary Peace Conference, which had been responsible for drawing up the list of violations of the laws and customs of war by the German and allied forces during the 1914-1918 War, had made a list of 32 crimes. In 1945, that list had been slightly expanded, but it had still not been exhaustive. The Charter of the Nürnberg Tribunal spoke of “violations of the laws or customs of war”, which “shall include, but not be limited to, murder, ill-treatment ...” (art. 6 (b)). Law No. 10 of the Allied Control Council had referred to “violations of the laws or customs of war, including but not limited to murder, ill-treatment ...” (art. 11, para. 1 (b)). In the 1954 draft code, the Commission had opted for a very general definition: “Acts in violation of the laws or customs of war” (art. 2, para. (12)).

17. The problem thus remained unsolved. To enable the Commission to make a choice, he had prepared two versions of draft article 13. The first alternative contained a general definition only, whereas the second combined a general definition with a non-exhaustive list of war crimes. In order to take account of the comments made at the Commission’s thirty-sixth session,⁷ he had mentioned “first use of nuclear weapons” in subparagraph (b) (ii) of the second alternative, but had placed those words in brackets. Since a political decision was involved, he thought the Commission could do no more than propose various solutions. It was for the international community, in other words the General Assembly, to decide whether or not use of weapons of that type should be expressly mentioned.

18. With regard to “other offences”, the 1954 draft code referred to such concepts as conspiracy, complicity and attempts, but did not analyse or define them.

⁶ *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

⁷ *Yearbook ... 1984*, vol. II (Part Two), p. 16, para. 57.

19. In internal law, the content of complicity varied in scope depending on the legislation concerned. Under French law, for example, complicity had a limited content. As a general rule, a charge of complicity could not be brought for acts committed after the principal offence. Concealment was thus an offence distinct from complicity. The laws of many other countries also limited complicity to acts committed prior to or concomitantly with the principal act. In other legal systems, such as that of the Soviet Union, and in common law, however, complicity had a broader content and included acts committed after the principal act.

20. In international law, complicity could have either a limited or an extended meaning. The Charters of the International Military Tribunals gave complicity a limited content by distinguishing it from certain related concepts. Thus both the Charter of the Nürnberg Tribunal and the Charter of the International Military Tribunal for the Far East distinguished between accomplices and leaders, organizers and instigators. Law No. 10 of the Allied Control Council established several categories of perpetrators, within which the accessory was separated from the person who "ordered or abetted" the crime, the person who "took a consenting part therein" and the person who, with respect to certain crimes, held "a high political, civil or military ... position ... or held a high position in the financial, industrial or economic life ..." (art. II, para. 2 (b), (c) and (f)).

21. On reading those texts, it might be asked what constituted complicity. But their drafters had been prompted more by concern for efficiency than by concern for legal exactitude. Their aim had been to let no wrongful act go unpunished. In addition to that narrow concept of complicity, there was a much broader one that extended complicity to superiors, members of groups or organizations and, in some cases, even to concealment.

22. At the end of the Second World War, domestic legislation had extended the concept of complicity so that it was possible to prosecute superiors in rank who had organized, directed, ordered or tolerated the criminal acts of their subordinates. Under the new laws, the responsibility of the superior was presumed failing disproof.

23. The same presumption was to be found in judicial decisions. In the *Yamashita* case (A/CN.4/398, para. 109), the United States Supreme Court had rejected an application for habeas corpus made by the Japanese General Yamashita, who had let his troops commit very serious crimes, concluding that: "The question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result." The Court had answered that question in the affirmative. The commanding officer had to produce proof that it had been impossible for him to prevent the commission of the crime

in question. Similarly, in the *Hostage* case (*ibid.*, para. 111), the United States Military Tribunal had decided that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which he knew or ought to have known about. That precedent had even been extended to heads of State and Government.

24. Complicity had sometimes also been extended to include concealment. In the *Funk* case (*ibid.*, para. 113), the accused, in his capacity as Minister of Economics and President of the Reichsbank, had concluded an agreement under which the SS had delivered to the Reichsbank the jewellery, articles of gold and banknotes taken from Jews who had been exterminated. The Nürnberg Tribunal had been of the opinion that Funk "either knew what was being received [by the Reichsbank] or was deliberately closing his eyes to what was being done". The judgment in the *Pohl* case (*ibid.*, para. 114) had been even more explicit. The United States Military Tribunal had stated: "The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates does not exculpate him. This was a broad criminal program, requiring the co-operation of many persons, and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation even in the after-phases of the action makes him *particeps criminis* in the whole affair." Complicity had even been extended to include membership in an organization, which Law No. 10 of the Allied Control Council had made an autonomous offence (art. II, para. 2 (e)).

25. If the concept of extended complicity was to be accepted, it might be asked what its limits should be. The last paragraph of article 6 of the Nürnberg Charter referred in particular to "accomplices participating in the formulation or execution of a common plan or conspiracy" and provided that persons who had participated in such a plan were "responsible for all acts performed by any persons in execution of such plan". That provision raised an extremely important problem because it was based on the concept of "conspiracy". A special feature of that common-law concept was that it covered two distinct types of responsibility: the individual responsibility of a person who had taken part in a common plan and who could be held to have committed a particular act, and the collective responsibility of all those who had participated in that plan, whether they had committed any act or not. The members of the Nürnberg Tribunal had, of course, been unable to agree on the very specific nature of that concept and the Tribunal had finally decided that it was not applicable in all cases. It had been of the opinion that the wording of the last paragraph of article 6 did

not add a new and separate crime to those already listed [but was simply] designed to establish the responsibility of persons participating in a common plan.⁸

It had even gone so far as to set aside the charge of conspiracy in the case of war crimes and crimes against humanity, retaining it only for crimes against peace. In

⁸ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. ..., p. 72.

other words, it had simply equated conspiracy with *complot* and had made it a crime of responsible government officials, for a crime against peace could be committed only by such officials.

26. That area was one in which most actions were undertaken or executed jointly and in which the role of each person was very difficult to determine. Did a concern for efficiency justify the recognition of collective responsibility? That was for the Commission to decide. He had proposed two alternatives for section A of draft article 14, the first of which referred to conspiracy in the sense of *complot*, and the second to conspiracy in the sense of "participation in an agreement".

27. The Commission would also have to define the content of the term "attempt", determine whether it included preparatory acts and specify what was meant by the words "commencement of execution".

28. The general principles in part IV of the report could be classified according to whether they related to the nature of the offence, the nature of the offender, the application of criminal law in time, the application of criminal law in space, or the determination and scope of responsibility.

29. The principles relating to the nature of the offence did not require any explanation. The offence in question was a crime under international law. With regard to the principles relating to the international offender, the first question that arose was who could be an offender. Since the Commission had decided to confine itself to offences committed by individuals for the time being, he had assumed, without prejudice to the criminal responsibility of the State, that the offender was an individual; and as to the principles relating to the person of the offender, he had provided in draft article 6 that the offender was entitled to the rights and guarantees extended by the relevant international instruments to all human beings appearing before a criminal court to answer for an offence.

30. The application of criminal law in time brought two concepts into play: that of non-retroactivity of the criminal law and that of prescription. In regard to non-retroactivity, the problem that arose was whether the rule *nullum crimen sine lege, nulla poena sine lege* was applicable in international law. In his opinion it was, for in that maxim it was not the form, but the substance that must be considered. The word *lex* was used in a very wide sense and covered both written law and custom as well as the general principles of law. The fact that that rule was not expressly formulated in the common-law countries, which were so respectful of human rights, did not make them ignore its substance. Moreover, various international instruments, including the European Convention on Human Rights,⁹ stated that rule, though specifying that it did not prejudice the trial of persons who had violated the general principles of law recognized by civilized nations. Thus the concept extended to the whole of law and not only to written law.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

31. As to prescription, a certain number of conventions provided that offences against the peace and security of mankind were imprescriptible. It should also be remembered that, in internal law, prescription was neither a general nor an absolute rule. Indeed, many countries did not recognize prescription, and in those which did it was subject to exceptions. Lastly, it was often regarded as a rule of procedure and not as a substantive rule.

32. The application of criminal law in space brought several principles into play: the principle of the territoriality of criminal law, which gave competence to a judge of the place where the crime was committed; the principle of the personality of criminal law, which gave competence either to a judge of the offender's nationality or to a judge of the victim's nationality; and the principle of universal competence, which gave competence to a court of the place of arrest regardless of where the offence was committed. Lastly, there might be a system giving competence to an international court.

33. Since the question of creating an international criminal jurisdiction was far from settled, it would be preferable, without prejudging that issue, to adopt for the time being the system of universal competence rather than to combine several systems, as had been done after the Second World War. A proliferation of jurisdictions would thus be avoided.

34. The last category of principles related to the determination and scope of responsibility. The question of the scope of responsibility need not be dealt with in the draft code, since it was linked with that of the application of the penalty, and the Commission had not yet decided whether the draft code should include provisions on penalties.

35. The principle on which the determination of responsibility was based was that every wrongful act entailed the responsibility of its author. That principle was subject to various exceptions, however, also known as "justifying facts"; for it sometimes happened that certain circumstances removed the criminal character of a wrongful act. That applied to coercion, state of necessity, *force majeure*, error, superior order, the official position of the offender, self-defence and reprisals.

36. In spite of the differences between them, the exceptions of coercion, necessity and *force majeure* were subject to the same basic conditions. For the exception to apply, there must in each of the three cases be a grave and imminent peril; the author must not have contributed to the emergence of that peril; and there must be no disproportion between the interest sacrificed and the interest protected.

37. As to error, it could be of two kinds: error of law and error of fact. In the first case, the error took the form of misrepresentation of a rule of law, and in the second, misrepresentation of a material fact. While it was certainly difficult to accept error of law in internal law—since no one was considered to be ignorant of the law—in international law the question might arise whether an error of law could not be considered as a justifying fact, for the rules of international law were not always precise and had not evolved in all areas, particularly where the law of war was concerned.

38. In his fourth report (*ibid.*, para. 208), he had given two examples of cases decided by international tribunals which seemed to show that error of law was admitted in certain circumstances. The error must, however, have been unavoidable, and that was a question of fact for the judge to determine. He must consider all the circumstances of law and of fact surrounding the commission of the allegedly wrongful act to determine whether the error was really unavoidable, which was very rarely accepted. Moreover, it seemed that it must first be established that the author of the act had examined his conscience with considerable rigour and that, in spite of that effort, he had been unable to perceive that he was committing an error.

39. Generally speaking, there was a category of offences regarding which error was not conceivable, namely crimes against humanity. By definition, those crimes had a racial, political or religious motive, so that the intention was an integral part of the crime itself. Hence it was unthinkable that error or, for that matter, coercion or state of necessity could be invoked in the case of crimes against humanity.

40. Error of fact had also been admitted in certain circumstances, when it had been established that the error had been committed without any possibility of the representation of a determined fact being challenged, and that it had not been possible for the offender to act otherwise.

41. The problem of the superior order should be very carefully examined because it was the most frequently invoked defence, especially before military tribunals and even at the highest level, as in the case of the former ministers of the Führer. It was natural to invoke an order from a superior in attempting to exonerate oneself, since military discipline required a soldier to be obedient. When a wrongful order was given there were several possibilities: the accused might have obeyed it with full knowledge of its wrongfulness and he would then clearly be liable to prosecution for complicity; but he might also have obeyed the order under coercion or by error. The question thus arose whether a superior order was really an exception, since in some cases it merged with coercion, and in others with error.

42. In the case of coercion, it was obvious that anyone who received a manifestly wrongful order and was not free to choose whether to obey it or not could invoke coercion and, if all the necessary conditions were satisfied, could be found not guilty. Hence the autonomy of the exception known as "superior order" could be called into question. The Nürnberg Tribunal had referred to it in the following terms:

... The true test [for criminal responsibility], which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.¹⁰

It might therefore be asked whether the notion of superior order should be retained. The 1954 draft code provided in article 4:

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does

not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

It must therefore be asked whether it was the order or the coercion accompanying it that constituted the justifying fact.

43. Referring to the relationship between superior order and error, he said that, if the order was not manifestly wrongful, the offender might have carried it out in good faith without knowing that it was wrongful. So if it was accepted that an error had been committed following a previous error, which was the justifying fact? Was it the order or the error?

44. In spite of the duplication involved in the defence of superior order—with that of coercion and that of error—he had devoted a paragraph to it because, according to all the manuals of international law, superior order was the justifying fact. Nevertheless, an examination of the facts showed that a superior order was not in itself a justifying fact. Obeying an order was just as normal as the order itself, in the interests of the proper functioning of an army, for instance. The problem lay, none the less, in the degree of autonomy of the notion of a superior order.

45. As to the official position of the author of the act, it was generally accepted that it could not serve as a justifying fact.

46. He had mentioned reprisals only because, in 1954, the previous Special Rapporteur had strongly defended them, on condition that they were carried out in conformity with international treaties and customary international law. Subsequently, the Commission had come to consider that armed reprisals were contrary to international law. In peacetime they were regarded as aggression, and in wartime as a violation of the laws and customs of war. If the Commission wished to mention reprisals in the code of offences, it would have to specify that, in principle, they were not admissible under contemporary international law.

47. He had not devoted a separate article to self-defence either, because it was provided for in the Charter of the United Nations; he had confined himself to mentioning it in the context of a general principle.

48. On examining the three categories of crimes—offences against the peace and security of mankind, crimes against humanity and war crimes—it would be seen that the exceptions did not apply to each of them in the same way. That was one of the reasons why he had preferred to take up general principles after the Commission had agreed on the definitions of those crimes. It could indeed be seen, first, that crimes against humanity were not subject to any exception, because their motive was racism and the author of such a crime could not invoke an exception since the motive itself was punishable; secondly, that only one exception was admissible in the case of crimes against peace, namely self-defence; and thirdly that, by contrast, war crimes could obviously be committed under coercion, by error or in a state of necessity. The exceptions themselves could, however, be subject to exceptions. He had in mind the case of an intelligence agent, for example, who assumed

¹⁰ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. ..., p. 42.

special responsibilities and could not invoke coercion under the same conditions as a simple soldier. Having accepted the responsibilities imposed by his duties, the intelligence agent must endure, as a counterpart, coercion which went beyond what was humanly acceptable.

49. The scope of responsibility fell within a different domain, but if the Commission thought he should deal with it in the draft code he was quite willing to do so. For the time being, however, he had preferred to keep to primary rules.

50. Referring to the draft articles submitted in part V of his report, he said that the question whether offences against the peace and security of mankind should be defined or not had been debated at length in the Commission and in the Sixth Committee of the General Assembly, and he had thought it necessary to submit new definitions, on which it would be for the Commission to pronounce.

51. In the definition of aggression, he had taken account of the criticism voiced at the previous session¹¹ and had deleted all reference to a political organ. In particular, he had deleted everything relating to the Security Council, and the article he proposed took account of the complete independence of the judge in that sphere, into which no political consideration entered.

52. In defining the offences, he had tried not to depart from the existing definitions, especially those in existing conventions, although he had sometimes had to add to the relevant texts new elements connected with the evolution of the situation. He had in mind, in particular, the hijacking of aircraft and acts committed against persons enjoying international protection. He had also endeavoured not to be constrained by individual cases when formulating general principles.

53. Mr. CALERO RODRIGUES said that, since the Special Rapporteur's fourth report (A/CN.4/398) was so comprehensive, the question arose how best to discuss the rich material it contained. The best course would probably be for the Commission to divide the subject-matter for the purposes of debate and he would like to know the Special Rapporteur's views on how that should be done.

54. Sir Ian SINCLAIR said that, in view of the wide range of subjects dealt with in the Special Rapporteur's excellent fourth report, the time available was not sufficient for a discussion in depth of its whole content. He would therefore like to know whether the Special Rapporteur had any suggestions on how to structure the debate. One possibility would be for the Commission to concentrate at the present stage on the general principles in part IV of the report and perhaps also the "other offences" in part III. Part I (crimes against humanity) and part II (war crimes) could be left over until the next session.

55. Mr. FRANCIS said that, in the light of the Commission's debates at previous sessions on some substantive aspects of the topic, and of the strategic role of the general principles in the whole draft, he would suggest that the discussion begin with the general principles.

Certain selected substantive issues could be discussed at the same time.

56. Mr. THIAM (Special Rapporteur) said that he had no objection to the Commission beginning by examining the general principles. He had always said that the final draft would include an introduction and general principles, but that to achieve that result he had to proceed inversely. Now that he was in a position to submit the whole of the draft, however, it mattered little whether consideration of it began with the general principles or with the "other offences".

57. Mr. BALANDA said that, in his view, the Commission could not usefully discuss the general principles until it had completed its consideration of the proposed list of offences, since the principles applied to the offences. The Commission should also be able to pronounce on the whole of the fourth report of the Special Rapporteur and not postpone its decision on part of it until the following session.

58. Mr. CALERO RODRIGUES said that he tended to agree with Mr. Balanda, whose view corresponded to the original scheme of the Special Rapporteur. For his own part, he had no preference as to whether the general principles should be discussed first or second, but he firmly maintained that both the general principles and the first three parts of the report should be dealt with at the present session. Every effort should be made to complete the first stage of the work in the current week, so as to have a full week in which to deal with the second stage.

59. Mr. DÍAZ GONZÁLEZ said it was with the agreement of the Commission itself that the Special Rapporteur had dealt with the offences before taking up the general principles, and he had done so for important reasons. It was necessary to take account not only of the viewpoint which the Special Rapporteur had adopted on the topic, but also of three other entirely valid arguments, namely: the importance of the topic in itself; the importance which the General Assembly had attached to it by considering it separately from the report of the Commission in the Sixth Committee; and the fact that the fourth report of the Special Rapporteur was complete and dealt with matters of substance. The Commission should forget that it would have less time than usual to send the General Assembly a thorough study of the draft code and should endeavour to examine the whole of the fourth report. It should follow the recommendations of the Special Rapporteur and examine the offences before concentrating its attention on the general principles, even if it had to give less time to the other items on its agenda.

60. Mr. FRANCIS explained that he had not proposed that the Commission should discuss the general principles alone, but that it should discuss them together with selected areas of the fourth report. He reminded the Commission that, at the previous session, 16 members had urged the need to include general principles in the draft.

61. The CHAIRMAN asked Mr. Francis whether he wished the Commission to devote the next two weeks to discussing the general principles, together with selected

¹¹ *Yearbook ... 1985*, vol. II (Part Two), p. 16, para. 83.

areas of the fourth report of the Special Rapporteur, and which areas he had in mind.

62. Mr. FRANCIS said that it would be for the Special Rapporteur to select the areas to be discussed with the general principles.

63. Mr. McCAFFREY said that the fourth report of the Special Rapporteur was indeed very comprehensive and his own first reaction had been that, in the time available, it would not be possible to deal in depth with all its aspects. He was inclined to agree that the Commission should proceed to a general discussion of the whole report, devoting, as Mr. Calero Rodrigues had suggested, one week to the general principles and one week to the substantive issues. He had no preference as to which the Commission discussed first. Clearly, the Commission could not make an exhaustive study of the fourth report at the present session. The general discussion it was about to hold should therefore not preclude the possibility of an examination in depth at a later session.

64. Mr. JACOVIDES stressed that the Commission should not hold over any part of the fourth report of the Special Rapporteur until the following session. It should divide the available time in such a way as to devote one week to certain aspects of the report and the other week to the remainder.

65. Sir Ian SINCLAIR said that the order in which the various parts of the fourth report were taken up was not very important. His own marginal preference would be to begin with the general principles, now that the Commission had the whole draft before it. As suggested, however, the general debate could be divided into two parts. During the current week the Commission could deal with parts I, II and III of the report; the following week it could deal with part IV, illustrated by examples taken from the other parts. The Commission would thus be able, at its next session, to examine in greater detail the formulation of the draft articles submitted by the Special Rapporteur.

66. Chief AKINJIDE said that he supported the suggestions made by Sir Ian Sinclair, which appeared to meet with general agreement.

67. Mr. THIAM (Special Rapporteur) proposed that the Commission should first consider war crimes and the "other offences" before passing on, if there was time, to a study of the general principles.

68. Mr. DÍAZ GONZÁLEZ said that he fully agreed with the Special Rapporteur, who had, moreover, never suggested that the Commission should make a detailed examination of each article. The essential need was to study the general trends of the fourth report.

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to examine the Special Rapporteur's fourth report (A/CN.4/398) in two stages in a general debate, and not article by article. Parts I, II and III would be examined first, and then part IV, on general principles.

It was so agreed.

The meeting rose at 1 p.m.

1958th MEETING

Tuesday, 3 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacobides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

Draft Code of Offences against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences)

1. Mr. MALEK congratulated the Special Rapporteur on his fourth report (A/CN.4/398), his brilliant oral introduction and, in particular, the efforts he had made to put an end to the long-standing controversy concerning how much priority should be given to the consideration of the general principles of criminal law that might be included in the draft code.

2. He intended to make some comments on crimes against humanity and war crimes, and more particularly on the definitions thereof, and reserved the right to speak at a later stage on other questions discussed in the report. On a point of detail, he would like the Special Rapporteur to explain why the report dealt with the various questions under consideration in the same order as in the 1954 draft code. In part I, on crimes against humanity, the Special Rapporteur noted (*ibid.*, para. 3) that that term had first appeared in the London Agreement of 8 August 1945 establishing the Nürnberg International Military Tribunal and explained (*ibid.*, para. 5) that crimes against humanity had been defined as offences separate from war crimes in the Nürnberg Charter, in Law No. 10 of the Allied Control Council and in the Charter of the International Military Tribunal for the Far East. In all those instruments, the three categories of crimes appeared in the same order: crimes against peace, war crimes and crimes against

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 ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).