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Summary record of the 1961st 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

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.

6. Some people believed that the authors of the Charter of the United Nations had foreseen the occurrence of conflicts which were not really wars. Article 39 of the Charter did not mention war, but dealt only with measures which the Security Council could take in the event of "any threat to the peace, breach of the peace, or act of aggression" in order "to maintain or restore international peace and security". In resolution 378 A (V) of 17 November 1950 on the duties of States in the event of the outbreak of hostilities, the General Assembly had made an even clearer distinction between the outbreak of war and the opening of hostilities, since it had declared that States had a duty to avoid war even after the opening of hostilities.

7. The 1949 Geneva Conventions stipulated that their provisions applied in the case of war or any other armed conflict. The 1977 Additional Protocols to those Conventions extended the scope of the expression "armed conflict" by making a distinction between international armed conflicts and non-international armed conflicts. That new concept responded to the "necessity of applying basic humanitarian principles in all armed conflicts", a necessity which the General Assembly had recognized in resolutions 2444 (XXIII) of 19 December 1968 and 2597 (XXIV) of 16 December 1969. The expression "armed conflict" was also used in articles 44 and 45 of the 1961 Vienna Convention on Diplomatic Relations.

8. The main arguments which had been advanced for introducing the concept of non-war hostilities into legal terminology included: (*a*) the desire of States not to be accused of a breach of the obligation not to go to war which they had assumed by acceding to such treaties as the Kellogg-Briand Pact;[6] (*b*) concern that States not parties to a conflict should not declare themselves neutral and impede the conduct of hostilities by adopting restrictive neutrality rules; (*c*) the wish to localize the conflict and prevent it from degenerating into generalized war.

9. Thus it was clear that there was a strong current of opinion in favour of the distinction between war proper, which was between States, and armed conflicts or breaches of the peace, which were not confined to hostilities between States and in which non-State entities might be involved. To solve the problem posed by the Special Rapporteur (A/CN.4/398, para. 74), it was not sufficient to replace the term "war" by "armed conflict". It was necessary to mention war proper, as well as international armed conflicts and non-international armed conflicts. The Commission might therefore consider amending the last part of draft article 10 to read "... and war crimes or crimes committed on the occasion of an armed conflict or other hostile relations".

10. For draft article 13 he recommended the adoption of a mixed formula, namely a statement of the elements characterizing a war crime and a non-exhaustive list of acts or omissions which constituted war crimes, without altering the general definition. The definition of war crimes proposed by the Special Rapporteur in the second alternative could be amplified to read:

> "Any serious violation of the conventions, rules and customs applicable to war proper, international or non-international armed conflicts and other hostile relations constitutes a war crime."

11. The provisions on crimes against peace, which would subsequently have to be made more specific, were imbued with great wisdom, and the mixed method of definition and enumeration adopted by the Special Rapporteur was entirely appropriate, especially in the case of aggression. In that connection, the provision in draft article 11, paragraph 1 (*b*), that the acts in question qualified as acts of aggression "regardless of a declaration of war" was of great importance.

12. Article 11, paragraph 3 (*b*), provided that "exerting pressure ... of an economic or political nature against another State ..." constituted aggression. In that regard it should be noted that, in resolution 2184 (XXI) of 12 December 1966, the General Assembly had condemned as crimes against humanity the violation of the economic and political rights of indigenous populations.

13. With regard to the place to be accorded to international terrorism in the draft code, several opinions had been expressed during the debate. It had been said that international terrorism should be classed both as a crime against peace and as a crime against humanity, but it had also been said that it should perhaps be classed only as a crime against humanity. For his part, he thought the Special Rapporteur had been right to include terrorism in the list of crimes against peace, for it was linked with other crimes against peace such as colonial domination. Moreover, that was a fact that the General Assembly had recognized in resolution 40/61 of 9 December 1985 on measures to prevent international terrorism. In that resolution, which had been adopted by consensus, the General Assembly had unequivocally condemned as criminal all acts, methods and practices of terrorism, and had urged all States, as well as relevant United Nations organs,

> to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations ... that may give rise to international terrorism and may endanger international peace and security;

14. Under the terms of draft article 11, paragraph 5 (i),

> 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;

constituted a crime against peace. There was a whole series of General Assembly resolutions relating to the prohibition of different types of weapons. At its fortieth session, for example, the General Assembly had adopted, in December 1985, resolution 40/92 A on the prohibition of chemical and bacteriological weapons and, most important, resolution 40/151 F, which made it the Commission's duty to mention nuclear weapons expressly in draft article 11, paragraph 6, since in that resolution and in the draft Convention on the Prohibi-

[6] General Treaty for Renunciation of War as an Instrument of National Policy, of 27 August 1928 (League of Nations, *Treaty Series*, vol. XCIV, p. 57).

tion of the Use of Nuclear Weapons annexed thereto, it was stated that the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity.

15. That affirmation raised a related question: in what category of crimes should the use of nuclear weapons be placed? He thought the Special Rapporteur should take account of the fact that, in the last two documents he had mentioned, that crime was qualified not as a crime against peace but as a crime against humanity.

16. Resolution 40/87 of 12 December 1985 on the prevention of an arms race in outer space, in which the General Assembly reaffirmed that States should refrain from stationing nuclear weapons in outer space, also showed the Commission the course it should follow.

17. With regard to draft article 11, paragraph 8, which provided that "the recruitment, organization ... of mercenaries" constituted a crime against peace, he pointed out that, in resolution 40/74 of 11 December 1985, the General Assembly had recognized that

> the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and seriously impede the process of self-determination of peoples struggling against colonialism, racism and *apartheid* and all forms of foreign domination,

and that they had a pernicious impact on international peace and security.

18. Referring to crimes against humanity, he welcomed the way in which the Special Rapporteur had dealt with genocide and *apartheid* in draft article 12. Genocide, which presupposed an accumulation of acts and a set of conditions, could not be committed by individuals alone. It was therefore necessary to provide for the responsibility, both civil and criminal, of the State. *Apartheid* had been condemned by the General Assembly as a crime against humanity in resolution 2202 A (XXI) of 16 December 1966.

19. The General Assembly, to which the Commission was answerable and to which it had to render an account of its work, had thus adopted numerous resolutions directly relating to the question of offences against the peace and security of mankind. In view of the importance in international law and the moral weight of General Assembly resolutions, many of which had been adopted by consensus and which, in numerous universities, were studied in the same way as the sources of international law referred to in Article 38 of the Statute of the ICJ, it might be advisable to consider asking the Secretariat to undertake a study of those resolutions and, more generally, of all the relevant resolutions and conventions adopted both inside and outside the United Nations system. Such a practical study could greatly facilitate the Commission's task.

20. The provisions relating to "other offences" in part IV of the draft code required meticulous study, because some of the offences proposed might be a source of error or injustice. That applied in particular to "conspiracy" or "agreement", an idea that was to be found in article 6 (*a*) of the Charter of the Nürnberg Tribunal, which defined a crime against peace as:

> ... planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Agreement to commit war crimes and crimes against humanity during the period from January 1933 to April 1945 had also been the first of the charges brought against the Nazi war criminals. But the question was whether the draft code should include a notion that was linked with very special circumstances and had been used for a very specific purpose, namely prosecution of the Nazis. In taking up that notion, the Commission would be entering the sphere of politics and should be extremely cautious. It was well known, for example, that the objectives defined in a country by a political party, whatever it might be, could be considered legitimate by the nationals of that country yet constitute a threat to other countries. It was also well known that, whenever there was a conflict, the victors were heroes and the vanquished were criminals.

21. The Commission should therefore exercise the greatest caution, for the provisions on "other offences" were the very type of provisions which could be used to start a witch-hunt and commit all kinds of injustice.

22. Mr. OGISO, after congratulating the Special Rapporteur on his work, said that the decisions of the Nürnberg and Tokyo Tribunals, referred to in the fourth report (A/CN.4/398), had some bearing on the subject-matter of the topic but were none the less of limited value as precedents for the Commission's work. First, those tribunals had not been international criminal courts in the true sense, but rather courts consisting of representatives of the Allied Powers only; and secondly, they had been under a political obligation to punish as many influential leaders as possible, rather than apply the existing law of nations. Article II of Law No. 10 of the Allied Control Council, referred to in the report in the context of complicity (*ibid.*, para. 101), had provided that any person was deemed to have committed a crime if he had belonged to an organization or group connected with the commission of the crime, thereby regarding membership of a group as an autonomous offence. That approach represented a considerable departure from the usual thinking regarding criminal law in general. Another example was to be found in the comment of Judge Biddle (*ibid.*, para. 161) that "the question ... was not whether it was lawful but whether it was just to try ...".

23. Referring to parts I and II of the report, he welcomed the Special Rapporteur's division of offences against the peace and security of mankind into three categories. The Special Rapporteur was right to state (*ibid.*, para. 19) that the word "crime" should cover only the most serious offences. In that connection, at the previous session,[7] he had himself expressed concern about the notion of "most serious offences", because of its necessarily subjective nature, and had pointed out that the establishment of an international criminal court was essential in order to ensure that the application and interpretation of the rules relating to the "most serious offences" were as objective as possible. In addition, it

[7] See *Yearbook ... 1985*, vol. I, p. 43, 1884th meeting, para. 15.

was desirable, if not necessary, to develop a set of criteria to be applied by the court in considering cases involving such crimes.

24. There were two key elements as far as crimes against humanity were concerned. First, there was a mass element, meaning: (*a*) that the crime must have been committed against a group or number of people within a group, so that the consequences of the criminal act were often of a widespread nature; (*b*) that the act itself must have been organized and executed systematically. Without the mass element, the draft code could be misinterpreted as applying to an isolated offender. Equally important was the second element, that of intent. Even when the number of victims was large, the act could not be classed as a crime against humanity if the intent of the author had not been to destroy a national, ethnic, racial or religious group as such. Those two elements would help to make judgments more objective. Objectivity was important, since the degree of seriousness of an act could be interpreted differently depending on a person's national background. For example, the mass destruction of the civilian populations of Hiroshima and Nagasaki by atomic bombs had at the time been described by the United States of America as necessary to minimize United States losses in the event of a landing in Japan. In other words, the suffering of the civilian populations of those two cities had been regarded by the United States as less serious than the hypothetical loss of its own soldiers' lives. Conversely, the Japanese view had been that the act had been unjustified.

25. He endorsed the Special Rapporteur's view that genocide should be given an autonomous place as a crime against humanity, for the draft code would be without prejudice to existing conventions. He had no objection to *apartheid* being treated in the same way. Moreover, while he had some doubts as to the precise legal definition of inhuman acts *per se*, he could accept the idea of giving them a separate place as crimes against humanity, provided they were defined to include murder, extermination, enslavement, deportation and persecutions, and also incorporated the mass element and the element of intent. With regard to serious damage to the environment, article 19 of part 1 of the draft articles on State responsibility provided that such acts were international crimes, thereby placing the author State under additional obligations as legal consequences of its act. However, the question of State responsibility was one thing, and the criminal responsibility of the individual for offences against the peace and security of mankind was another. Moreover, the criminal responsibility of the individual should be regarded as being incurred only when the author of serious damage to the environment had acted with intent.

26. He was inclined to agree that the term "war crime" could be used to denote serious violations of humanitarian laws and customs as applied to armed conflicts in general. The risk of confusion between a war crime and a crime against humanity might be avoided, as suggested by the Special Rapporteur (*ibid.*, paras. 79-80), by categorizing an inhuman act committed in time of war as a war crime, while the same act committed in time of peace would be categorized as a crime against humanity.

27. On the question of methodology, he supported the idea of an enumeration. The mere formulation of a code of criminal offences would be not only useless, but also harmful if it was not accompanied by an implementation procedure. It was a matter of general principle, as pointed out by other members. Furthermore, it was essential to show as clearly as possible which acts were liable to punishment as war crimes under the code and to indicate the laws and customs of war under which those acts were punishable. In view of the practical difficulties involved, the enumeration would have to be illustrative rather than exhaustive. In that connection, Mr. Calero Rodrigues (1959th meeting) had wondered how new war crimes could be dealt with. A possible solution would be to attach a list of crimes to the future convention as an additional protocol, which could be revised by a simple amendment procedure to take account of new crimes.

28. The question of nuclear weapons could pose an additional problem. His initial reaction was that the use of nuclear weapons should be treated as a war crime if a convention prohibiting their use was concluded and entered into force. The relevant provision in the code might read:

> "The use, production or stockpiling of weapons of mass destruction shall be regarded as a war crime when and to the extent that they are prohibited by international agreement."

29. As to the question of other offences, the concept of complicity, as utilized in the Charters of the Nürnberg and Tokyo Tribunals to encompass leaders, organizers, instigators and accomplices, had been based on the political desire to "let no act go unpunished", rather than on a concern for legal exactitude or rationality, as the Special Rapporteur noted (A/CN.4/398, para. 104). The Commission should avoid extending the application of positive law unnecessarily and thereby casting doubts on individuals who had not committed explicit violations under international law. One of the basic principles of criminal law should be the presumption of innocence. In that connection, the Special Rapporteur seemed (*ibid.*, paras. 106-112) to be in favour of an automatic extension of complicity to military commanders, based on an assumption of responsibility attaching to them simply by virtue of their position of command. In determining the responsibility of a military commander, it should first be ascertained whether the commander had known of the criminal acts committed by his subordinates and, if so, whether he could have prevented such acts or could have exercised control over his subordinates for that purpose. In the *Yamashita* case (*ibid.*, para. 109), the United States Supreme Court did not appear to have assumed that General Yamashita was automatically responsible because of his position as military commander in the area. Rather, it had assumed his complicity because he had permitted his subordinates to commit extensive atrocities when he had been in a position to know of their criminal acts and prevent them. Consequently, the case could provide a precedent for automatic incrimination of military commanders only

when they permitted their subordinates to commit criminal acts.

30. The legal content of the concept of conspiracy differed from one legal system to another. Moreover, the Judgment of the Nürnberg Tribunal made for a narrow definition of conspiracy applying only to crimes against peace, something which was not in line with the broader concept stated in the Nürnberg Charter. As the Special Rapporteur stated (*ibid.*, para. 121):

> ... Contrary to the general principle of criminal law under which an individual is responsible only for his own acts, for acts which may be ascribed to him personally, conspiracy attaches collective criminal responsibility to all those who have participated in the agreement.

Personally, he thought that individual responsibility should, as far as possible, be treated as a general principle in the case of war crimes. He therefore had doubts about the Special Rapporteur's conclusion (*ibid.*, para. 126) that conspiracy became a general theory of criminal participation.

31. Again he had considerable doubts as to the advisability of including concepts such as complicity and conspiracy in the draft code, because they were vague and were open to different interpretations, depending on the internal law of the country concerned. If the Commission wished to include them in the code, however, they should be applied more restrictively, the concept of conspiracy being used only for crimes against peace and for the crime of genocide, as already provided in article III of the 1948 Convention on genocide.

32. The concept of attempt should be interpreted as the commencement of execution of an act regarded as an offence under the code, when the act had either failed or been halted because of circumstances beyond the control of the would-be perpetrator. Mere preparation should not be interpreted as a criminal act, as pointed out by the Special Rapporteur (*ibid.*, para. 144). The borderline between attempt and preparation was fairly clear if attempt was regarded as he had suggested.

33. Mr. TOMUSCHAT congratulated the Special Rapporteur on his fourth report (A/CN.4/398) and said that the draft code, along with the draft articles on State responsibility, was not only the most politically sensitive topic currently before the Commission, it was also one that raised considerable difficulties at the purely legal level. In suggesting a set of rules that would entail the most serious consequences for individual human beings, the Commission bore a heavy responsibility. Typical inter-State law that did not strike a fair balance between all the interests involved would simply be ignored; but the code would cover individuals, who would not be in a position to dismiss measures of prosecution merely because they deemed them to be unfair. In proceeding from the perceived need to impose penal sanctions in cases of grave violations of civilized values, the Commission should not lose sight of the fact that every trial began with a charge against a person who was presumed innocent until proved guilty. Defining offences too loosely would considerably increase the risk of individuals having to stand trial even though they had observed the law. Generally speaking, therefore, the draft code should be limited to a hard core of offences identifiable in law as well as in fact.

34. In regard to crimes against humanity, the basic question was whether such a specific category was really needed. All the acts mentioned in draft article 12, paragraph 3, were punishable under the laws of any civilized nation. They none the less had to be included in the code because it was precisely when a country suddenly repudiated the standards of civilized human conduct that international sanctions became necessary. Many States had passed through periods of political anarchy, when the rule of law had broken down and human life had been at the mercy of arbitrary Governments. Contrary to the hopes expressed in 1945, instances of genocide still occurred. Clearly, it was essential for the draft code to stipulate that genocide was an offence.

35. The second question was whether the draft code should relate only to crimes which had been perpetrated under the authority of the State or with the toleration of the public authorities, or whether it should also encompass common crimes. In the case of crimes against humanity, the Commission could largely avoid taking a stand. Basically, there was no need to incorporate common crimes which were regarded as reprehensible by all States and were effectively prosecuted by all civilized Governments. Drug trafficking, for example, could safely be left out of the draft code, and terrorism remained a borderline case.

36. There was also the question whether offences already punishable under existing treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide, should be made part and parcel of the draft code. In his opinion, it made sense to reiterate the prohibition on genocide inasmuch as it was the Commission's goal to round off the code by establishing an international criminal court competent to adjudicate all the offences covered by the code. As was well known, plans to establish an international penal tribunal within the framework of the Convention on genocide had not been pursued, so that only the courts of the country in which the alleged criminal acts had been committed had jurisdiction. That limitation meant that no prosecution of the culprits by the authorities of another State was legally possible.

37. The wording of draft article 12, paragraph 1, was satisfactory, for it was taken almost verbatim from article II of the Convention on genocide, with the exception of subparagraph (v), which should also be brought fully into line with that Convention.

38. *Apartheid*, as the ICJ had stated in its advisory opinion of 21 June 1971 on Namibia,[8] could not be reconciled with the prohibition of discrimination contained in Article 1, paragraph 3, of the Charter of the United Nations. It was also prohibited under article 19 of part 1 of the draft articles on State responsibility. However, the Commission was now dealing with the criminal responsibility of the individual and the ques-

[8] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 57, para. 129.

tion was whether a rule had already developed making participation in the policy of *apartheid*, as practised by the Government of South Africa, a criminal act punishable under international law. In fact, not a single Western State had so far ratified the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the reason being that the scope of the crime had been drafted in such broad terms that practically every South African could be liable to the sanctions prescribed in the Convention. Accordingly, the rules on participation called for the most careful scrutiny. In short, to establish that acts of *apartheid* were criminal offences would go beyond codification and amount to an innovative decision which, while possibly justifiable in that it purported to strike at political leaders, would none the less make little sense if it meant declaring that an entire people was criminal. As to the actual wording of the provision, he would prefer the second alternative of draft article 12, paragraph 2. A criminal code should be self-contained and not confine itself to *renvois* to texts which were unfamiliar to ordinary individuals.

39. Paragraph 3 of article 12 was too broad. The 1954 draft code had stated that the acts in question must have been carried out by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities. Without that qualification, many common crimes would fall within the purview of the code. It should be borne in mind that the code was needed only when there was connivance on the part of the authorities of the State concerned. He also had doubts regarding the meaning of the term "persecutions". In some States, specific groups were subjected almost daily to political or religious persecution. In order to be consistent, the Commission would have to extend to political or religious persecution the rules applicable to the crime of *apartheid*. In any event, further clarification was required.

40. Mr. Calero Rodrigues (1959th meeting) was right to say that paragraph 4 of draft article 12 was still couched entirely in terms of inter-State relations and, as it stood, could not possibly form a basis for criminal prosecution. No one knew what the obligations of essential importance for the safeguarding and preservation of the human environment were. It would also be necessary to clarify whether the element of intent was required or whether mere negligence would suffice for an act to be considered a violation of such obligations.

41. In regard to part II of the report, he endorsed the Special Rapporteur's idea of retaining the traditional term "war crimes", which had a firmly established place in international law. It was, of course, universally agreed that war crimes had to be construed as encompassing all crimes committed on the occasion of armed conflicts. The suggestion by Mr. Illueca that the expression should also cover other hostile relations none the less went much too far. Similarly, the concept of war as formulated by the Special Rapporteur, namely "any armed conflict pitting State entities against non-State entities" (A/CN.4/398, para. 76), was too broad. Clearly, the entities concerned had to have certain specific characteristics, which were carefully set out in the 1977 Additional Protocol I (*ibid.*, para. 75).

42. He would caution against the use of the expression "customs of war", even though it figured in earlier texts drafted by the Commission. He drew attention in that respect to Hague Convention IV of 1907, the well-known annex to which was entitled "Regulations respecting the Laws and Customs of War on Land"[9] and thus related to a legally consolidated body of rules, rather than mere practices. Accordingly, to avoid any misunderstanding, the appropriate reference throughout the draft code should be to the "rules of war" or "laws of war".

43. Quite clearly, the draft code should cover only "grave breaches" within the meaning of the four Geneva Conventions of 1949. Not every violation of the rules of war was serious enough to warrant international repression. Consequently, for the sake of clarity, the relevant articles of the Geneva Conventions should be reproduced, but on the understanding that they were simply meant to provide examples, thereby leaving the door open for developments in the future.

44. The humanitarian law of the Geneva Conventions and the rules of warfare of the Hague Conventions had once been clearly differentiated. The 1977 Additional Protocols had partly done away with that distinction, but the rules limiting the use of specific weapons still constituted a separate category. He therefore suggested the insertion in the draft code of an additional article containing all the prohibitions that were generally agreed upon and were contained in such instruments as the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,[10] the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,[11] and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.[12]

45. It was, of course, highly desirable to do away with nuclear weapons, but that aim could not be achieved simply by declaring that their use was a war crime. Pressure should be brought to bear upon the nuclear States to break the dreadful spiral of the arms race, which had already brought mankind to the brink of self-destruction. The draft code could not rid the world of nuclear weapons; diplomatic efforts were the sole means available to achieve that result. It was not enough to seek guarantees to the effect that such weapons would not be used; it was equally important to halt their production and to destroy existing stockpiles on the basis of agreements on mutually verifiable disarmament.

46. With reference to the "other offences", he too thought that the rules on participation and attempt came under the heading of general principles. Again, Sir Ian Sinclair (1960th meeting) had rightly suggested that,

[9] See 1958th meeting, footnote 7.

[10] League of Nations, *Treaty Series*, vol. XCIV, p. 65.

[11] United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 118.

[12] United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), p. 113.

after completion of the list of crimes, a careful examination should be made on a crime-by-crime basis to determine whether complicity was conceivable and, if so, whether it should be made a punishable offence. That inductive approach was preferable to a deductive approach, in view of the novelty of the questions which arose.

47. Generally speaking, an attempt to commit a crime should not in itself be a punishable offence. It should be remembered that the Special Rapporteur had placed a broad spectrum of acts in the category of crimes against peace. If, for instance, a major international crisis was averted through the efforts of the Security Council, the international community should rejoice and not immediately call for the application of a code of offences. On the other hand, crimes against humanity were normally mass phenomena, even if the actual victim was one single person. Even there, the act would have to "reveal a consistent pattern of gross and reliably attested violations"[13] for it to be considered by the international bodies competent to deal with violations of human rights. In order for justice to be done, however, it would always be sufficient to prosecute the persons who had actually ordered one of the crimes listed in the draft code.

48. To sum up, it would be better if the rules on complicity and attempt were drafted only after the catalogue of crimes had been drawn up.

49. Mr. BOUTROS GHALI, after conveying to the Special Rapporteur his regret at being unable to be present during his oral introduction of his fourth report (A/CN.4/398), said that, like Mr. Balanda at the previous meeting, he had already drawn the attention of members to the importance that should be attached to research into comparative law on the conflicts which had broken out since the Second World War in Africa, Latin America and Asia and which were not mentioned in the report. A number of countries in those regions had been the setting for conflicts, serious violations of the law and even genocide. Hence it was not third world nationalism which prompted him to press the issue, but the facts themselves. Mr. Reuter (1960th meeting) had said that subversive activity, terrorism, had been the weapon of the poor States, which had resorted to it even in conflicts between one another. For that reason, the Secretariat should conduct research on the *travaux préparatoires* of the OAU Charter,[14] more particularly the discussions that had given rise to article III, paragraph 5, of that Charter, which unreservedly condemned political assassination as well as subversive activities waged by one State against another, on the Declaration of Brazzaville of 19 December 1960, concerning subversive activities, and on the work which had preceded the adoption of the Declaration on the Problem of Subversion at the second ordinary session of the Assembly of Heads of State and Government of OAU, held in Accra in October 1965.[15] Such research was warranted by the need to scrutinize the steps undertaken for the peaceful settlement of conflicts and to establish whether such conflicts revealed an element of aggression or the threat of aggression.

50. Again, the draft code failed to mention press and radio campaigns that were waged before the outbreak of a conflict and were a major element in subversive activities. OAU had issued numerous appeals urging one State or another to put an end to agitation over the airwaves. He had no pre-set idea about the most appropriate draft article in which to cover that type of activity, which might well relate to the provisions on aggression, on the threat of aggression or on terrorism. The crux of the matter was that it should be included in the draft code, as should the other aspect of indirect aggression represented by manipulation of political refugees by one State to the detriment of another, a course of conduct which was all too easy in Africa inasmuch as Africa had five million refugees. In that connection, he recalled the experience long ago of the committee established in 1942 by the Governing Board of the Pan-American Union to combat subversion in Latin America.[16] Yet another subject of research should be the new forms of terrorism and counter-terrorism. In particular, he had in mind hostage-taking, which came under the heading of subversive activity. The draft code was of interest to the third world, since the major armed conflicts nowadays took place in some of those countries, and he wished to add that the ravages of terrorism were very often passed over in silence in the third world itself.

51. Mr. THIAM (Special Rapporteur) said that the Commission's aim was to work out a criminal code and thus consider legal problems, not to conduct a study of political sociology on the way in which States acted to combat subversion, a study that could lead the Commission to stray from the proper path into byways.

52. At the conference to establish OAU, subversion had indeed been one of the first items to engage the attention of the participants. Nevertheless, after considering the matter, he had come to the view that it was not one offence in itself, for it covered a range of very different acts, such as terrorism, political assassination, and civil war fomented from abroad by pitting one part of the population against another. A distinction had to be made between subversion and criminal acts.

53. If he had drawn on the experience of the third world countries, his report would have taken on the dimensions of a book or a treatise, something which seemed all the more pointless in that genocide, for instance, was defined everywhere in the same terms, as was *apartheid*. Why single out the law of the third world countries when it was, generally speaking, based on either the common-law or the civil-law system? He was ready to go further into the matter if the Commission urged him to do so, but he did not think that it would be of any advantage to the draft. Moreover, it should be

[13] Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, entitled "Procedure for dealing with communications relating to violations of human rights and fundamental freedoms", para. 1.

[14] United Nations, *Treaty Series*, vol. 479, p. 39.

[15] OAU, resolution AHG/Res.27 (II).

[16] See resolution XVII adopted by the Third Meeting of Consultation of Ministers of Foreign Affairs of the American Republics (Rio de Janeiro, 15-28 January 1942), *The International Conferences of American States, Second Supplement, 1942-1954* (Washington (D.C.), 1958), pp. 25-27.

remembered that the General Assembly had attached a high degree of priority to the draft code and that he was therefore compelled to keep to a certain time-limit.

54. Mr. ROUKOUNAS congratulated the Special Rapporteur on submitting a report (A/CN.4/398) containing a wealth of ideas and suggestions that opened the way to an examination of all the problems posed by offences against the peace and security of mankind. The report confirmed the general trend towards the elaboration of a code which drew distinctions between three categories of crimes, a trend initiated by the Commission as early as 1950. The Commission would now have to clarify the legal parameters of those distinctions. The overlapping between categories and the existence of "inter-category" offences did not signify that the distinctions were no longer of any value. In the case of crimes against peace, the draft code related to persons acting in conjunction, for it was hardly conceivable that one individual alone could prepare and launch aggression. Crimes against humanity constituted a category of offences resulting from mass atrocities committed against civilians, and the substance thereof was to be found in their sheer scale. War crimes necessarily entailed an armed conflict and the idea that the criminal acts affected protected persons and property. Thus the crime itself and its legal consequences could unquestionably vary from one category to the other; but in deciding whether a particular offence should be included in the draft code, the Commission would have to refrain from holding to the tripartite division.

55. Over and above the question of the various categories of offences was the question of a basic choice. At its third session, in 1951, the Commission had discussed the expression "offences against the peace and security of mankind" and had taken the view that its study should be confined "to offences which contain a political element" and which endangered or disturbed the maintenance of international peace and security.[17] Because of that political element, it had at that time expressly ruled out such matters as piracy, traffic in dangerous drugs, traffic in women and children, and slavery. Yet the Commission must take account of present-day needs and it was free to determine the substance of the political element on the basis of which it would proceed to evaluate a particular offence.

56. The offences had to be examined separately, in terms of the needs of the international community of today. Apart from *apartheid*, which he had no objection to mentioning in the draft code, acts of racial discrimination, enslavement, terrorism and grave injury to the dignity of man did occur and they had to be taken into account. Was there any need to allude to the *obiter dictum* of the ICJ in the *Barcelona Traction* case,[18] which had involved acts that were today outlawed? So-called "new" offences should therefore be scrutinized in terms of their intrinsic features before they were placed in one category or another.

57. Even with the help of a computer, the Special Rapporteur would not be able to perform his task if he had to look into all the relevant instruments concerning war crimes and crimes against humanity. For that reason, the Special Rapporteur had directed his work towards texts that seemed best to reflect the law now in force and the present needs of the international community. For his own part, he shared Mr. Malek's idea (1958th meeting) that it was necessary to avoid legislating by *renvoi*. It was essential, without insisting too much on the deterrent and preventive nature of the draft code, to establish precise standards of conduct, particularly since the code would include a general part, so as to ensure the autonomy of the concepts discussed in the course of recent meetings, and possibly leave it to national legislators to determine the rules for penalizing the offences. Hence the Commission should work out detailed standards and not simply rely on such expressions as *apartheid*, colonial domination and aggression.

58. Mr. Reuter (1960th meeting) had cautioned against the temptation of drawing for codification purposes on texts which had not been ratified to any great extent; yet the Commission and even the ICJ sometimes referred to relevant instruments, regardless of the number of ratifications, and even to instruments which had not yet entered into force. Consequently, the Special Rapporteur had quite rightly reproduced provisions from instruments that did not lend themselves to controversy. The question of treaties in force would be more delicate, since the Commission would have to guard against weakening them by extracting definitions contained in such treaties and then altering them. In other words, it would have to refrain from providing, for one and the same concept, a definition different from the one appearing in the relevant instrument in force.

59. As to the relationship between war crimes and grave breaches, the substance of which was clarified in the four Geneva Conventions of 1949 and Additional Protocol I of 1977, the expression "grave breaches" was not purely and simply another term for war crimes, which after the Second World War had acquired very serious connotations. In 1949 and even in 1977, care had been taken to distinguish war crimes from grave breaches, so that accused persons could benefit from all the procedural guarantees in the Geneva Conventions. Nevertheless, the exact meaning of those expressions was not entirely clear. It was customary for grave breaches to be encompassed by war crimes, but the opposite was also true and the relationship between the two concepts was therefore ill-defined. For that reason, he suggested that any mention of "grave breaches" should be accompanied by the words "within the meaning of the Geneva Conventions", particularly since they were alluded to only in those Conventions and in Additional Protocol I.

60. In such matters as participation and omission, or failure to act, the first thing was to determine whether they should be included in the draft code. The Commission was not required to elaborate a code of uniform international criminal law: if it did decide to mention such matters it would have to free itself as far as possible of systems of internal criminal law and thereby assert the

[17] *Yearbook ... 1951*, vol. II, p. 134, document A/1858, para. 58 (*a*).

[18] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 32, para. 34.

autonomy of the draft. In connection with the question of an offence by failure to act, which had set a precedent and was covered by article 86, paragraph 2, of Additional Protocol I of 1977, on which the Special Rapporteur had drawn, it was worth noting that the proceedings of the Thirteenth International Congress on Criminal Law, held in Cairo in October 1984, called for caution and stated the need to make failure to act a criminal norm for a specific legally determined activity. The same was true of conspiracy, which was not an offence of participation properly speaking, but an offence that could be attributed to each participant in acts, even though they were distant acts, the important point being the element of intent. There, too, the Commission should free itself of municipal law.

61. Article 19 of part 1 of the draft articles on State responsibility was not yet in force, but three conventions were already applicable in regard to serious damage to the environment, namely the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques[19] (art. 1), Additional Protocol I of 1977[20] (art. 35, para. 3) and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons[21] (fourth preambular paragraph). All those instruments placed a prohibition on acts causing widespread, long-lasting or severe damage to the natural environment. The understandings annexed to the 1976 Convention indicated the meaning of the terms "widespread", "long-lasting" and "severe".[22] Perhaps an examination of those instruments would make for a more restrictive approach to the matter.

62. Mr. McCAFFREY said that he had some general points to make before going on to deal with parts I, II and III of the fourth report of the Special Rapporteur (A/CN.4/398).

63. The first general point concerned the purpose of the entire project. The question in his mind was whether the draft was a practical or a political exercise. In other words, was the aim to produce an instrument for deterrence or to afford an opportunity for diatribe? He agreed with Mr. Calero Rodrigues (1959th meeting), Mr. Balanda (1960th meeting) and other members that, if the draft was to be taken seriously, it must consist of more than a mere list of offences. In that connection, he was attracted by the suggestion by Mr. Calero Rodrigues that the draft code should also provide for means of implementation, by way of an international court, and even penalties, although the penalties would be difficult to determine. One thing was certain, namely that the inclusion of highly controversial concepts—especially without broad support for including them—would doom the project to oblivion. The Commission had to be realistic and avoid producing a draft that bore the seeds of its own destruction. He therefore endorsed Mr. Tomuschat's comment that it was desirable to concentrate on the hard core of clearly understood offences.

64. The second general point concerned the basis for the work in hand. The Commission had always tended to take the 1954 draft code as the starting-point, with a view to supplementing it. It was essential to remember that the 1954 draft code had been approved by only a very narrow majority of 6 votes to 5, at a time when the Commission had consisted of 15 members. Similarly, it should not be forgotten that the General Assembly had quietly shelved the 1954 draft. Accordingly, the Commission should exercise caution and not rely too heavily on that text.

65. Another problem was the use of international conventions and other sources, for it was essential to distinguish clearly, as stressed by Mr. Roukounas, between instruments which commanded wide acceptance and those which did not.

66. Again, there was the question of the weight to be attached to General Assembly resolutions. It was worth recalling that, at the 1945 San Francisco Conference which had adopted the Charter of the United Nations, only one State had voted to confer binding effect on General Assembly resolutions. A vote in favour of a draft resolution in the General Assembly did not mark the intention to make law; it was simply a reflection of political considerations.

67. Like Mr. Reuter (1960th meeting), he had doubts about the ultimate usefulness of the tripartite classification of offences in draft article 10 into crimes against humanity, crimes against peace and war crimes. At the present stage, however, he would not oppose it, since it was probably useful as scaffolding which could be discarded later.

The meeting rose at 1 p.m.

1962nd MEETING

Monday, 9 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. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

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[19] See 1958th meeting, footnote 8.

[20] See 1959th meeting, footnote 6.

[21] See footnote 12 above.

[22] See the Report of the Conference of the Committee on Disarmament on its 1976 session, vol. I (*Official Records of the General Assembly, Thirty-first Session, Supplement No. 27* (A/31/27)), annex I, understanding relating to article I.