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Summary record of the 1960th 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

in the 1949 Geneva Conventions, which drew a distinction between "breaches" and "grave breaches". The grave breaches could be said to constitute war crimes. No reference should be made in the code to any particular international instrument, since an enumeration of the acts constituting war crimes on the basis of existing conventions would automatically exclude from the scope of the code any new laws or prohibitions relating to the conduct of war. The use of a general definition such as "grave breaches", on the other hand, would maintain a degree of flexibility and automatically include new prohibitions.

21. Historically, the concept of "crimes against humanity" had developed from that of war crimes, but it had subsequently acquired an independent character. He agreed with the Special Rapporteur (A/CN.4/398, para. 11) that: "Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict." The definition of such crimes was not easy. If "war crimes" were violations of the laws and customs of war, it might be tempting to define crimes against humanity as violations of the laws of humanity. But what were those laws? No matter how appalling conduct contrary to those laws might be, it would seem impossible to transfer to the sphere of international law the idea that such crimes were to be punished internationally. The definition of crimes against humanity should be sought in the concept of *lèse-humanité*, which he understood as meaning acts that were not only abhorrent in themselves, but constituted a threat to the security of humanity in the widest sense of the term. An isolated act of cruelty might be simply repulsive to the human conscience and, as such, should be punished under internal law; but the same act might be indicative of a wider design which could indeed jeopardize the security of mankind.

22. Genocide was a typical example of a crime against humanity. It was not necessary to destroy a national, ethnic, racial or religious group in its entirety; the intention to destroy the group "in whole or in part" was enough. Even causing serious mental harm to members of the group was an act of genocide, as was killing some of its members, whether in a cruel or a "civilized" way. Genocide was so typically a crime against humanity that, in 1948, Georges Scelle had equated the two ideas. *Apartheid*, as defined in the 1973 Convention, also fell into that category. The Convention defined as crimes "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" (art. II).

23. Those two well-defined crimes, genocide and *apartheid*, provided the elements which could be generalized to establish what constituted a crime against humanity. The solution suggested by the Special Rapporteur in his report (A/CN.4/398, paras. 60-63) and in draft article 12, paragraph 3, provided a sound basis, but needed some refinement.

24. While the definition of serious damage to the environment as a crime against humanity set out in the report (*ibid.*, para. 66) was generally acceptable, further clarification was needed. The question when a breach of an obligation of essential importance constituted a crime against humanity called for very careful consideration if it was not to give rise to a wider and unacceptable interpretation.

25. Acts of terrorism might be better dealt with as crimes against humanity than as crimes against peace, since they did not affect peace as such, but could threaten the security of mankind as a whole.

The meeting rose at 11.15 a.m.

1960th MEETING

Thursday, 5 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, 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 Mankind[1] (*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) (*continued*)

1. Mr. CALERO RODRIGUES, continuing the statement he had begun at the previous meeting, said that the thorough analysis of the concepts of complicity, conspiracy and attempt in part III of the fourth report (A/CN.4/398) had led the Special Rapporteur to suggest in draft article 14 three separate offences: first, conspiracy (*complot*), which, in the second alternative proposed by the Special Rapporteur, was defined as "participation in an agreement with a view to the commis-

[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).

sion of an offence against the peace and security of mankind"; secondly, complicity, defined as "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"; and thirdly, "attempts to commit any of the offences defined in the present Code".

2. Conspiracy, as understood in the common-law countries, was close to but not similar to *complot*. It was, as the Special Rapporteur indicated (*ibid.*, para. 121), an agreement to commit a criminal act and was punishable even if the act had not been committed and even if there had been no commencement of execution. It was very difficult to apply the concept of conspiracy in international law and, indeed, in any system of law outside the common law. It was significant that the Nürnberg Tribunal had accepted the charge of conspiracy only for crimes against peace and had considered that it did not "add a new and separate crime to those already listed".[4] The Tribunal had not applied the notion of conspiracy either to war crimes or to crimes against humanity. The Special Rapporteur himself had suggested as the second alternative of section A of draft article 14, as an alternative to conspiracy, "participation in an agreement" to commit an offence. Personally, he would favour the adoption of that formula, but without singling out conspiracy as such: the idea of participation could be included in the concept of complicity, which would be broadened in order to cover it.

3. With regard to complicity as defined in draft article 14, section B, he noted the various elements of complicity indicated by the Special Rapporteur (*ibid.*, para. 131), such as instigation, aiding, abetting, order and consent, and suggested that a reference to them should be included in the commentary. The notion of participation subsequent to the offence, which was embodied in article 14, section B (*b*), in connection with complicity, would prove difficult to introduce into international law. It was unknown to many national criminal codes. Hence he would accept a broad definition of complicity, provided it excluded complicity *ex post facto*.

4. In the matter of attempt, the Special Rapporteur made some interesting comments on the "path of the crime" (*ibid.*, para. 134), which comprised four successive stages: the project phase, the preparatory phase, the commencement of execution and, lastly, the actual commission of the crime. Attempt was thus already a part of the commission of a crime. It involved acts actually linked to the commission, and not just to the preparation of a crime. As stated in article 14 of the Brazilian Criminal Code:[5]

> The crime is:
>
> I—completed, when all the elements of its legal definition are present;
>
> II—attempted, when, the execution having commenced, the crime is not completed due to circumstances beyond the will of the perpetrator.

5. Since attempt was not a separate offence, but the commencement of execution and therefore part of the crime, it was difficult to see how it belonged among "other offences", as suggested by the Special Rapporteur. For his own part, he had serious doubts about the need to devote a part of the code to "other offences". Attempt was part of the crime, and complicity was a matter of attribution of responsibility to different persons. In both cases, there was only one crime. He therefore suggested that the provisions on attempt and complicity should be included in the general principles, and that conspiracy as such should be excluded from the draft and covered by the broad concept of complicity.

6. Lastly, the examples taken by the Special Rapporteur from the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, paras. 131 and 145) were not convincing. Article III of the Convention stated:

> The following acts shall be punishable:
>
> (*a*) Genocide;
>
> (*b*) Conspiracy to commit genocide;
>
> (*c*) Direct and public incitement to commit genocide;
>
> (*d*) Attempt to commit genocide;
>
> (*e*) Complicity in genocide.

It was understandable that the Convention on genocide should make those references to attempt and to complicity, for it did not contain any general provisions. The formula used in article III was the only way of stating that complicity in genocide and attempts to commit genocide were punishable.

7. Sir Ian SINCLAIR said that crimes against humanity, the subject-matter of part I of the report (A/CN.4/398), constituted a category whose content was particularly difficult to determine. The concept had originally been closely linked with that of war crimes and with crimes against peace. The Commission itself, in its formulation of the Nürnberg Principles in 1950,[6] had defined crimes against humanity by reference to such acts as murder, extermination, enslavement and deportation and had specifically required that "such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime" (Principle VI (*c*)).

8. He none the less agreed with the Special Rapporteur (A/CN.4/398, para. 11) that the concept of crimes against humanity had now become effectively autonomous in law and was no longer indissolubly linked with war crimes or crimes against peace. It was also true, as the Special Rapporteur said (*ibid.*), that the content of the concept had to be defined, since the area was one which lent itself to inflated language.

9. On the question of terminology and the meaning of "crime" in the expression "crimes against humanity", he would point out that the differentiation of criminal offences according to their seriousness was a feature of most internal law systems. Nevertheless, the way in which the differentiation was made depended on the particular legal system involved. Since reference had been made in the course of the debate to the distinction between the English terms "felony" and "misde-

[4] See 1957th meeting, footnote 8.

[5] Amended by Law No. 7,209 of 11 July 1984; see Brazil, *Coleção das Leis de 1984*, vol. V (Brasilia, 1984), p. 41.

[6] See 1958th meeting, foonote 4.

meanour", he drew attention to the fact that that distinction had been abolished in English law in 1967 and had been replaced by a parallel distinction between arrestable and non-arrestable offences—the former being very serious offences for which the alleged offender could be arrested without a warrant. Members should therefore avoid transposing to the draft code the distinctions drawn in their own national legal systems, since they were bound up with the historical development of the internal law concerned.

10. A key issue with regard to crimes against humanity was whether they must of necessity be mass crimes. In the 1954 draft code, the Commission had considered that a certain mass element was an essential feature of crimes against humanity, as was apparent from article 2, paragraph (10), which referred to acts committed with intent to destroy "a national, ethnic, racial or religious group as such". Similarly, article 2, paragraph (11), spoke of "inhuman acts ... committed against any civilian population". Those references to a "group" and a "civilian population" showed that something more than acts directed against an individual was required.

11. Since the concept of crimes against humanity was being treated as an autonomous concept detached from war crimes and crimes against peace it was important for its content to be related not to acts directed against an individual, but to multiple acts directed against a group or a people. Otherwise, the result would be to create confusion between common crimes and crimes against humanity. In many societies, individual crimes were sometimes motivated by racial or religious hatred: they had to be prosecuted under the ordinary criminal law of the State concerned and the proven motivation could be reflected in the severity of the penalty. For those reasons, he was firmly of the view taken by the Legal Committee of the United Nations War Crimes Commission that isolated offences against individuals "did not fall within the notion of crimes against humanity" (*ibid.*, para. 33).

12. The crime of genocide should certainly be included in the draft code and it was desirable to keep as close as possible to the relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. On the other hand, he would prefer not to use the actual term "genocide", but simply list the various acts which constituted that crime. He also thought it better to retain the separate notion of "inhuman acts" set forth in article 2, paragraph (11), of the 1954 draft code.

13. As for singling out *apartheid* as a separate crime against humanity, he had some reservations regarding the formulation to be used. Clearly, certain acts committed in pursuance of the policy of *apartheid* were so inhuman as to warrant mention in the draft code, but there was some problem of overlapping. Some of the acts committed in pursuance of the policy of *apartheid* could well constitute "inhuman acts" or even acts of genocide.

14. Accordingly, he suggested that the Commission should elaborate a definition of acts constituting genocide, followed by a definition of the more general concept of "inhuman acts"; then, without prejudice to the generality of those definitions, it would single out as separate crimes against humanity certain acts that were peculiar to the policy of *apartheid* and might not otherwise be covered by the definition of genocide and that of inhuman acts.

15. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* had not been widely ratified outside the continent of Africa and it was therefore necessary to elaborate provisions that were more widely acceptable. In that regard, careful consideration should be given to the second alternative submitted by the Special Rapporteur for the definition of the crime of *apartheid* in draft article 12, paragraph 2, so as to extract certain elements that were inherent in the practice of *apartheid* and distinguishable from "inhuman acts". His own preliminary view was that the Commission might initially concentrate on some of the elements suggested in subparagraphs (*c*) and (*d*) of the second alternative, which set out some of the more significant features of *apartheid*.

16. Unfortunately, the denial of basic human rights and freedoms to members of a racial group or groups was not a unique feature of the one country that practised *apartheid*. A formulation should therefore be found to indicate that racial segregation practised on such a scale and as a deliberate policy, as was the case with *apartheid*, constituted a specific crime against humanity. The task would not be easy, but it would not be made any easier by using a form of language open to the criticism that it applied equally well to policies practised in other countries.

17. Despite his great concern for the preservation of the human environment, he had serious reservations about including breaches of relevant international obligations in the list of crimes against humanity. In that connection, it was pointless to invoke article 19 of part 1 of the draft articles on State responsibility, which was concerned exclusively with establishing an aggravated degree of international responsibility for what the Commission had unfortunately termed "international crimes". The "international crimes" in question were simply internationally wrongful acts for which the author State had an aggravated international responsibility. They had nothing to do with international crimes proper, for which individuals incurred criminal liability. An individual could not possibly commit a breach of an international obligation regarding the environment that was incumbent upon a State; he could do so only in circumstances such that the act of the individual could be imputed to the State.

18. Again, it was disturbing that terrorist acts were included in the draft code only under the heading of crimes against peace. The only acts covered in draft article 11, paragraph 4, were those committed pursuant to a policy of State-sponsored or State-directed terrorism, doubtless an important aspect of terrorism; but terrorist acts, even where it could not be established that they were State-sponsored or State-directed, constituted crimes against humanity. Consequently, they should be included among the crimes in that category. Terrorism would thus figure in two categories, namely crimes

against peace and crimes against humanity, and the category invoked for the purpose of applying the code would depend on whether or not the act was State-sponsored or State-directed.

19. On the subject of war crimes, he agreed with Mr. Calero Rodrigues (1959th meeting) that it was desirable to retain the familiar expression "war crimes", yet clarify that it also covered crimes committed in the course of an armed conflict which did not constitute a "war" in the strict sense of the word. As to the choice between a general or a detailed definition, he would prefer a detailed definition along the lines suggested by Mr. Malek (1958th meeting, para. 6). A detailed definition need not, of course, be exhaustive: a general formula could be adopted, followed by an illustrative enumeration. It was essential, however, to confine war crimes to "grave breaches" of the laws and customs of war and hence to cover only the most serious offences capable of being classified as offences against the peace and security of mankind.

20. He disagreed with Mr. Flitan's suggestion (1958th meeting) that the use of nuclear weapons should be included among war crimes. The Commission had already discussed that question at previous sessions. Certainly, everyone hoped that disarmament negotiations would result in an agreement whereby the threat of the use of nuclear weapons would be reduced, if not eliminated entirely. Nevertheless, he could not agree that the use, or *a fortiori* the first use, of nuclear weapons should be characterized as a war crime. The solution to that problem could only be sought through disarmament negotiations leading to a balanced reduction or elimination of such weapons. The Commission had to be realistic about a problem which, as the Special Rapporteur recognized (1957th meeting), was essentially political. It should not be diverted from its task by proposals which stood no chance of achieving consensus in the Commission, and still less in the General Assembly.

21. On the question of "other offences", it was plain that the Commission could not accept a solution derived from a particular legal system. Moreover, he did not believe that the wider notions of complicity and conspiracy could apply equally to all the crimes in the draft code. A distinction might have to be drawn between, on the one hand, crimes against peace and crimes against humanity, for which the broader notions of complicity and conspiracy might be appropriate if the list of crimes was carefully limited, and, on the other hand, war crimes, to which less extensive notions of complicity and conspiracy could apply.

22. In that connection, it was significant that, notwithstanding the very broad terms of its Charter, the Nürnberg Tribunal had limited to crimes against peace the application of the notion of "accomplices participating in the formulation or execution of a common plan or conspiracy" (article 6, last paragraph, of the Charter). In that context, article III of the Convention on genocide included "conspiracy to commit genocide", "complicity in genocide" and "attempt to commit genocide" as punishable acts. Indeed, it went further by declaring that "direct and public incitement to commit genocide" was punishable. All that would have to be taken into account, so as to avoid anything which might seem to limit the scope of the Convention on genocide.

23. He welcomed the careful conclusions reached by the Special Rapporteur on the matter (A/CN.4/398, para. 131), with perhaps the reservation that the extended notions of complicity and conspiracy should apply to crimes against peace and possibly to crimes against humanity, depending upon the list of crimes to be included under those headings, but not necessarily to war crimes, for which a more limited concept of complicity seemed in principle to be required.

24. Very careful consideration would have to be given to the various crimes to be included under each of the three headings before determining what degree of participation in each particular crime—whether by way of complicity or otherwise—would be appropriate. The mental element would be crucial. In the list of offences suggested by the Special Rapporteur, more emphasis would have to be placed on the requirement that the perpetrator of the offence must have had criminal intent or must at least have acted recklessly or in wilful disregard of the consequences of his act or omission. The necessary *mens rea* could be presumed in certain cases because of the nature of the particular offence, but that would not be so in other instances. Finally, he reserved the right to speak on part IV of the report at a later stage.

25. Mr. BALANDA congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/398) and said that he would make some general comments before dealing with the report itself.

26. With reference to Mr. Sucharitkul's point at the previous meeting about the importance of the use of terms in international law, autonomy was something that international law necessarily had to acquire because it did not have its own terminology. It had to borrow terms and therefore had in some way to keep them at a distance. Almost inevitably, the Commission would have to define certain concepts in the draft code on the basis of terms used in internal law, or rather in different systems of internal law. Hence those concepts should be given a specific content because they did not reflect the same concerns as those expressed in the internal law of States. For example, the concept of "conspiracy" was not always easy to understand because, in some States, it included intent, while in others it included acts committed concomitantly with, prior to and after the principal offence.

27. Secondly, when the General Assembly had invited the Commission to study the present topic, it had been prompted by concerns caused by the Second World War. Consequently, the Commission could not simply submit a list of punishable acts without prescribing penalties and, needless to say, without machinery for enforcement, in which connection there could either be an international tribunal or each State could be left to find the best way of enforcing the penalties. Nevertheless, the time had not yet come for a decision on the matter. The important thing was to take deterrent measures so that anyone who committed an act covered by the code would know that he would be liable to punishment.

28. Thirdly, the Special Rapporteur had done an enormous amount of research on comparative law, but unfortunately had not taken account of the African, Latin-American and Asian legal systems in dealing with "other offences". Yet the third world countries, whether they followed the common-law system or the written-law system, had all established their own means of combating crime. The Special Rapporteur should therefore broaden his study by focusing on the law of those countries, which would not fail to give him ideas to help complete his work.

29. In his view, the question of offences that were linked to another offence through criminal participation should be dealt with as part of the general principles, in connection with which the Commission would have to decide whether or not the theory of criminal participation should be recognized.

30. As to the report itself, he agreed with the Special Rapporteur that there should be three categories of offences and that account should be taken only of the most serious acts. With regard to crimes against humanity, the Special Rapporteur rightly suggested that the original context of the 1954 draft code should be left aside in order to do away with the historical background and select only acts designed to destroy individual human beings and, ultimately, the entire human race. How then should a crime against humanity be defined, having regard to the definition proposed for an offence against the peace and security of mankind? Referring to subparagraphs (*b*) and (*c*) of the first alternative of draft article 3 submitted in the third report (A/CN.4/387, chap. III), he pointed out that "safeguarding the right of self-determination of peoples" and "safeguarding the human being" were virtually the same thing, and therefore the exact difference between offences against the peace and security of mankind and crimes against humanity was not very clear. Just as some elements of the definitions in question were bound to overlap, so some war crimes could also be crimes against humanity. Because of such overlapping, a clear distinction could not be drawn between those concepts.

31. The Special Rapporteur had also been right to exclude the mass element from the definition of a crime against humanity, even though it had been included in article 19 of part 1 of the draft articles on State responsibility, adopted by the Commission on first reading. In view of the particular conception of crimes against humanity as acts endangering the human race as such, there was no need to decide whether isolated or mass acts were involved. If the Commission's concern was for efficiency, it would, in order to punish any act harmful to the human race, have to include any isolated act that would affect the human race through a single individual or several members of a group. Consequently, when it came to consider article 19 on second reading, the Commission would, in the light of the relationship between the topic of State responsibility and the draft code, have to delete the words "on a widespread scale", which had been provisionally retained in paragraph 3 (*c*).

32. The Special Rapporteur had also drawn attention in his fourth report (A/CN.4/398, para. 25), in connection with crimes against humanity, to the importance of motive, which would shed some light on that category of crimes. Although he himself did not deny that intent to exterminate human beings by reason of their race, ethnic group or nationality did play a role, he did not think that intent could be a constituent element of a crime against humanity unless it was linked to a material element.

33. The act and the motive had to be taken into account. With regard to the ethnic, racial or national factors behind ill-treatment and persecution of persons belonging to a particular community, he had some doubts about the distinction drawn by the Special Rapporteur between the ethnic bond and the racial element (*ibid.*, para. 58). He was not an anthropologist, an ethnologist or a sociologist, but it seemed to be apparent from the research work done by experts in the field that the ethnic bond was not without a physiological element. The Commission therefore had to take greater care not to place undue restrictions on certain concepts.

34. Genocide was a generic category of crimes that had to be dealt with separately from other categories of inhuman acts, for which a kind of illustrative definition must be worked out by distinguishing between the intent and the consequences of such acts. In order to be consistent, the Commission must take account not only of physical assaults on the human being, but also of acts which endangered his spiritual and mental health. Slavery should, accordingly, be regarded as an inhuman act, for it set no store on human life. It belittled the individual and turned him into some kind of merchandise or object intended for another individual's use. Rather than speak of slavery *stricto sensu*, however, perhaps the Commission should try to find a more general term to encompass all situations in which human beings were placed in a degrading position. He had in mind, for example, the traffic in women and children, which was an affront to human dignity, and even drug trafficking, which was an affront to the mental integrity of mankind.

35. Despite the political problems associated with weapons of mass destruction, the members of the Commission could not remain indifferent to the manufacture, possession and use of such weapons, since they were ultimately intended for the destruction of the human race. The question that arose was whether the acts of manufacturing, possessing and/or using such weapons should be punished.

36. He wondered whether terrorism had a proper place in a definition that enumerated inhuman acts, particularly since it was already covered by the definition of an offence against the peace and security of mankind proposed in the third report (A/CN.4/387, paras. 124 *et seq.*). Terrorism should definitely be condemned, but it was more a security problem than a serious threat to the human race.

37. On the subject of *apartheid*, it had been said that a number of States had not ratified the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*. The African States, for their part, had not hesitated to condemn the acts involved in that odious crime, which affected them directly and was the result of a system to which the Commission could not remain indifferent. Nevertheless, rather than speak of

apartheid, the Commission might list some of the practices and policies adopted in the context of the *apartheid* system.

38. Because of its relationship to development, serious damage to the environment gave rise to apprehension, doubts or reservations. It was sometimes surprising to see, in some parts of the world, the cause and effect relationship between the impact on the ecosystem of certain agricultural and industrialization policies and population movements and declining birth rates. Nevertheless, account must be taken only of serious damage to the environment.

39. He agreed with the Special Rapporteur's approach of moving away from the spatial and temporal context in dealing with war crimes. The Special Rapporteur had also been right to note in his fourth report (A/CN.4/398, paras. 78-80) that some crimes against humanity could, in time of war, become war crimes.

40. As he had already indicated, it would be preferable to deal with "other offences" in part IV, relating to general principles. Quite apart from the acts to which it related, criminal participation should be covered in the draft code, which would otherwise be incomplete. Complicity should also be kept in mind, but the concept had to be broadened in view of the differences that had come to light as a result of the comparative study carried out by the Special Rapporteur. There again, the autonomy of the draft code had to be affirmed. In the case of collective responsibility, the Special Rapporteur pointed out that, in criminal law, an individual must have taken part in a wrongful act in order to become liable to punishment, and that collective responsibility might be regarded as a set of responsibilities. By agreeing to become a member of a group or an association, an individual became a link in a chain and, as such, incurred individual responsibility, which, together with that of the other members of the group or association, constituted collective responsibility.

41. Mr. REUTER, after commending the Special Rapporteur on his quite remarkable fourth report (A/CN.4/398), said that he would make some general comments on questions of methodology and then move on to the problem of nuclear weapons and explain why he was not in favour of including any provisions in that regard in the draft articles.

42. As to methodology, if the Commission intended, as it had always done so far, to prepare a text leading to a convention acceptable to the largest possible number of States, it would have to lower its sights and take care not to prepare too lengthy a set of articles. In other words, the draft could not include all the provisions the Commission would like it to contain. A choice, possibly painful for some, had to be made.

43. The provisions the Commission had to draft were provisions of criminal law and they had to be as precise as possible. A number of cases would inevitably call for vague formulations simply as conjurations—which indeed were not always pointless—but, generally speaking, efforts had to be made to prepare draft articles that would genuinely be of a legal nature.

44. For example, one provision that would have to be made clearer was draft article 11, paragraph 3 (*b*), which specified that "exerting pressure ... of an economic or political nature against another State ..." was a crime against peace. As it now stood, paragraph 3 (*b*), although it stated an entirely correct idea, was not satisfactory and could not be included in a legal instrument. In the modern-day world, States, whether producers or consumers of petroleum, mainframe computers, etc., were subjected to pressure of all kinds and, although the developing countries' concerns were entirely understandable, it was no less true that, when they were in a position to do so, they too exerted pressure of the kind referred to in paragraph 3 (*b*).

45. Similarly, the concept of "colonial domination" used in article 11, paragraph 7, would have to be clarified. Colonization as practised in the past by the European countries had undeniably been responsible for many crimes, but it was now an outdated form of domination. If the Commission wanted its work to serve some purpose, it had to decide exactly what that term meant and formulate a precise definition that would take account of the new forms colonization might take in the future.

46. The question of the seriousness of offences had been discussed at length, and all the offences listed in the draft articles were serious in terms of object and purpose, but to varying degrees. Thus, if the Commission attempted—and it would be no easy task—to identify forms of aggression other than aggression by armed force, and if it succeeded in doing so, aggression by armed force, which was particularly serious, would still be, as everyone had always agreed, the offence against the peace and security of mankind *par excellence*.

47. With regard to penalties for such offences, the Special Rapporteur had stipulated in draft article 4 that an offence against the peace and security of mankind was a universal offence. In other words, any State would be entitled to punish such an offence. That in itself was an innovation, because it was highly unlikely at the present time that a State would decide to try the perpetrator of an offence which had no connection with its territory, its nationals or its government services.

48. Article 4 also stipulated that every State had the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory and, despite his justifiable reservations, the Special Rapporteur had not ruled out the solution of establishing an international jurisdiction. However, if the Commission decided to adopt that solution and to provide for the establishment of an international jurisdiction, the existence of such a body could well dissuade countries from accepting the code. In order to avoid that problem, it might be necessary to restrict the competence of such a jurisdiction to certain offences and therefore distinguish between offences on the basis of their degree of seriousness.

49. He had doubts about the intermediate solution of making it an obligation for States to try or extradite the perpetrators of offences against the peace and security of mankind arrested in their territory—a solution which seemed to appeal to most members of the Commission.

There was no certainty that Governments and States would be prepared to accept those two obligations, particularly in the case of terrorism. In most instances, terrorist acts were disinterested acts committed by idealists whose aim was to alert public opinion and draw attention to the existence of unbearable situations. Moreover, in the modern-day world, where everything was based on the delicate balance of terror, countries possessing nuclear weapons themselves practised their own brand of terrorism. States did take measures against terrorism in their territory and even at the regional level, but it was not at all certain that they would be prepared, for the reasons he had just mentioned, to try or hand over terrorists. Again, from the standpoint of judicial institutions, a State could not try the perpetrator of an act which had been committed outside its territory.

50. One might well ask, therefore, whether it was really wise to enunciate general rules that would be applicable to all the offences under consideration. It would be better to adopt a pragmatic approach, to examine each offence individually and to study not only the obligations to be imposed on States and the rights to be made available to them in each case, but also other offences.

51. The Special Rapporteur had incorporated conventions in the draft articles and reproduced treaty provisions. In that connection, it had been asked whether it was appropriate for the draft code to reproduce the text of conventions which had not entered into force or had been ratified by only a small number of States. In his opinion, the Commission should display great flexibility and settle the matter on a case-by-case basis. Conventions which had been ratified by only a small number of States but to which no State had actually formulated reservations could be cited. On the other hand, the Commission would be taking a risk if it reproduced the provisions of conventions to which States had formulated express reservations. He would be quite unable to agree that the Commission should characterize as conventions of the international community instruments such as Additional Protocol I[7] to the 1949 Geneva Conventions, which had been the subject of major reservations by some States. If the Commission intended to invoke some of the general principles of humanitarian law, it must first be certain that the principles were widely recognized.

52. He would, however, have no objection if the draft articles contained provisions taken from the draft international convention against the recruitment, use, financing and training of mercenaries,[8] the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

53. The Special Rapporteur had distinguished three categories of offences; but there was a kind of relationship, an interdependence, between those categories which the Commission could not overlook and which made it impossible to draw a clear-cut distinction.

54. The Commission would also have to decide whether the draft code should apply only to offences by individuals committed on account of the State or also to offences by individuals having no link with the State. If it adopted the latter solution, which was of course more liberal, it might, because of certain definitions of inhuman treatment, for example, have to study two difficult questions, namely the protection of national minorities and, more generally, the protection of human rights. Such problems provided an indication of the magnitude of the task facing the Commission.

55. Perhaps the most tragic aspect of nuclear weapons was not so much the destruction they caused—it was even conceivable, in view of rapid scientific and technological progress, that selective "clean" nuclear weapons would be developed—as the fact that they created a new world in which the real bordered on the imaginary and psychological and other elements that were difficult to understand had to be taken into account. It had even been said that such a world was beyond the law and that, on nuclear issues, it was impossible to reason on the basis of the traditional categories of law. If that was actually true, it would be necessary to outlaw the manufacture, possession and use of, and trade in, nuclear weapons and all new types of weapons.

56. Nevertheless, he was not in favour of including provisions on nuclear weapons in a set of draft articles, for two reasons.

57. The first reason was technical. In order to formulate a provision that would be something more than a pious wish, the Commission would be compelled to study in detail a number of extremely technical questions and, for example, determine the period of time between the first use of the weapon and the response thereto and decide how that period of time was to be measured. Did it begin when the weapon was launched or when it reached its target? Conceivably, the response would be made before the weapon of which a State made first use had achieved the purpose for which it was intended. Clearly, the Commission was in no position to carry out a study of that kind.

58. The second reason was political. He was convinced that Governments and States which had unilaterally undertaken not to make first use of nuclear weapons had done so for the purpose of drawing the world's attention to the seriousness of that offence and encouraging negotiations on the matter.

59. The proposal to outlaw the "first use of nuclear weapons" and the various other proposals made in that regard would all have the effect of altering the balance of forces; but peace depended on that precarious balance, and hence extreme caution was called for. He would not go into the question of deterrence, but would point out that, faced with countries much more powerful than they were in every respect, many States considered, rightly or wrongly, that the inclusion of such a formulation in the draft articles would in effect mean that an aggressor had a choice of weapons.

60. The prohibition of the use of nuclear weapons was a very sensitive issue and was better left alone, par-

[7] See 1959th meeting, footnote 6.

[8] See *Official Records of the General Assembly, Fortieth Session, Supplement No. 43* (A/40/43), chap. V.

ticularly since countries had been observing a relative truce in that regard since 1945. At present, the most serious problem of mankind was aggression. It was true that, since the end of the Second World War, not one country had admitted to being the aggressor, but that did not mean that there had been no aggression. What measures had the international community taken to come to the aid of countries subjected to aggression? For example, what had it done to support Lebanon, a country which had been the victim of aggression a number of times and was now in the course of being destroyed? The international community's passive attitude should prompt the Commission to be cautious. He fully understood that others might have a different point of view on that issue, but reaffirmed that he was not in favour of the idea of including in a set of draft articles provisions concerning the use of nuclear or other weapons.

The meeting rose at 1 p.m.

1961st MEETING

Friday, 6 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Mahiou, 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 Mankind[1] (*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) (*continued*)

1. Mr. ILLUECA said that the elaboration of a draft code of offences against the peace and security of mankind was a difficult task which would take a long time, but the Commission should be encouraged to go forward by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which the General Assembly had adopted by consensus at its fortieth session,[4] and by resolution 40/148 of 13 December 1985, in which the General Assembly had reaffirmed that the prosecution and punishment of war crimes and crimes against peace and humanity constituted a universal commitment for all States, and had set out the measures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror.

2. If the code was to be an effective instrument and satisfy the aspirations of all peoples, it would have to define the different offences it covered, provide for the attribution of responsibility both to States and to private individuals, deal with the penalties to which those committing the offences were liable and provide for the establishment of an international criminal jurisdiction.

3. In draft article 10, on the categories of offences against the peace and security of mankind, the Special Rapporteur had faithfully followed the classification adopted in article 6 of the Charter of the Nürnberg Tribunal, paragraphs (*a*), (*b*) and (*c*) of which referred respectively to crimes against peace, war crimes and crimes against humanity; in article II of Law No. 10 of the Allied Control Council; in article 5 of the Charter of the Tokyo Tribunal; and in Principle VI of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

4. In article 10, the Special Rapporteur had also offered a choice between the expressions "war crimes" and "crimes committed on the occasion of an armed conflict", with an alternative of draft article 13 corresponding to each of those expressions. Yet there seemed to be a very clear difference between "war" and "armed conflict", for although both involved hostile relations, they did not have the same legal consequences.

5. On that point it might be noted that, during the past 40 years, a number of events had upset the rules of international law forming the "law of war". The hostilities in Korea from 1950 to 1953, the fighting in Indochina from 1946 to 1954 and the Suez crisis in 1956 were three examples of armed conflicts that were not classified as wars. In none of those conflicts had there ever been a general recognition of a state of war. On the contrary, in referring to the hostilities in the Suez Canal zone, the United Kingdom authorities had spoken of a "state of conflict", declaring expressly that: "Her Majesty's Government do not regard their present action as constituting a war. ... There is not a state of war, but there is a state of conflict."[5]

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

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

[4] General Assembly resolution 40/34 of 29 November 1985, annex.

[5] United Kingdom, *Parliamentary Debates* (Hansard), 5th series, vol. 558, *House of Commons*, session 1955-56 (London, 1956), debate of 1 November 1956, col. 1719.