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A/CN.4/SR.1962

Summary record of the 1962nd meeting

Topic:
**Draft code of crimes against the peace and security of mankind (Part II)- including the
draft statute for an international criminal court**

Extract from the Yearbook of the International Law Commission:-
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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 Techniques¹⁹ (art. 1), Additional Protocol I of 1977²⁰ (art. 35, para. 3) and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons²¹ (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. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

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. 1 (*Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*), annex I, understanding relating to article 1.

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

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I (Crimes against humanity)

PART II (War crimes) and

PART III (Other offences) (continued)

1. Mr. McCAFFREY, continuing his general remarks, said that more attention could profitably be paid to the role of specific criminal intent (*mens rea*) in the offences covered by the draft articles. That element was, of course, present by definition in the case of some offences for which a certain "purpose" was required, but it had not been specified in connection with others. For some of them at least, the element of criminal intent should be clearly stated as part of the definition of the offence.

2. As to the procedure for dealing with the topic, it was his understanding that the Commission would now engage in a general discussion and that it might begin its consideration of one or more draft articles at its next session. For the time being, therefore, he would not comment on specific articles, except incidentally. Moreover, although the fourth report of the Special Rapporteur (A/CN.4/398) did not cover crimes against peace, which had been discussed at the previous session, it did contain draft article 11, which appeared to be a rewording of the article originally proposed on that subject. Other members had made observations in that regard and, to assist the Special Rapporteur in his future work, he wished to reiterate certain points which he had made at the previous session.⁴

3. The first related to the definition of aggression in draft article 11, paragraph 1, and to the threat of aggression dealt with in paragraph 2. According to those provisions, the Security Council would not be responsible for determining whether there had been aggression or a threat of aggression and the problem thus arose of how that shift in responsibility was to be effected. It was necessary to bear in mind in that connection the Definition of Aggression,⁵ as well as the lack of any implementation mechanism in the draft articles, which meant that it would fall to the national courts to adjudge the matter. He doubted whether removing the determination from the Security Council was appropriate.

4. He also recalled his comments at the previous session on the subject of interference in the internal or ex-

ternal affairs of another State, covered by paragraph 3 of draft article 11, and on certain breaches of treaty obligations, mentioned in paragraphs 5 and 6. It was doubtful whether such acts rose to the level of offences against the peace and security of mankind. The same was true of the use in paragraph 7 of the antiquated term "colonial domination", which might be interpreted as excluding certain modern-day practices, such as subjecting a people against its will to alien subjugation and domination.

5. With regard to terrorism, he too considered that it could more logically be included in the category of crimes against humanity, rather than among crimes against peace.

6. The nature of crimes against humanity was very difficult to define. It was now agreed that they constituted a separate category and that very fact signified that even greater care was needed in defining them in the draft, since offences not committed in the context of an armed conflict would no longer be automatically excluded.

7. In a very broad sense, every serious human rights violation was a crime against "humanity", yet not every violation of that kind could qualify as a crime against humanity for the purposes of the draft. For a crime to be included in the draft it had to meet two requirements, one being exceptional seriousness, and the other not so much the mass nature of the act as the fact that it was part of an overall design, of a systematic pattern of conduct. The second requirement was particularly important in order to distinguish the offence from a common crime.

8. As to genocide, it was necessary to follow closely the terms of the 1948 Genocide Convention, although some aspects thereof called for further study, such as the exact meaning of the expression "causing serious ... mental harm" (art. II). Another problem arose from article IX of the Convention, which provided for the compulsory jurisdiction of the ICJ. The Commission would have to consider whether it was possible to ignore that article, which some States viewed as an integral part of the Convention.

9. He was still concerned that the Commission's approach to *apartheid* was more political than legal. Many aspects of *apartheid* as practised in South Africa undoubtedly fell under other categories of offences, but it was certainly a political exercise to define a general crime by reference to a situation that existed in only one country and, moreover, to use that country's name for it. The result could well be that similar practices occurring in other countries were not qualified as offences under the code and hence that the code would not, as the international community wished, play the requisite deterrent role. He therefore urged the Commission to identify the various aspects of the system known as *apartheid* and indicate clearly whether they were to be regarded in each instance as offences against the peace and security of mankind.

10. The question of serious damage to the environment was an enigma. The problem arose of whether only the extent of the damage was relevant or whether, in addition, some criminal intent (*mens rea*), or at least

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 See *Yearbook ... 1985*, vol. I, pp. 54-55, 1885th meeting, paras. 45-55.

⁵ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

a reckless disregard for the safety of the environment, was required. The whole subject demanded detailed further study and it was hardly sufficient to invoke article 19 of part I of the draft articles on State responsibility in that connection. Not only was that article highly controversial, but it related to the international responsibility of States and not to the criminal liability of individuals.

11. He agreed that the term "war crimes" should be retained, but on the understanding that it applied to all armed conflicts. The definition of such crimes in draft article 13 was broad enough to encompass both international and non-international armed conflicts. In regard to methodology, it would indeed be useful to include an illustrative list of war crimes such as that proposed by Mr. Malek (1958th meeting, para. 6). However, the list should in no way freeze the development of the category of war crimes and only grave breaches should qualify as war crimes under the draft code.

12. The Special Rapporteur had included a reference in draft article 13 to the "first use of nuclear weapons", but had placed it in parentheses to show that a political decision, one which should be left to the General Assembly, was involved. It was well known that the questions of the development, stockpiling, testing and deployment of nuclear weapons were highly controversial and essentially political. It was worth recalling in that regard that the General Assembly, in the annex to resolution 40/151 F of 16 December 1985, had referred not to the first use, but to "any use" of nuclear weapons.

13. It was an eminently political matter and fell outside the domain of law. As Mr. Tomuschat (1961st meeting) had pointed out, nuclear weapons would not be eliminated simply by declaring their use criminal. Any such action would render more difficult the negotiations that could alone solve the problem.

14. The "other offences" dealt with in part III of the report would be more appropriate in part IV, on general principles, but it might be convenient to deal with them separately for the time being. Care should none the less be taken to examine the extent to which such concepts as complicity and attempt were applicable to each offence once it was defined in the code. He agreed with Sir Ian Sinclair (1960th meeting) that the extended concept of complicity might be inappropriate in the case of war crimes.

15. Like other members of the Commission, he did not believe it necessary to retain the concept of conspiracy in the draft. For crimes against peace and most crimes against humanity, the extended concept of complicity was sufficient to meet all needs. In the matter of attempt, it was doubtful whether a plan that never came to fruition could qualify as an offence against the peace and security of mankind.

16. Lastly, he reiterated his doubts regarding the prospects for the present topic, which was highly political. Nevertheless, the Commission's work on it was attracting increasing scholarly attention and would at least make a useful contribution to the legal literature on the subject.

17. Mr. JACOVIDES said that he would comment not only on parts I, II and III of the fourth report of the Special Rapporteur (A/CN.4/398), but also on parts IV and V. The topic was of the utmost importance and the elaboration of a code "could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations", as stated by the General Assembly in resolution 40/69. Accordingly, the Assembly had urged the Commission to "fulfil its task on the basis of early elaboration of draft articles". The Commission would soon be reaching that stage in its work and thus fulfilling its mandate.

18. He wished to stress from the outset that, for the pragmatic reasons which he had given at the previous session,⁶ his willingness to accept that the scope of the draft code should for the time being be restricted to individuals was without prejudice to his position regarding the responsibility of States as well.

19. He also agreed with other members that, for the draft code to be complete, it had to include three elements, namely crimes, penalties and jurisdiction, even though all three elements might not be politically achievable in the present circumstances.

20. The term "offences", in the title of the draft code, should be replaced by "crimes", thereby aligning the English text with the Spanish and the French. The discussion had revealed that the draft code dealt only with "crimes", as distinct from "delicts" in the sense of article 19 of part I of the draft articles on State responsibility, and only with the most serious of such crimes. The word "crimes" in the title would be more accurate legally and would carry more weight politically.

21. Like other members, he deemed it essential to concentrate on the hard core of clearly understood and legally definable crimes. Any attempt to cover too much ground would make the Commission's efforts ineffectual. There could, of course, be differences of opinion as to what was legally definable and clearly understood. Admittedly, the code the Commission was drafting was not an all-embracing international criminal code, but a code of offences against the peace and security of mankind. Nevertheless, enslavement and trafficking in narcotic drugs could qualify as crimes against humanity.

22. The issue had also been raised of the basis for the content of the draft code. Existing conventions should doubtless be relied upon, especially those which commanded general acceptance by States, such as the 1948 Genocide Convention. But other sources of law could be used, including less widely accepted conventions and United Nations resolutions which were declaratory of existing law. He had in mind, for example, the Definition of Aggression, which the General Assembly had adopted by consensus in 1974,⁷ and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁸

⁶ See *Yearbook ... 1985*, vol. 1, p. 13, 1880th meeting, para. 8.

⁷ See footnote 5 above.

⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

23. Mr. Balanda (1960th meeting) and Mr. Boutros Ghali (1961st meeting) had been right to point out the need to pay close attention to issues of concern to the third world and to rely on legal sources in those countries. With the radical transformation in the composition of international society and the increase in the membership of the United Nations from 51 States in 1945 to 159 at the present time, a very great contribution had been made by the newly independent States to the progressive development and codification of international law. Accordingly, due account should be taken of the special concerns, practices and legal thinking of the third world, not only for the present topic but for all the items before the Commission.

24. The basic structure of the fourth report, namely the division into "crimes against humanity", "war crimes", "other offences" and "general principles", was logical and constituted a sound basis for the Commission's work, although that format might need to be revised at a later stage.

25. The category of crimes against humanity undoubtedly included the crime of genocide as defined in article II of the 1948 Genocide Convention: "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The classic example lay in the acts committed by the Nazi régime before and during the Second World War, but others could be cited. Particularly interesting in that regard was the observation by the Special Rapporteur that "a national group often comprises several different ethnic groups" and that "States which are perfectly homogeneous from an ethnic point of view are rare" (A/CN.4/398, para. 57). If every ethnic group were able to go its own way and secede from an established State, the present nation State system would collapse into utter chaos.

26. *Apartheid*, as defined in the 1973 Convention, was unquestionably a crime against humanity. Though a specific phenomenon, *apartheid* had features common to situations in other parts of the world. In Cyprus, for example, an attempt was being made under the pressure of foreign occupation to establish an undemocratic and unworkable system of government based on ethnic discrimination and separatism, accompanied by denial of the fundamental freedoms of movement, residence and property. That attempt had been made possible by illegal foreign invasion and occupation and by the failure so far of the international community to implement its unanimously adopted and legally binding resolutions.

27. The 1954 draft code contained in article 2, paragraph (11), an illustrative list of inhuman acts, thereby leaving the door open for additional cases as the law developed. The list could thus be expanded to cover such crimes as enslavement and trafficking in women and children. The Special Rapporteur had pointed out that the relevant criteria for determining whether inhuman acts constituted crimes against humanity were "the principles of the law of nations, the usages established among civilized peoples, the laws of humanity and the dictates of the public conscience" (*ibid.*, para. 63). Naturally, those same basic considerations were relevant in determining whether a rule of international law constituted *jus cogens*.

28. On the matter of damage to the environment, much more reflection was necessary before the Commission could take a position as to how far a breach of international obligations that was an "international crime" under article 19, paragraph 3, of part 1 of the draft articles on State responsibility could properly be regarded as a crime against humanity under the code of offences against the peace and security of mankind. One of the relevant factors in that connection would be the presence of the element of criminal intent (*mens rea*).

29. Terrorism would indeed be more appropriately included in the category of crimes against humanity than among crimes against peace. Consideration could also be given to Sir Ian Sinclair's suggestion (1960th meeting) that international terrorism should fall under both categories.

30. He wished to reiterate his suggestion that international drug trafficking be included among crimes against humanity, whether under "inhuman acts" or independently.

31. The first problem regarding war crimes was that of terminology, and more specifically the use of the term "war". War had been prohibited by the Kellogg-Briand Pact of 1928⁹ and, more significantly, by the Charter of the United Nations. As stated by the Special Rapporteur, however, "although war is today a wrongful act, it is an enduring phenomenon" (A/CN.4/398, para. 70). In fact, the broader term "armed conflict" was now commonly used, but the formula "war crimes" had a certain standing in international law and it should therefore be maintained, on the clear understanding that, in the Special Rapporteur's words, the term "war" was used "in the material sense of armed conflict, not in the formal and traditional sense of inter-State relations" (*ibid.*, para. 76).

32. As an illustration of war crimes committed in an armed conflict, he drew attention to the 1976 report of the European Commission of Human Rights,¹⁰ which, after a quasi-judicial inquiry following an application by the Government of Cyprus, had found that, in the course of the 1974 invasion of Cyprus, the Turkish Army had been guilty of murder, rape, looting and other such crimes—in addition to the massive violations of human rights suffered by the population as a result of the continuing Turkish occupation.

33. With regard to substance, war crimes and crimes against humanity were distinct categories, but they could well overlap. That aspect of the matter was well analysed in the report (*ibid.*, paras. 78-80).

34. As for methodology, a general definition of war crimes was preferable. Not all violations of the laws and customs of war constituted war crimes, but only "grave breaches" within the meaning of the 1949 Geneva Conventions. As the law developed, additional categories of war crimes could emerge.

⁹ See 1961st meeting, footnote 6.

¹⁰ Council of Europe, European Commission of Human Rights, Applications Nos. 6780/74 and 6950/75, *Cyprus v. Turkey*, Report of the Commission (adopted on 10 July 1976), vols. I and II (mimeographed).

35. On the much debated question of the legality of nuclear weapons, he naturally shared the general desire for them to be eliminated. If and when a general treaty was concluded to prohibit the use of such weapons, violation of that treaty would constitute a war crime. In the absence of such a universal treaty, however, the Commission could not declare the use of nuclear weapons to be a war crime. Such a provision would be futile and might even be detrimental to the draft code as a whole. He would therefore reserve his position on that point.

36. Turning to part III of the report, concerning "other offences", he wished merely to note the interesting analysis made by the Special Rapporteur of the issues of complicity, conspiracy and attempt in the various national legal systems and in international law.

37. Part IV of the report dealt with general principles under five headings, the first being the juridical nature of the offence. No one could deny, as emphasized by the Special Rapporteur, that offences against the peace and security of mankind

... are crimes under international law, defined directly by the Nürnberg Charter independently of national law. Hence the fact that an act may or may not be punishable under internal law does not concern international law, which has its own criteria, concepts, definitions and characterizations. (*Ibid.*, para. 147.)

38. In regard to the second heading, the nature of the offender, it had been agreed that, as a compromise and without prejudice to the criminal responsibility of States, the Commission would for the time being deal only with the criminal responsibility of the individual, and the Special Rapporteur set out the logical consequences of that position (*ibid.*, paras. 148-149).

39. As to the third heading, the application of criminal law in time, the issue of the non-retroactivity of criminal law was controversial, but the problem was not insoluble. In fact, that rule was not limited to formulated law; it related also to natural law and to overriding considerations of justice, the decisive factor being that the concept of justice should prevail over the letter of the law. In the words of Hans Kelsen: "in case two postulates of justice are in conflict with each other, the higher one prevails".¹¹ He therefore entirely agreed with the Special Rapporteur's conclusion that

... the rule *nullum crimen sine lege, nulla poena sine lege* is applicable in international law; but the word "law" must be understood in its broadest sense, which includes not only conventional law, but also custom and the general principles of law. (*Ibid.*, para. 163.)

40. The fourth heading was that of the application of criminal law in space. Unless and until the code established a competent international court of criminal jurisdiction, he shared the conviction expressed by the Special Rapporteur on that matter (*ibid.*, para. 176).

41. In connection with the fifth heading, which related to the determination and scope of responsibility and covered justifying facts, extenuating circumstances and exculpatory pleas, he would merely observe that the Special Rapporteur had dealt with them with his usual clarity and objectivity.

42. Before concluding, he had some remarks to make on the draft articles in part V of the report. In the first place, the heading "Offences against the peace and security of mankind" should be placed at the very beginning of the draft, in other words before chapter I, so as to cover all the draft articles and not just those in chapter II.

43. In part II of chapter I, concerning general principles, draft article 8, subparagraph (e), contained a reference to "a peremptory rule of international law". In view of the importance of the doctrine of *jus cogens*, he would suggest that that reference be erected into a more general and more widely applicable provision.

44. In the light of his earlier comments on the use of the term "war crimes", he suggested that the square brackets around the phrase "crimes committed on the occasion of an armed conflict" in draft article 10 be removed.

45. With regard to draft article 11, paragraph 1, he reiterated the importance of preserving the fine balance achieved through compromise in General Assembly resolution 3314 (XXIX), whereby the Definition of Aggression was adopted. The wording proposed in article 11 now left matters of interpretation and evidence to the judge rather than to the political organ, namely the Security Council, and he therefore reserved his position on that point.

46. In regard to article 11, paragraph 4, on terrorism, he wished to draw the Commission's attention to General Assembly resolution 40/61 on measures to prevent international terrorism, unanimously adopted on 9 December 1985, and to Security Council resolution 579 (1985) on hostage-taking, unanimously adopted on 18 December 1985. He would none the less accept the Special Rapporteur's treatment of the important subject of terrorism based on the definition in the 1937 Convention for the Prevention and Punishment of Terrorism,¹² with the addition of certain new forms of terrorism such as the seizure of aircraft and violence against diplomats. Consideration might also be given to including a reference to the seizure of ships, so as to cover incidents such as that of the *Achille Lauro*.

47. It was quite right that the draft code should cover the forcible establishment or maintenance of colonial domination, as well as mercenarism, which were dealt with in draft article 11, paragraphs 7 and 8.

48. As to draft article 12, on crimes against humanity, he endorsed paragraph 1, which was based on the definition embodied in the 1948 Genocide Convention. In the case of *apartheid*, he preferred the definition proposed in the first alternative of paragraph 2, because it was simpler. If a definition formulated along the lines suggested by Sir Ian Sinclair (1960th meeting, para. 15) proved generally acceptable, it would be a welcome development; otherwise, he could accept either of the two alternatives proposed by the Special Rapporteur.

49. Lastly, in draft article 13, if the second alternative for the definition of war crimes was adopted, appropriate reference should also be made to the

¹¹ "Will the judgment in the Nuremberg trial constitute a precedent in international law?", *The International Law Quarterly* (London), vol. 1 (1947), p. 165.

¹² League of Nations, document C.546.M.383.1937.V.

systematic destruction of cultural property to achieve a political objective in situations of armed conflict.

50. Mr. ARANGIO-RUIZ said that, before dwelling on the important problem of implementation, which he would discuss in the second part of his statement, he wished to make a few comments on points arising from the Special Rapporteur's excellent fourth report (A/CN.4/398).

51. To begin with, the Commission had acted wisely in retaining the tripartite division of crimes against peace, war crimes and crimes against humanity contained in article 6 of the Charter of the Nürnberg International Military Tribunal. It was hardly necessary to reiterate the generally shared views about overlapping, which was not peculiar to those three categories of crimes. It was found in every field of law and even between one field and another, just as it occurred, for instance, between the present topic and those of State responsibility and of international liability for injurious consequences arising out of acts not prohibited by international law. For his part, he agreed with members who had pointed out that terrorism should be placed under two headings. Overlapping was also possible between war crimes and crimes against humanity and, in that connection, the Special Rapporteur had made some interesting comments on the advantages of dual characterization (*ibid.*, para. 79).

52. He himself had drawn attention¹³ to a case of overlapping of crimes of that type, a case in which his own country had been the immediate victim between 1922 and 1943/1944, but one which had ultimately affected the rest of the world. A régime had been established by force, contrary to the principle of self-determination, and the human rights of the Italian people had been violated. The case had tended to escape attention because it had not been followed up by trials of the Nürnberg and Tokyo type; but the international relevance of the crime—which had been a crime both against humanity and against peace—had emerged in the light of the concept of conspiracy embodied in the Charter of the Nürnberg Tribunal and also the concepts of *apartheid* and colonialism.

53. Whatever the value of the analogy with colonialism and *apartheid*, the establishment of a régime in utter disregard of the principle of self-determination of peoples and at the cost of systematic suppression of human rights and fundamental freedoms unquestionably constituted a crime against humanity as well as an important step towards the perpetration of crimes against peace. He hoped that the Special Rapporteur would take that point into account in his future work.

54. He was not entirely in agreement with Mr. Calero Rodrigues's criticism (1959th meeting) of the term "offences" in the English title of the draft code, for it helped to convey the idea that the aggravation of certain otherwise common crimes made them crimes against humanity.

55. With reference to aggression, he agreed with members who favoured a "mixed" definition including

a non-exhaustive list. Careful consideration should also be given to the definitions of indirect aggression contained in a number of universal and regional instruments. One example was to be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁴ the ninth and tenth preambular paragraphs of which, dealing with the prohibition of the use of force, contained a definition of indirect aggression.

56. The question of economic measures posed some problems. In that regard, a distinction should be drawn between economic measures amounting in quality and dimension to aggression, and economic measures qualifying as "countermeasures" under the draft articles on State responsibility.

57. He could not entirely agree with Mr. Roukounas (1961st meeting) that aggression was inconceivable as a crime by an individual. There were cases in which "one man, one man alone", to use the words of Winston Churchill during the Second World War, was the culprit. Of course, one man alone could not wage a war and other persons would certainly be rightly held liable under the heading of complicity or conspiracy.

58. On the subject of crimes against humanity, he shared the doubts expressed by other members regarding the general concept of "humanity". Common crimes included some examples of inhumanity and, conversely, crimes against humanity included some examples of common crimes.

59. The list of crimes against humanity should not omit slavery or enslavement, or drug trafficking. In the case of the crime of *apartheid*, he preferred the definition given in the second alternative of paragraph 2 of draft article 12, for it was essential that the condemnation of South Africa's policy should be combined with the necessary legal precision.

60. On the question of damage to the environment, it was plain that a distinction had to be made between State responsibility and criminality, in other words between cases of mere legal liability of a State and cases which reached the level of a criminal act.

61. As far as war crimes were concerned, he entirely agreed that the general term "war crimes" should be retained, on the understanding that it covered conflicts other than wars. Similarly, he supported the suggestion by Mr. Malek (1958th meeting) for the inclusion of a list that was not exhaustive, thereby making it possible to add a reference to the use of nuclear weapons once they became the subject of prohibition, as well as to the use of other weapons of mass destruction.

62. On the other hand, he did not favour Mr. Tomuschat's suggestion (1961st meeting) that the reference to the "customs of war" should be deleted. Such a deletion could well mistakenly imply that the rules of warfare, or of armed conflict, had all been codified.

63. The "other offences" would be better placed in the draft code in the part on general principles. Account

¹³ See *Yearbook ... 1985*, vol. I, p. 66, 1887th meeting, paras. 35-36.

¹⁴ See footnote 8 above.

must be taken, however, of the problem of overlapping and particularly of the tendency of criminal activities to spread and escalate in terms of gravity and the number of participants.

64. He agreed that it was necessary to be precise in the definitions to be given in the code, to bring out the concept of criminal intent (*mens rea*) and to avoid any idea of collective responsibility. In international law, collective responsibility was conceivable only in wartime, when an entire military and economic machine was involved in armed action and destruction. Once hostilities were over and a country was occupied, and individuals were apprehended and brought to trial, the only crimes to be dealt with were crimes by individuals, even if they had been committed within the framework of some delinquent association or of participation in a criminal agreement.

65. Although the question of implementation had been left aside by the Commission at its previous session, the issue had been referred to in the Sixth Committee at the fortieth session of the General Assembly as essential for the effective and proper application of the code, particularly with regard to crimes against peace and crimes against humanity (see A/CN.4/L.398, paras. 111-115). In his view, implementation was also a vital and central issue because the solution adopted would, in many respects, condition the choices the Commission was called upon to make in connection with penalties, as well as the definition and classification of the offences themselves. The comments by some members of the Commission seemed to indicate that the implementation of the code should be ensured by an international criminal court, and he fully agreed with them. Indeed, it was the only really satisfactory solution. But he very much doubted whether it would be practicable in the short or medium terms.

66. Indeed, the idea of an international criminal court was really the product of an unjustified analogy between the situation prevailing in 1945 and current international realities. The situation prevailing in 1945 had been unique, as far as the States to which the accused parties belonged had been concerned. One of them had, in term of general international law, been reduced to the legal status of an occupied territory—if not four occupied territories—subject to the temporary, but none the less overwhelming, primacy of the law of the occupying Powers. Anything more than a superficial study of the 1945 proceedings revealed quite clearly the lack of a general international legal umbrella. Technically, the Nürnberg trials had taken place not under the aegis of general international law but under the law of the military occupiers. The Nürnberg Tribunal had ultimately been considered in law either as a common organ of the four occupying Powers, or as an organ of the German people set up by the occupying Powers. While such a technical explanation might be seen as justified by the principles of natural law and morality which lay at the root of any decent legal system, it was more than abundantly clear that the absence of general rules of international law and the complete absence in the Tribunal of any judges appointed by either neutral or occupied countries precluded any description of the Nürnberg Tribunal as a genuinely international court

prosecuting acts committed by individuals and punishable under general international law. In short, the legal and political framework in which the trials had taken place had been such that, while warranted morally and politically, they had not been justified under the international law of that time. It was difficult, therefore, to see how the Charter of the Nürnberg Tribunal and the trials that followed could be regarded as precedents justifying the current underestimation of the difficulties that the international community of today would encounter on the way to establishing an international criminal court and its complementary institutions.

67. In the case of war crimes, general international law had long provided a relatively adequate answer, for by virtue of the laws and customs of war the alleged author of any such crime was liable to be tried and punished by a captor belligerent State. Of course, prosecution still seemed to be a matter of choice on the part of the captor, and the draft code might instead stipulate that the captor State was under a legal obligation to prosecute. In any event, no revolutionary reform of the existing unwritten law seemed to be necessary.

68. The problem was different in the case of crimes against peace and crimes against humanity, precisely because, while international machinery would be the only proper solution, the establishment of an international court would meet the most serious obstacles in the realities of international relations. Indeed, the international court that would be established under the code would be called upon to try principally, if not exclusively, individuals. As such, it would have to be nothing less than a supranational court, rather than an international court such as the ICJ, which dealt with disputes between States. It would be a long and difficult undertaking to convince the sovereign States of today, which were considered to be not inclined to accept the jurisdiction of the ICJ in the draft articles on State responsibility, to agree to the establishment of a supranational court. Even if the establishment of such an international jurisdiction were accepted, it was difficult to imagine how, and under what conditions, it would have a chance to function satisfactorily in dealing with charges of crimes against peace or crimes against humanity brought against the members of a sovereign State's Government.

69. Another international, yet not supranational, theoretical solution would be to entrust such international criminal jurisdiction to *ad hoc* bodies appointed either by the Security Council or by the General Assembly, with the co-operation of Member States. But the difficulty for such problematic bodies of delivering consistent and impartial pronouncements and of obtaining the necessary co-operation from all the States directly or indirectly involved in each case would be of such magnitude as to imperil the very credibility and effectiveness of the draft code.

70. The only viable option thus seemed to be the one mentioned in paragraph 52 of the Commission's report on its thirty-seventh session, namely the so-called principle of universal jurisdiction.¹⁵ However, such a principle could surely not be applied overnight; it could be

¹⁵ *Yearbook ... 1985*, vol. II (Part Two), p. 13.

pursued only on a step-by-step basis. Each step in the extension of national jurisdiction would have to be accompanied by a parallel step in inter-State co-operation in the detection, apprehension, extradition, trial and punishment of persons accused or found guilty of a crime. Although conceivable for crimes such as piracy, drug trafficking, slavery, torture, hijacking, counterfeiting or certain neutral forms of terrorism, such a development seemed improbable for crimes with highly political connotations such as the most serious among the crimes that should be dealt with in the code. Indeed, the adoption of the universal jurisdiction solution presupposed a degree of unification of the criminal laws of different States that would be very hard to achieve.

71. Mr. JAGOTA congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/398), which would enable the Commission to make substantial progress on the topic at the present session.

72. He had already commented on the substance of new draft articles 1, 2, 3 and 11 at the previous session.¹⁶ The new definition of crimes or offences in draft article 1 was acceptable, but the scope and unity of the concept of "offences against the peace and security of mankind" should be covered in the commentary to the article.

73. He also endorsed the definition of aggression contained in paragraph 1 of new draft article 11. The competence of the Security Council under the Charter of the United Nations to determine that other acts constituted aggression or to assess the gravity of such acts would none the less remain intact. Similarly, he approved of the content of the other paragraphs of article 11. On the other hand, an additional paragraph should be included on the preparation of the use of armed force against another State, as had been done in article 2, paragraph (3), of the 1954 draft code, together with the limitations mentioned in that draft.

74. The report conveyed the impression (*ibid.*, paras. 175-176) that the draft code should perhaps foster the concept of universal criminal jurisdiction and leave it to the competent court to prescribe penalties for the offences committed. For the time being, he wished simply to reiterate that penalties were a deterrent to a potential offender and that they protected the interests of the international community. Even though the absence of penalties would not make the criminal acts innocent and permissible, it would be useful for the Commission to await the decision of the General Assembly and the reaction of Governments before dealing with that aspect.

75. Part I of the report rightly distinguished crimes against humanity from crimes against peace and war crimes, a classification that had been adopted in Principle VI of the Nürnberg Principles¹⁷ and in the 1954 draft code. Given the developments in the law since 1954, it should be defensible to elevate the autonomy of crimes against humanity and give them priority over war crimes.

¹⁶ See *Yearbook ... 1985*, vol. I, pp. 76-77, 1888th meeting, paras. 49-58.

¹⁷ See 1958th meeting, footnote 4.

76. There might be an overlap between crimes against humanity and war crimes. Since article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide stated that "genocide, whether committed in time of peace or in time of war, is a crime under international law", that aspect could be taken into account in defining the term "war crimes".

77. Quite properly, genocide and *apartheid* were included in draft article 12 as crimes against humanity. The second alternative definition of *apartheid*, taken from article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, was preferable. A mere reference to that Convention, or use of the first alternative, would simply define a given crime indirectly, rather than directly indicate its elements and identify it as a crime as should be done in a self-contained code. The wording of the second alternative might be considered by the Drafting Committee, without any adverse effect on the interpretation of the 1973 Convention.

78. Paragraph 3 of draft article 12 enumerated other crimes against humanity. Even though most of them would also be crimes under the national laws of States, they also constituted crimes against humanity in view of their nature as inhuman acts against elements of the population. Like other members, he too considered that terrorism should be mentioned in a separate paragraph as a crime against humanity.

79. Paragraph 4 of article 12, concerning serious damage to the environment, was based on article 19 of part I of the draft articles on State responsibility, which the Special Rapporteur had already used in defining the offence in subparagraph (d) of the first alternative of draft article 3 submitted in the third report (A/CN.4/387, chap. III). Accordingly, the matter was already before the Commission in connection with the topic of State responsibility and also that of international liability for injurious consequences arising out of acts not prohibited by international law. It had been suggested that the issue should be left at that, so that the proper remedy against any serious damage to the environment would be damages in tort or in other civil action, and hence that it should not be raised to the level of an international crime. In his opinion, a serious breach of an international obligation relating to the environment might be tantamount to an inhuman act against elements of a population affected thereby, and it should therefore be treated as a crime against humanity. Paragraph 4 of draft article 12 should therefore be retained, subject to possible redrafting in the light of the comments made in the Sixth Committee of the General Assembly and by Governments.

80. Referring to part II of the report, he noted that the Special Rapporteur had submitted two alternatives for draft article 13, one of them defining war crimes in general terms, with a definition of the term "war" that seemed to combine a general definition and an enumeration of criminal acts. As to terminology, he considered that the Commission should retain the term "war crimes" for reasons of usage and clarity. The term would not imply "legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations", to use the words of

the preamble to Additional Protocol I of 1977 to the Geneva Conventions.¹⁸ In order to include a reference to armed conflict, it might be useful to define the term "war crime" as follows:

"Any serious violation of the laws or customs of war or an armed conflict constitutes a war crime."

The meaning of "armed conflict" could be explained in the commentary.

81. With regard to methodology, article 2, paragraph (12), of the 1954 draft code simply used the words "acts in violation of the laws or customs of war". It might be useful, however, to include a non-exhaustive enumeration, as proposed in the second alternative of draft article 13, but with a number of changes. Subparagraph (b) (i) should be supplemented to include the additional elements referred to in article 130 of Geneva Convention III and in article 147 of Geneva Convention IV.¹⁹ The specific points to be included would be "unlawful treatment of prisoners of war and protected persons, taking of hostages". In subparagraph (b) (ii), the parentheses around the words "in particular first use of nuclear weapons" should be removed. The deterrent effect of such a provision, pending the conclusion of a comprehensive convention on the subject, could not be over-emphasized.

82. As to part III of the fourth report, concerning "other offences", the Special Rapporteur raised the question (A/CN.4/398, para. 117) whether membership of an organization implicated in a criminal affair should constitute a separate offence or whether it should be subsumed under complicity or participation. Article 2, paragraph (13), of the 1954 draft code included the acts of conspiracy, direct incitement, complicity and attempt as offences. They were also separate offences under article III of the 1948 Genocide Convention. Yet draft article 14 did not expressly mention direct incitement or membership of a criminal group or organization as other offences.

83. The Indian Penal Code²⁰ dealt at considerable length with such concepts as: joint offenders, or the criminal responsibility incurred by each person when a criminal act was committed by several persons pursuant to a common intention; abetment, namely aiding or instigating the commission of a criminal act, or engaging in a conspiracy if an illegal act or omission took place pursuant thereto; criminal conspiracy, namely agreement to commit an illegal act or to commit an act that was not illegal by illegal means; membership of an unlawful assembly committing an offence pursuant to a common object; and attempts to commit an offence that was punishable with imprisonment, whether or not for life, and failed because of circumstances independent of the volition of the offender. In addition, the offences of abetment, conspiracy and attempt were specifically included in connection with offences against the State, offences relating to the armed forces and offences affecting the human body, such as culpable homicide and murder, and other serious offences. Even

an attempt to commit suicide was a separate offence, with a prescribed punishment.

84. In view of the seriousness of the acts constituting offences or crimes against the peace and security of mankind, the Commission should include conspiracy, abetment or direct incitement, complicity and attempt in the draft code as separate offences. Such provisions should be placed in the part containing the list of offences, rather than among the general principles, since they dealt with the identification of an offender committing a specified act. As to draft article 14, he preferred the first alternative of section A. The substance of the second alternative should form the subject of a commentary elaborating on the term "conspiracy". Provision might also be made for the article to cover direct incitement, as had been done in the 1954 draft code, the 1948 Genocide Convention and the 1973 *Apartheid* Convention. No reference need be made to mere membership of an organization or group as an act constituting a crime, unless the person concerned came within the scope of the other provisions of draft article 14.

The meeting rose at 1 p.m.

1963rd MEETING

Tuesday, 10 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. Laclea 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, Mr. Ushakov, Mr. Yankov.

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

[Agenda item 5]

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).

¹⁸ See 1959th meeting, footnote 6.

¹⁹ See 1958th meeting, footnote 7.

²⁰ *The Indian Penal Code*, with commentary and notes by M. P. and R. Tandon, 12th ed. (Allahabad, Allahabad Law Agency, 1979).