Document:-

A/CN.4/SR.1964

Summary record of the 1964th 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

80. Genocide should come first in the hierarchy of crimes against humanity. The unique nature of that offence lay in the intent to destroy in whole or in part a national, ethnic, racial or religious group. Without such intent, mass killings would qualify as homicide punishable under internal law. On the other hand, where that intent was present, the murder of even a single individual could constitute genocide.

81. *Apartheid* should be given autonomous status as a crime against humanity. It had been defined in the relevant Convention of 1973 in terms of policies and practices of racial segregation and discrimination as practised in southern Africa for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. Hence acts of *apartheid* must have been perpetrated in the context of southern Africa for the purposes described above. *Apartheid*, which the international community had declared to be a crime against humanity and a violation of the principles of international law, constituted a very serious offence.

82. The 1973 Convention, which had declared *apartheid* to be a crime, had been in force for some 10 years and had been ratified or acceded to by some 90 States, not only from Africa, but also from Europe, Asia and Latin America. The Convention could thus be said to have received universal approval. It was clear from article II of the Convention that its effect was confined to southern Africa. Articles III and IV showed that the aim was not to indict everyone in South Africa, but only the representatives of the State of South Africa, such as the members of the executive.

83. It was interesting that some States which had ratified neither the 1973 *Apartheid* Convention nor the International Covenants on human rights were none the less in the forefront of the struggle against *apartheid* and of the promotion of human rights. Thus the absence of such ratifications in no way detracted from the universal acceptance of those important instruments. Moreover, the decisions of the ICJ in a number of cases reinforced the conception of *apartheid* as an autonomous offence and a crime against humanity.

84. Slavery and the slave trade should also be included among crimes against humanity. Those acts had been prohibited by many international conventions and, given their serious nature, there was universal consensus that they constituted an affront to mankind.

85. He supported retaining the term "war crimes", on the understanding that, as the Special Rapporteur indicated (A/CN.4/398, para. 76), the word "war" related to the material aspect of the offence. In that connection, he supported the definition proposed by Mr. Jagota (1962nd meeting, para. 80), which had the advantage of being both simple and clear.

86. The issue of nuclear weapons was divisive; and as for the question of damage to the environment, it was linked to other topics currently being considered by the Commission.

87. Finally, the question of what was to be included in the draft articles depended on the nature of the draft code. If the code was to serve simply as a standard, some further offences could be included in it. If, however, the Commission hoped that States would adopt the draft code, it should confine itself to those areas on which there was universal consensus.

The meeting rose at 1.15 p.m.

1964th MEETING

Wednesday, 11 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. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

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 IV (General principles) *and*

PART V (Draft articles)

1. Chief AKINJIDE said that his remarks on the Special Rapporteur's excellent fourth report (A/CN.4/398) were in the nature of suggestions intended to assist in improving the draft and to contribute material for the Special Rapporteur's next report.

2. The present topic was one of the most important on the Commission's agenda. It was also a very sensitive one in that it dealt with matters connected with the very existence of mankind and brought back painful memories of the Second World War. For his part, he agreed on the need for a draft code that would attract as much support as possible and hence foster peace and harmony throughout the world.

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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).

3. The Commission's work on the topic was likely to affect the balance of power, as well as certain economic interests, competing ideologies and even the vanity of States. Against that background, every effort should be made to strike a balance between the various conflicting interests at stake.

4. Like Mr. Balanda (1960th meeting), he thought that more attention should be paid to the experience in Africa and Asia, as well as to developments in the law in those continents. Concrete examples could be cited in that connection, the first being the trials of mercenaries in Angola a few years previously, when a number of white mercenaries had been arrested in that country and charged with crimes against humanity, crimes against peace and the crime of mercenarism. To his knowledge, they had been the first trials of their kind since the Nürnberg and Tokyo trials at the end of the Second World War.

5. The tribunal which had tried the mercenaries in Angola had been a national court, but the international implications of its judgment should not be underestimated, nor should their special relevance to the present discussion. It should also be noted that the mercenaries had acted on behalf of an outside—although unknown—Power, so that the case had been one of war by proxy. It was significant, moreover, that international observers had been allowed to attend the trial. Some of the accused had been sentenced to death and executed, despite outcries in their countries of origin; most of them had been citizens of developed countries. Others had been sentenced to terms of imprisonment, and others discharged for lack of evidence.

6. The Angolan tribunal had applied laws *ex post facto*, a problem that had of course already arisen in connection with the Nürnberg and Tokyo trials. At Tokyo, the Indian judge had given a dissenting opinion, one of the grounds being that the law applied by the tribunal was *ex post facto* and hence invalid. There had already been differences of opinion on that point in connection with the earlier Nürnberg trial and many eminent jurists, including Mr. Reuter, had written on the subject. The Angolan judges, in applying laws *ex post facto*, had invoked the international precedents of the Nürnberg and Tokyo trials.

7. A case of such importance could therefore not be ignored in considering the present topic and he strongly urged the Special Rapporteur to consult the records of the proceedings of those trials, which would have to be translated from the Portuguese, for the purposes of his future work . He also suggested that due account should be taken of Benin's experience of mercenarism. A study of the records of the proceedings of the trial of a mercenary in that country would prove a rewardng exercise.

8. In the course of the discussion, Mr. Jagota (1962nd meeting) had referred to the Indian Penal Code and Mr. El Rasheed Mohamed Ahmed (1963rd meeting) to the Penal Code of Sudan, and in particular to the provisions on attempt, conspiracy, complicity and accessories before and after the fact. Those two codes had their origin in the colonial era, but they embodied significant departures from European concepts with regard to the trial and punishment of criminals. The position in his own country, Nigeria, was that a code similar to those of India and Sudan was applied in the northern part of the country (the Penal Code of Northern Nigeria), where Indian and Sudanese case-law was currently invoked and law books from those countries were in common use. In the south, however, the Criminal Code of Southern Nigeria, modelled on the Criminal Code of Queensland, Australia, had remained in force. In many respects, and more especially in matters pertaining to complicity, conspiracy and attempt, the codes of India, Sudan and Northern Nigeria were far more advanced than the corresponding legislation anywhere in Europe. He therefore urged the Special Rapporteur to study those laws for his future work.

9. Africa and Asia were contributing a great deal to the development of international law on the topic under consideration. The Commission's work would be all the poorer if that contribution were ignored.

10. The members of the Commission who were opposed to making *apartheid* a crime had not, in his opinion, advanced any persuasive reason in support of their position. Their arguments had been demolished by Mr. Koroma (*ibid.*) and hence there was no need to repeat the latter's excellent statement.

11. He thus found himself in disagreement with Sir Ian Sinclair (1960th meeting). The various international conventions and United Nations resolutions, as well as the Charter of the United Nations itself, were enough to demonstrate the all too clear grounds for regarding *apartheid* as a crime. The British people held liberal views and the overwhelming majority of them condemned *apartheid* and wanted to see it ended. What then were the reasons for the unwillingness to make *apartheid* a crime?

12. In a recent article, *The Times* of London had indicated some of them, the first being that there were in South Africa one million Whites who held United Kingdom passports in addition to South African passports. Consequently, they would be able to take refuge in the United Kingdom if they had to leave South Africa and they might well have to be received in an already overcrowded island. Yet it was only fair to weigh in the scales of justice the one million Whites with two passports against the 26 million Blacks with nowhere to go. Another argument put forward by that newspaper was that 250,000 jobs in the United Kingdom depended on exports to South Africa. In a country with 4 million unemployed, those jobs were important. *The Times* had also emphasized that, apart from the Common Market and the United States of America, South Africa accounted for the largest volume of exports by the United Kingdom. Those considerations of self-interest explained, but did not justify, the reluctance to make *apartheid* a crime.

13. At the same time, it was as well to remember that Nigerian imports from the United Kingdom were larger than South African imports from the same source. Also, there were several thousand Whites living in Nigeria, some actually holding Nigerian passports. He was convinced that, if the Blacks came to power in

South Africa, the Whites would be able to live there in peace and their interests would be fully protected.

14. The African National Congress had been set up in 1912—a fact that was not very often mentioned. In 1910, with the creation of the Union of South Africa, political power had been transferred to 2 million Whites as against 20 million Blacks. A similar process had taken place in 1923 in Rhodesia, where power had been transferred to 200,000 Whites in a country with 4 million Blacks. The progress towards the independence of the African peoples, however, could not be stopped and countries previously ruled by Whites were now ruled by Blacks—Kenya, Zimbabwe and Zambia being obvious examples. In the United States of America, segregation had been overcome since the Second World War. Australia—once well known for its "White Australia" policy—was now a staunch opponent of *apartheid*. As for South Africa, the choice was clearly between allowing peaceful change, on the one hand, and violence and revolution, on the other.

15. The matter was one that could not be examined purely from the legal angle; humanitarian considerations also had to be borne in mind. During the discussion, it had been suggested that the opponents of *apartheid* were being too emotional or too political. For his part, he could not but be emotional where millions of human lives were being wasted. Again, international law evolved from foreign policies and it could not be divorced from politics. He therefore urged that *apartheid* should be included in the draft code as a crime, and he welcomed Mr. Reuter's statement (*ibid.*), which had been all the more remarkable in view of France's past as a colonial Power.

16. Every single nation condemned nuclear weapons and there was an obvious contradiction between such condemnation and the refusal to make the use—or at least the first use—of nuclear weapons a crime under international law. In that regard, he was greatly concerned that, as a result of computerization, there would be no guarantee that a computer would not set off a nuclear attack in error as a result of a mistaken alarm. Some provision should be made in the draft articles for that type of situation.

17. The Special Rapporteur had rightly made use of the material provided by the Nürnberg and Tokyo trials. All the same, it should not be forgotten that the victors who had organized those trials also had sins to answer for. The Nazis had killed millions of Jews, but atomic bombs had destroyed Hiroshima and Nagasaki.

18. Mr. ILLUECA said that the Commission's consideration of the general principles that would form the legal, moral and philosophical foundations of the draft code inevitably brought it face to face with the norms concerning human rights now incorporated in the rules of international law applicable to armed conflicts. It should be noted in that regard that the branch of international law previously known as the "law of war" was now termed international humanitarian law.

19. During the Second World War, both the Axis and the Allied Powers had indiscriminately bombed civilian populations and civilian targets to break the morale of the population. It was also apparent from the statistics on losses of human lives that 17 million soldiers, sailors and airmen had died in the conflict, compared with 18 million civilians. At the present time, the risks were incalculable: since the hecatomb at Hiroshima and Nagasaki, the potential of nuclear weapons for mass destruction had maintained a climate of terror.

20. It was from that standpoint that the members of the Commission should look at the general principles, bearing in mind the message in which the Secretary-General had urged them, on the occasion of the International Year of Peace, to give expression to the aspiration of all peoples for peace and to move towards the achievement of the objectives of the United Nations.

21. It was entirely right that offences against the peace and security of mankind should be defined in the context of public international law, without reference to systems of internal law. It therefore followed that the perpetrators of crimes under international law, together with their victims, should be regarded as subjects of international law.

22. Everyone was fully aware that, traditionally, international law was designed first and foremost to govern the rights and duties of States in their mutual relations. Nevertheless, the emergence over the past 40 years of many enduring international organizations and the concern of the international community to protect human rights and fundamental freedoms had led to the adoption of new rules of international law aimed, among other things, at punishing genocide and *apartheid*, as well as war crimes, crimes against peace and crimes against humanity.

23. Accordingly, one could not fail to share the view of those who maintained that international law consisted essentially of the principles and rules of conduct applicable by States in their mutual relations, rules which also included the legal norms concerning the functioning of international organizations, their mutual relations and their relations with States and individuals, as well as certain legal rules concerning individuals and non-State entities, inasmuch as their rights and duties affected the international community.

24. With reference to chapter I of the draft articles, it should be noted that the Spanish heading of part I, *Definición y calificación*, did not meet the Special Rapporteur's concern to describe the features of a crime under international law. The word *calificación* should be replaced by *tipificación*, both in the fourth report (A/CN.4/398) and in the draft articles, and in particular in the heading of part I and in the title and text of draft article 2.

25. With regard to the principles relating to the international offender, it would be wise, in view of the close link between the Special Rapporteur's comments (*ibid.*, para. 148) and draft article 3, to specify in the title of that article that a "criminal" penalty was being referred to. Moreover, it should not be inferred from those comments that the concept of the offender under international law was confined to the individual. To illustrate

that point, he recalled that article 3 of Hague Convention IV of 1907[4] stipulated that:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Similarly, article 5, paragraph 1, of the International Covenant on Civil and Political Rights[5] covered the responsibility of the State, the group and the individual as potential perpetrators of international offences. The list contained in article 2 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination[6] was even broader in that, among potential perpetrators of international offences, the word "institution" was added to the State, the group and the individual. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* went still further by specifying in article III that:

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State ...

26. Those texts illustrated the close links between the doctrine of human rights and the rules of international law applicable to armed conflicts, links which were of extreme importance in eleborating the draft code, for some human rights could not be classed as rights of the individual, but fell within the category of collective rights. Such rights included: the right of peoples to self-determination, set forth in article 1 of the International Covenant on Civil and Political Rights and in General Assembly resolutions 1514 (XV) and 1803 (XVII); the right of national, ethnic, racial and religious groups to live as such, recognized by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the right of a racial group not to be subjected to systematic domination and oppression by another racial group, as guaranteed by the 1973 *Apartheid* Convention; and the right of ethnic, religious or linguistic minorities to respect for their integrity, set out in article 27 of the International Covenant on Civil and Political Rights.

27. Draft article 3 submitted by the Special Rapporteur contained two basic concepts, namely illegality and penalty, but said nothing about one of the essential elements of the doctrine of criminal law: culpability. Needless to say, no penalty could be imposed without guilt. The Special Rapporteur had provided for guarantees against the *jus punendi* of the State in draft article 6, but it was essential to specify in article 3 that there could be no penalty without guilt. If the person committing the act was to be punished, it was necessary for him to have understood and wanted the act or omission that was attributed to him, and he should not be allowed to invoke any ground for precluding culpability. Accordingly, the phrase "provided his guilt is established" should be inserted in article 3 after the word "therefor".

28. The guarantees available to any person charged with an offence, mentioned by the Special Rapporteur (A/CN.4/398, para. 149), were set forth in draft article 6. In that regard he drew attention to article 11, paragraph 1, of the Universal Declaration of Human Rights[7] and article 14, paragraph 2, of the International Covenant on Civil and Political Rights, and added that the Commission should in its future work seek to remedy the present legal vacuum in matters pertaining to collective criminality on the part of States, organizations, institutions or groups of persons.

29. At its fortieth session, the General Assembly had given the Commission clear and precise guidelines on the question of individual and collective victims by adopting in resolution 40/34 the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was the outcome of the endeavours of a number of meetings of experts and of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. In the resolution, the General Assembly not only recognized the existence of millions of victims of crime and abuse of power, but also affirmed the necessity of adopting national and international measures to secure recognition of, and respect for, the rights of such persons. For his own part, he also welcomed the draft international instruments elaborated by the various United Nations Congresses on the Prevention of Crime and the Treatment of Offenders in the field of criminal law and international crime.

30. The very existence of various international declarations or conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[8] demonstrated that the international community was continuing to elaborate instruments which unquestionably had primacy over international custom in the matter of whether or not the perpetrators of international offences could be made subject to a universal criminal jurisdiction.

31. The definition of "victims of abuse of power" contained in paragraph 18 of the Declaration annexed to resolution 40/34 was of major interest for the purposes of the draft code. In its work on penalties, the Commission should also take account of paragraph 8 of that Declaration, which stated:

Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

In paragraph 12, the Declaration established that, when compensation was not fully available from the offender or other sources, States should endeavour to provide the requisite financial compensation. In addition, paragraph 10 of the Declaration related to substantial harm to the environment and contained elements that could be used by the Commission.

32. The description of "abuses of power" given by the experts who had met in Ottawa in 1984 to elaborate the draft declaration on justice and assistance for victims

[4] Convention respecting the Laws and Customs of War on Land (see 1958th meeting, footnote 7).

[5] United Nations, *Treaty Series*, vol. 999, p. 171.

[6] General Assembly resolution 1904 (XVIII) of 20 November 1963.

[7] General Assembly resolution 217 A (III) of 10 December 1948.

[8] General Assembly resolution 39/46 of 10 December 1984, annex.

intended for the Seventh Congress could also be used to identify the offences in the draft code:

> Abuses of power that are crimes under international law, such as crimes against peace, war crimes, crimes against humanity, genocide, *apartheid*, slavery, torture, extra-legal execution, enforced or involuntary disappearances and other gross violations of human rights infringing upon the right to life, liberty and security of persons, shall be subject to investigation. Persons against whom there is evidence that they have committed such crimes shall be subject to prosecution wherever they may be found, unless they are extradited to another State which has the authority to exercise jurisdiction in respect of such crimes. The defence of "obedience to superior orders" shall not be admissible for persons accused of such crimes.[9]

33. In connection with the principles relating to the application of criminal law in space, the Special Rapporteur reached the conclusion that, "in the absence of an international jurisdiction, the system of universal competence must be accepted for offences against the peace and security of mankind" (A/CN.4/398, para. 176). His own opinion was that the establishment of an international criminal jurisdiction was essential in order to ensure observance of the fundamental rights of accused persons, along with their right to a fair and public hearing by an independent and impartial tribunal, to be presumed innocent until proved guilty according to the law, and to enjoy all the necessary guarantees for their defence. In formulating the principles relating to the application of criminal law in space, in its report on its thirty-eighth session, it would be better for the Commission to use the expression "universal jurisdiction for offences against the peace and security of mankind" rather than "universal competence for offences against the peace and security of mankind".

34. Clearly, the principle of universal jurisdiction, as embodied in draft article 4, paragraph 1, was linked to the idea that the State should judge a person charged with an offence who was on its territory or extradite that person to a State willing to exercise its criminal jurisdiction. Until such time as there was an international criminal court, it was entirely reasonable to propound the principle of universal jurisdiction. In the case of hostage taking, which also gave rise to compulsory universal jurisdiction—unlike piracy, which lent itself only to optional universal jurisdiction—the ICJ had stated that:

> ... Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. ...[10]

Such an affirmation by the Court gave food for thought to those who considered that the Universal Declaration of Human Rights, as a General Assembly resolution, had no binding force. Had the Declaration acquired that binding force with the passage of time? Was it or was it not a source of law? Were practices harmful to the life, liberty and security of persons breaches of international legal rules or were they not? Was a breach of principles recognized by general international law involved?

35. On the subject of the application of criminal law in time, the Special Rapporteur enunciated the principles of non-retroactivity and the non-applicability of statutory limitations to offences covered by the code, principles which the Special Rapporteur examined closely in the light of contemporary international law (*ibid.*, paras. 150-172). The principle of non-retroactivity (*ibid.*, paras. 151-163) was set forth in concrete form in draft article 7, on which he would comment after some brief remarks on the principle *nullum crimen sine lege, nulla poena sine lege*.

36. The root of the principle of legality lay in the struggle waged by peoples for centuries to institutionalize their security under the law in the face of the arbitrary exercise of power and, more specifically, to urge rulers to make equitable use of penalties. History showed that the principle *nulla poena sine lege* lay not in Roman law, in Germanic law or in canon law, or even in the merging of those three systems in the Middle Ages. It had appeared for the first time in England, in the Magna Carta in 1215, and had taken on its full dimensions in the Declaration of the Rights of Man and the Citizen, proclaimed at the beginning of the French Revolution. Tribute should none the less be paid to Beccaria, the Italian criminologist, who had enunciated it as early as 1764 in *Crimes and Punishments*, and to Feuerbach, the German jurist, who had devised the well-known Latin formula in a treatise on criminal law published in 1801. The same principle was embodied in the Bill of Rights in the United States of America, in the Charter of the United Nations, in the American Declaration of the Rights and Duties of Man, in the Universal Declaration of Human Rights and in the Declaration of Fundamental Principles of the Standard Penal Code for Latin America.

37. As for draft article 7, the wording of paragraph 1 could be improved by adding the phrase "in accordance with the provisions of the present Code". The text of paragraph 2 more or less followed the wording of paragraph 2 of article 15 of the International Covenant on Civil and Political Rights, but it would be interesting to know why it said "according to the general principles of international law", when the formula used in the Covenant was "according to the general principles of law recognized by the community of nations".

38. Draft article 5 unequivocally and indisputably set forth the principle of the non-applicability of statutory limitations to offences against the peace and security of mankind, in keeping with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It would be useful, in the same context, for the Special Rapporteur to consider a new draft article stipulating that States should not grant asylum to any person with respect to whom there were serious reasons for considering that he had committed a crime against peace, a war crime or a crime against humanity, as stated in article 1, paragraph 2, of the Declaration on Territorial Asylum[11] and in principle 7 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.[12]

[9] A/CONF.121/IPM/4 and Corr.1, annex I, draft declaration, art. VIII, para. 1.

[10] *United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 42, para. 91.

[11] General Assembly resolution 2312 (XXII) of 14 December 1967.

[12] General Assembly resolution 3074 (XXVIII) of 3 December 1973.

39. The exceptions to the principle of responsibility set out in draft article 8 were highly technical issues that called for very close examination. They corresponded in fact to the causes for precluding culpability, a subject to which he would revert in due course. He also reserved the right to revert to draft article 9, which dealt with an extremely delicate matter and on which Mr. Ogiso (1961st meeting) had made some very sound comments.

40. Mr. FLITAN, reviewing the general principles discussed in part IV of the fourth report (A/CN.4/398), said that he unreservedly endorsed the principles relating to the juridical nature of offences against the peace and security of mankind, for such offences were well and truly offences under international law, directly defined by international law, independently of systems of municipal law. Moreover, those principles were in conformity with the ones set forth in the draft articles on State responsibility.

41. As to the principles relating to the international offender, he wished to reaffirm that the code should apply first and foremost to States. Admittedly, the General Assembly had requested the Commission to confine itself, for the time being, to the criminal responsibility of individuals, without prejudging the question of the criminal responsibility of States. Nevertheless, in working out provisions relating to individuals alone, the Commission was not really following the instructions of the General Assembly and was in some way prejudging the question of the criminal responsibility of States. Indeed, a code applicable exclusively to individuals would not have the requisite deterrent effect and would be of no great value.

42. In respect of the guarantees for a person charged with an offence, it would be necessary to mention in draft article 6 the right to a defence, or more properly the obligation to ensure that the accused person had the defence he wanted, and perhaps specify at the same time that every trial must be held before a jurisdictional body. From the purely drafting point of view, it would also be better, in the body of article 6, to add the word "jurisdictional" before "guarantees", for it was already contained in the title. Those points, however, could be settled in the Drafting Committee.

43. The application of criminal law in time involved two principles: the non-retroactivity of criminal law and the non-applicability of statutory limitations to offences against the peace and security of mankind. As to the first of those principles, he fully shared the Special Rapporteur's view that the rule *nullum crimen sine lege, nulla poena sine lege* was applicable in international law, on the understanding that the term *lex* meant not only written law, but also custom and the general principles of law.

44. The principle of the non-applicability of statutory limitations to offences against the peace and security of mankind was unanimously upheld by the Commission and called for no special comment.

45. In connection with the principles relating to the application of criminal law in space, he would have no objection if the code enunciated the principle of universal jurisdiction. Nevertheless, the Commission should take account of recent cases which revealed that in France, Yugoslavia and Israel, in particular, a trend had emerged towards recognition of the competence of a judge of the nationality of the victim, rather than of the court of the place of arrest.

46. As to the principles relating to the determination and scope of responsibility, the Special Rapporteur indicated (*ibid.*, paras. 255-258) that he had not deemed it advisable to elaborate on exculpatory pleas and extenuating circumstances, since those concepts were closely bound up with the application of penalties, in other words with a matter that fell within the competence of the judge. For his own part, he did not entirely share that view. Regardless of the jurisdiction for trying offences against the peace and security of mankind, the judge would need to find in the code the most precise information possible on the penalties that were applicable.

47. On the subject of exceptions to criminal responsibility, the Special Rapporteur was right to say (*ibid.*, paras. 190-196) that coercion, state of necessity and/or *force majeure* could not relieve the perpetrator of responsibility for the offence unless there had been a grave and imminent peril, unless the perpetrator had himself not contributed to the emergence of the peril, and unless there had been no disproportion between the interest sacrificed and the interest protected. In the case of coercion, however, it might be as well to stipulate that the perpetrator must have had no other way of escaping the peril. Needless to say, such an exception could not apply in the case of crimes against peace and crimes against humanity, for the consequences of those crimes could not be likened in any way with those of any other act. He fully agreed that a special provision should be included on *force majeure*.

48. The Special Rapporteur took the view (*ibid.*, para. 215) that error, whether of law or of fact, could relieve the offender of responsibility for a war crime. Personally, he was not sure that such an exception had a place in a code intended to penalize the most serious offences.

49. In the matter of superior order, and more especially its links with error, his own view was that compliance, by an error of law or of fact, with an unlawful order could not constitute an admissible exception.

50. It would be useful, in connection with reprisals and self-defence, for the draft code to stipulate expressly that armed reprisals were contrary to international law.

51. Lastly, concurrent breaches, extenuating circumstances and exculpatory pleas could be dealt with in part II of chapter I of the draft, on general principles, but he had doubts about the proposal to include in that general part the provisions concerning "other offences". In the criminal codes of systems of internal law, the forms of participation were always viewed in conjunction with the corresponding offences. It would be illogical to deal, in the general part of the draft, with the forms of participation in offences which were not dealt with until later, in chapter II. It would be more usual to set forth the offences before dealing with the forms of participation therein.

52. Sir Ian SINCLAIR, referring to part IV of the fourth report (A/CN.4/398), said that he was particularly grateful to the Special Rapporteur for including a section on general principles. He had always been a partisan of the view that the Commission should consider the general principles in parallel with the efforts to establish a list of offences for inclusion in the draft code. Such an approach made it possible both to test the case for including a particular offence against the proposed general principles and to assess the proposed general principles in the light of the possible content of the list of offences.

53. He would concentrate initially on draft article 4, which dealt with the concept of universal jurisdiction over offences against the peace and security of mankind. There were two reasons for his choice: firstly, he could not agree that universal jurisdiction was a general principle; and secondly, the entire question of how the draft code was to be implemented raised issues of fundamental importance to the work in hand.

54. In his report (*ibid.*, para. 173), the Special Rapporteur rightly recalled the basic principles of jurisdiction. In the first instance, criminal jurisdiction could be, and was, founded on the territorial principle. It could also be founded on the nationality principle. However, the principle that each State was entitled to exercise criminal jurisdiction over aliens in respect of crimes committed outside its territory and not affecting or prejudicing its national security had, in general international law, hitherto been limited to piracy, except in the case of conventions expressly designed to deal with specific types of crimes. By no means could it be said that universal jurisdiction was a general principle of law: rather, it was a limited exception to other principles. Consequently, he could not agree that universal jurisdiction, in the sense in which that concept was used in article 4, paragraph 1, should stand as a general principle applicable to all the offences that might be included in the draft code.

55. In fact, he would suggest to the Special Rapporteur that much more thought should be given to the fundamental issue of how the draft code was to be implemented. It should not be dealt with in a perfunctory and wholly unsatisfactory manner in the context of general principles. If the Commission's work was to have any value at all, other than as an empty manifesto, the problem of implementation must be tackled seriously and objectively. It was implied that there were two alternatives: universal jurisdiction or an international criminal jurisdiction. He was wholly unable to accept the notion of universal jurisdiction, at least in regard to crimes against peace and crimes against humanity, and he had serious reservations about its applicability to war crimes. In the case of crimes against peace, for example, could one seriously contemplate that the courts of one State should be entitled to arraign the responsible leaders, or even subordinates, of another State—possibly even trying them *in absentia*—on charges of having committed or participated in the crime of aggression? He could think of no notion more destructive of the peace and security of mankind. It would be a recipe for constant conflict, far outweighing any possible benefit that would accrue from enforcing the code in that way. Similar considerations applied to the trial of crimes against humanity. The considerations which had led the drafters of the Convention on the Prevention and Punishment of the Crime of Genocide to eschew the principle of universal jurisdiction in the prosecution of the crime of genocide were just as valid today as they had been 35 years earlier.

56. He could not agree with those of his colleagues who believed that, even in the absence of effective implementation provisions, the code would be of value as a deterrent. Other United Nations organs could produce broad condemnations of acts which the international community as a whole already condemned. The Commission's mandate was much stricter. It was to produce a code of offences against peace and security that was capable of being effectively and impartially enforced.

57. An international criminal jurisdiction was therefore the best method for effective and impartial implementation. In that connection he disagreed with Mr. Arangio-Ruiz (1962nd meeting), who took the view that, while an international criminal jurisdiction might ultimately be the best solution, universal jurisdiction should be retained in the mean time. Even as an interim measure pending the establishment of an international criminal jurisdiction, universal jurisdiction was not acceptable. As Mr. Razafindralambo had suggested (1963rd meeting), the General Assembly should be urged to fulfil its responsibilities towards the Commission. Three years earlier, the General Assembly had been asked for guidance as to whether the Commission's mandate was to be regarded as encompassing the preparation of the statute of an international criminal jurisdiction.[13] No reply had yet been received, and the request should be reiterated. He for one was convinced that the code could be made effective only if an international criminal court was vested with jurisdiction to try offences under the code. He was well aware of the political and other objections to the establishment of such a court; but if the international community was not prepared to contemplate such a course, it should not call on the Commission to formulate a code of offences that would be offences only on paper. The Commission had its own reputation to protect. A criminal code that lacked teeth was a mockery and an insult to a lawyer's every instinct. Accordingly, whatever the political or other obstacles, the members of the Commission would be failing in their duty if they did not reiterate the request made to the General Assembly in 1983 for guidance on that aspect of the matter. Meanwhile, he would continue to be resolutely opposed to applying the concept of universal jurisdiction to the offences to be listed in the code, save to the extent that existing conventions might impose the obligation of prosecution or extradition in respect of narrowly and clearly defined offences.

58. With regard to draft article 2, the concept expressed in the first sentence posed no difficulty, but he had doubts about the second sentence, namely: "The fact that an act or omission is or is not prosecuted under

[13] *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (*c*).

internal law does not affect this characterization." As a statement of principle, it could not be faulted in so far as it related only to characterization of the act, but it immediately prompted the question of what would happen if an individual was prosecuted under internal law for an offence which was or might be, simultaneously, an offence against the peace and security of mankind. In his previous statement on the topic (1960th meeting), he had stressed the importance of not confusing common crimes with crimes against humanity. Yet that was not an easy matter, and it might prove in the event to be impossible to distinguish between the two. Was the individual to be exposed to double jeopardy? What about the general principle of *non bis in idem*? He was by no means sure that it was covered by draft article 6, which dealt with jurisdictional guarantees. The whole issue of the relationship between common crimes and the offences to be listed in the code warranted careful examination, and he would welcome any further explanations the Special Rapporteur might care to offer on that aspect of the subject. No doubt it was closely bound up with the issue of implementation, but the possibility could not be ignored that, on the basis of the text in its present form, individuals might be exposed to double jeopardy.

59. In his report (A/CN.4/398, paras. 164-172), the Special Rapporteur briefly expounded his reasons for setting out in draft article 5 the rule that statutory limitations should not apply to offences against the peace and security of mankind, a rule that should be looked at very carefully. It was interesting to note that only 24 States were parties to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and that only two States had become parties to it since 1980. He was not suggesting that that was a decisive reason not to include such a principle in the draft code, but it certainly gave some food for thought. A critical question was how to balance conflicting considerations: on the one hand, to ensure that crimes of such gravity and horror should not go unpunished notwithstanding the lapse of time, and on the other, to take proper account of the difficulty of marshalling convincing and compelling evidence against a particular individual when most of the witnesses were dead or might have only hazy recollections of events in the long-distant past. For the time being, he would reserve his position on that proposed principle, but doubted whether it commanded sufficiently widespread support to be incorporated in the code.

60. Recalling his previous reference to draft article 6, he said it was gratifying that the Special Rapporteur had suggested the need to include jurisdictional guarantees. Obviously, everything would depend on how the code was to be implemented. If, as he hoped, implementation was to be effected by means of an international criminal court, the necessary guarantees of a fair trial would be spelt out in detail in the statute of the court. He therefore regarded article 6 as being simply a marker for the future. As now formulated, it would be quite insufficient in the context of implementation of the code by national courts or on the basis of universal jurisdiction. Given the nature of some of the offences to be included in the code, it was difficult to see how a fair trial on the law and facts could be achieved by a national court. It was a well-known feature of the common-law system that "justice must not only be done, it must be seen to be done". Even if, in a particular set of circumstances involving application of the code, justice was done by a national court in a trial of an alien for an offence against the peace and security of mankind committed outside its territory, justice would not be seen to be done. Jurisdictional guarantees were important, but they should be built into the statute of an international criminal court having exclusive or quasi-exclusive jurisdiction to try offences falling within the scope of the code.

61. He experienced much less difficulty with draft article 7, on the non-retroactivity of criminal law. He would not enter into the difficult question of whether the Charter of the Nürnberg Tribunal had involved any departure from the rule *nullum crimen sine lege*, although much could be said, and had been said, in favour of the contrary proposition. In his opinion, the general principle of criminal law at issue was accurately expressed in article 7 of the European Convention on Human Rights, to which the Special Rapporteur referred (*ibid.*, para. 162).

62. Draft article 8, on the other hand, raised some problems. In principle, subparagraph (*a*) was the counterpart of article 3 of the 1954 draft code and was not open to objection. He would simply like to point out that it reinforced the case for establishing an international criminal court to try offences under the code, particularly offences involving the criminal responsibility of heads of State or Government. Subparagraph (*c*) was, in a modified form, the counterpart of article 4 of the 1954 draft code and the Special Rapporteur explained (*ibid.*, paras. 217-226) the relationship between superior order and coercion, and the extent to which coercion of a subordinate to obey an obviously illegal order by a superior might relieve the subordinate of criminal responsibility. It was a difficult matter. The defence of superior order had been raised in practically every war crimes trial for which records existed. It was only natural: given the strictly hierarchical relations that existed in any structure of military command, compliance with an order of a superior must be the norm. Indeed, non-compliance was itself an offence under military law. On the other hand, he could accept that compliance with an obviously illegal order could not relieve the perpetrator of the act of his criminal responsibility. He was not even convinced of the possible exception of coercion, although he was willing to be persuaded by the arguments advanced by the Special Rapporteur (*ibid.*, paras. 218-225), at least in the case of war crimes. However, the formulation of draft article 8 would have to be looked at more carefully.

63. With regard to the responsibility of the superior, dealt with in draft article 9, he tended to believe that the issue could be settled by applying the notion of complicity as one of the "other offences", and hence that no separate article was necessary.

The meeting rose at 1 p.m.