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Summary record of the 1966th 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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neither desirable nor possible for the present. In that connection, he supported the views expressed by Sir Ian Sinclair (1964th meeting) and hoped that they would be politically acceptable to a large section of the world community.

53. In regard to the question of exceptions to the principle of responsibility, which was the subject of draft article 8, the non-exceptions embodied in subparagraphs (a) and (c) should not cause many problems, since they were in conformity with the essence of the 1954 draft code. Matters of form would, of course, be settled by the Drafting Committee.

54. He also endorsed draft article 9 as a counterpart of article 8, subparagraph (c), or even independently, although its content would also be covered by the provisions relating to complicity. As to the other exceptions to responsibility, if the individual concerned acted as an official or agent of a State, the applicability of the circumstances precluding the wrongfulness of the act of that State would also have to be examined carefully with reference to each category of offences—crimes against peace, crimes against humanity and war crimes—despite the basic differences between the present topic and that of State responsibility, particularly in terms of their scope. One example was the defence of state of necessity as precluding the wrongfulness of an act of the State. The Commission had devoted much time to considering it in 1980 and had specified in article 33 of part 1 of the draft articles on State responsibility that state of necessity could not be invoked if the international obligation with which the act of the State was not in conformity arose out of a peremptory norm of general international law, or if the obligation was laid down by a treaty which explicitly or implicitly excluded the possibility of invoking state of necessity, such as a treaty dealing with humanitarian law, or if the State in question had contributed to the occurrence of the state of necessity. In the commentary to article 33, the Commission, referring to *jus cogens*, had said:

... The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation. ...¹³

State of necessity could therefore not be invoked in connection with crimes against peace and crimes against humanity, in view of the gravity of such crimes. Similar considerations applied to the idea of consent. No one consented to aggression, colonialism, genocide or *apartheid*, or the violation of any other rule of *jus cogens*. The exceptions arising from *force majeure*, fortuitous event or distress would also have to be examined carefully with reference to each category of offences. The qualified exceptions of coercion—both in relation to orders of a superior and in other circumstances—and error of law or of fact should pose no problems. No error of law or of fact could, however, be invoked in the case of a crime against humanity or a crime against peace, as the Special Rapporteur rightly affirmed in his report (A/CN.4/398, paras. 211 and 216).

55. The conditional application of the exceptions to responsibility in draft article 8, subparagraphs (b), (c), (d) and (e), was clearly stated, in the light of the indications given in the report (*ibid.*, para. 196). The conditions on those exceptions would thus preclude their application to crimes against humanity and crimes against peace, bearing in mind the proportionality of the interest sacrificed to the interest protected. The exception of self-defence in cases of aggression was not controversial and would be easier to draft if it formed the subject of a separate paragraph or article. The question of reprisals, referred to in the report (*ibid.*, paras. 241-250), called for further reflection.

56. The Commission would also have to consider whether certain well-known exceptions applicable to alleged offenders under national penal laws should be expressly mentioned in the draft code, particularly since it was to be confined for the time being to offences committed by individuals, whether as agents of the State or otherwise. The exceptions he had in mind were the age of the offender (in the case of a child or minor), unsoundness of mind or insanity, induced intoxication against the will of the offender or without his knowledge, the right of private defence of life and property, and consent of the alleged victim. If those defences or exceptions were to be applicable to the person concerned under the terms of draft article 6, which stated that "any person charged with an offence ... is entitled to the guarantees extended to all human beings", the point should be clarified in the commentary.

57. In conclusion, the Commission would need to spend more time reflecting on the content and scope of draft article 8, concerning exceptions to the principle of responsibility. However, he generally agreed with the conclusions reached by the Special Rapporteur with regard to justifying facts (*ibid.*, para. 254).

The meeting rose at 1 p.m.

1966th MEETING

Friday, 13 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jagota, 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.

¹³ *Yearbook ... 1980*, vol. II (Part Two), p. 50, para. (37).

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 IV (General principles) and

PART V (Draft articles) (continued)

1. Mr. OGISO expressed appreciation to the Special Rapporteur for elaborating the general principles underlying the draft code of offences against the peace and security of mankind and said it was particularly gratifying to note that the principle *nullum crimen sine lege, nulla poena sine lege* had its rightful place among the general principles. He would concentrate on three major questions dealt with in part IV of the fourth report (A/CN.4/398): the rule *nullum crimen sine lege*, exceptions to criminal responsibility, and an international criminal jurisdiction.

2. With regard to the rule *nullum crimen sine lege*, it was stated in the report: "If the word *lex* is understood to mean not written law, but *droit* in the sense of the English word 'law', then the content of the rule will be broader" (*ibid.*, para. 156). Unlike the continental legal system, the Anglo-American system relied heavily upon a body of judicial precedents and, in that sense, unwritten law was also a part of the "law". Such a body of judicial precedents, if not written law within the strict meaning of the term, constituted authoritative evidence of the state of positive law. Only if *lex* was defined as positive law, therefore, could the rule *nullum crimen sine lege* extend not only to the countries of the continental legal system, but also to those of the Anglo-American legal system.

3. The Special Rapporteur, however, went on to assert (*ibid.*, para. 161) that that concept of justice had been the decisive factor in the Nürnberg Tribunal and cited the remark by Judge Biddle that "the question then was not whether it was lawful but whether it was just to try ...". He for one was opposed to that position. It was unacceptable that *lex*, in the rule *nullum crimen sine lege*, should designate something beyond positive law, such as a vague and undefinable concept of justice *per se*.

4. On the other hand, he accepted the Special Rapporteur's conclusion (*ibid.*, para. 163) that "the rule *nullum crimen sine lege, nulla poena sine lege* is applicable in international law". But the Special Rapporteur should clarify what he meant by "custom and the general principles of law" (*ibid.*), otherwise a dangerous situation could arise by allowing non-legal concepts to creep into the legal rule *nullum crimen sine lege*. In that connection, the words "general principles

of international law" in draft article 7, paragraph 2, must be very carefully examined.

5. In his view, the prohibition of any rule applicable *ex post facto* lay at the very core of criminal law, and the essential criterion of criminal responsibility was whether or not a positive law prohibiting a specific act existed at the time of the commission of the act. The rule *nulla poena sine lege* meant that the perpetrator of the act could not be punished if, at the time of the commission of the act, the law did not prescribe any penalty. As the Special Rapporteur stated (*ibid.*, para. 181), "the Commission has not yet decided clearly whether the draft under consideration should also deal with the penal consequences of an offence". Perhaps for that reason the secondary rules on the topic under consideration had not yet emerged. Nevertheless, in his opinion, some guidelines for rules of punishment must be given in the draft code, in order to avoid, for example, a situation in which an individual could be sentenced to death for an act which was not forbidden by law at the time it was committed.

6. With regard to the principles relating to the determination and scope of responsibility, generally speaking he supported the Special Rapporteur's approach, namely that there should be no exception to criminal responsibility other than coercion, state of necessity and *force majeure*. The Special Rapporteur also pointed out (*ibid.*, para. 199) that the distinctions between coercion, state of necessity and *force majeure* were not found in all legal systems, which was perfectly true.

7. As far as the exception of superior order was concerned, he endorsed the Special Rapporteur's formulations, but wondered whether the threat of a grave, imminent and irremediable peril, stemming from a superior order to an individual might not vary according to the degree of discipline in which the individual was operating. In particular, freedom of choice would be extremely limited in the case of a subordinate military officer. While he did not believe that a military officer should be entirely relieved of responsibility because of a superior order, the degree of rigidity of discipline could constitute an extenuating factor.

8. The Special Rapporteur was right about error of fact; but error of law was still likely to occur, especially in the case of customary international law, which was not precisely codified. He himself wondered whether responsibility could be attributed to an individual simply because of ignorance of the law, as was laid down in draft article 8, subparagraph (e), which embodied the idea of *jus cogens*, a concept which, as he had underlined on many occasions, should be clearly defined.

9. Draft article 8, subparagraph (e) (iii), contained another element of balance, namely between the interest sacrificed and the interest protected. The principle appeared at first sight to be sound, but doubts were possible about its impartial application, particularly if no international criminal jurisdiction was established.

10. On the question of criminal jurisdiction, a number of members of the Commission, including himself, had stressed the need to establish an international criminal court for the purposes of implementing the code, and he welcomed that trend of thought among his colleagues.

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).

All were aware of the political difficulties attached to the establishment of an international court. Yet such a court was indispensable in order to provide as much objectivity as possible in the interpretation and application of the code. He could support the idea of universal competence only pending the establishment of an international criminal court: in the case of crimes against peace and crimes against humanity, the international court formula was essential. The Commission, as a unique legal organ of the General Assembly, should in his view openly address the question of the best possible procedure for implementation of the code.

11. Mr. BALANDA said that the matters discussed by the Special Rapporteur under the heading "other offences" were more in the nature of general principles than a separate category of offences, for complicity or attempt were conceivable in each of the proposed categories of crimes.

12. In answer to those members who questioned the usefulness of classifying offences into three categories, he would draw attention to the passage in the fourth report (A/CN.4/398, para. 254) in which the Special Rapporteur stated that the theory of justifying facts involved varying applications and differed in scope according to the offences or categories of offences in question; that, in view of their gravity, crimes against humanity could not be justified; that the only possible justification for crimes against peace was self-defence in cases of aggression; and that the theory of justifying facts could only really apply in relation to war crimes. That distinction between the three categories of crimes also applied when it came to penalties. While at the present stage he wished to reserve his position in the matter, he would stress that there could be no code of offences without penalties. There was, however, one category of crimes that had to be punished more severely than the others, namely crimes against humanity.

13. On the delicate issue of the criminal responsibility of States, a number of representatives in the Sixth Committee of the General Assembly had spoken in favour of recognizing such responsibility (see A/CN.4/L.398, para. 39). It was perhaps a novel idea, but he did not see how the draft code could ignore the criminal responsibility of States. Even allowing for the fact that a State acted through individuals and that, if apprehended, those individuals could be prosecuted, it would be wrong to punish them as individuals, since they would have acted as agents of the State. Accordingly, a person who committed a terrorist act on behalf of a State could not be punished as an individual: it was the organ in whose service the individual was engaged that incurred responsibility and was answerable for the act in question. Consequently, a whole range of penalties applicable to the individual were automatically excluded, and the Commission would have to identify penalties that were suitable for punishing crimes by States. If it did not accept the concept of the criminal responsibility of the State, it would be all the more necessary for the Commission to substantiate its position in that some crimes could be committed only by States.

14. With regard to the general principles, he endorsed the view that, in drafting the code, the Commission should refrain from legislating by *renvoi*. In that con-

nection, draft article 6 only alluded to the judicial guarantees provided for in the Universal Declaration of Human Rights⁴ and in Additional Protocol II⁵ to the 1949 Geneva Conventions. Those guarantees should be expressly stipulated.

15. International law had an element of autonomy so far as general principles were concerned, for under internal law those principles were generally applied to all offences, of whatever kind, whereas some of the general principles enunciated in the report could not be so applied. For instance, the theory of justifying facts could not apply to crimes against humanity, given the nature of such crimes, whereas under internal law it could always be invoked save as otherwise provided by law.

16. There were also two other principles that were not mentioned in the report. The first was the principle applicable to concurrent offences, whereby the penalty varied according as a series of offences or a compound offence were involved. That basic question would have to be dealt with under the general principles, since it obviously had a bearing on the application of penalties. The other principle not mentioned, one that was embodied in the internal law of some States, was that the perpetrator of a political crime could not be extradited. In that instance, in order not to thwart the general duty to extradite proposed by the Special Rapporteur, the Commission should affirm such a duty even for political crimes, since the motive for a crime against humanity was connected with political, racial, ethnic and national considerations. Two further principles would also have to be affirmed in the draft code, namely the principle of adversary proceedings and the principle of two-tier jurisdiction.

17. He agreed with the Special Rapporteur's proposals regarding the non-applicability of statutory limitations, on the understanding that it would be necessary for that purpose to agree on the facts—in other words the alleged perpetrator of an offence against the peace and security of mankind remained liable to prosecution at all times irrespective of the period that elapsed between the commission of the offence and his arrest—and to agree on the penalty—in other words the period that elapsed between arrest and trial did not absolve the offender from serving his sentence.

18. Similarly, he endorsed the idea of non-retroactivity as set forth in draft article 7. Under internal law, however, if a new law more favourable to the accused was enacted, it generally had retroactive effect. What would be the position in the present case if the principle of national jurisdiction were recognized? How would a national court that was required to deliver judgment react towards such a law, bearing in mind the principle of non-retroactivity laid down in the code?

19. The other principles proposed by the Special Rapporteur also met with his approval, but he wondered whether the principle whereby everyone was deemed to know the law was applicable in the context of the draft code.

⁴ General Assembly resolution 217 A (III) of 10 December 1948.

⁵ See 1959th meeting, footnote 6.

20. The question of implementation of the code involved delicate issues. Virtually all members took the view that a code without implementation machinery would be useless. Implementation, however, required not only penalties, but also an organ capable of applying them. In cases where an act was not punishable under the internal law of a State, the courts of that State which were called upon to apply the code would have great difficulty in determining the relevant penalty unless it was indicated in the code. It was therefore important to provide for penalties in the code itself. Moreover, the Commission was also bound to abide by the principle *nulla poena sine lege* and hence it would have to specify the whole range of penalties.

21. The question of penalties inevitably introduced the issue of the organ that would order them, which in turn gave rise to the problem of providing for either universal jurisdiction or the creation of an international criminal court. The Special Rapporteur proposed opting at first for universal jurisdiction, whereby the perpetrators of offences against the peace and security of mankind would be brought before the courts of the State on whose territory they had been apprehended or to which they had been extradited. But the problems involved were legion and prompted certain remarks which were not intended as criticism, but might give the Commission food for thought. How, for instance, could the impartiality of national courts be guaranteed? Or how, if an act was perpetrated by the highest authorities of a State, could a judge in the forum State be prevented from refusing to try those authorities? Might not the State in question, for its part, refuse to extradite, as a result of political pressures detrimental to co-operation between States? Furthermore, in the event of extradition, there would be the problem of gathering evidence to prove the guilt or innocence of the accused; and, where a political leader had taken the decision to commit an act of aggression and had been brought before the courts of the injured State, the problem of the impartiality of the judges. Again, in the event of national jurisdiction, the penalties could well vary significantly from country to country, owing to the diversity of legal systems. Finally, national laws differed in one more respect, namely the penalties for complicity: in some States an accomplice was liable to the same penalty as the principal offender, whereas in others he did not suffer the fate reserved for the main actor. Those factors indicated that the principle of universal jurisdiction did not necessarily offer an entirely satisfactory solution.

22. The idea of having an international criminal court, whether the ICJ or some other body, also gave rise to a certain number of problems. The problem of evidence, for example, would be even more acute than in the case of universal jurisdiction. If the role were assigned to the ICJ, would it have a "general prosecution department for mankind" so that the prosecutor could gather evidence? What would be the prosecutor's powers in that regard? Who would undertake the search for war criminals? Would States be prepared to collaborate by extraditing criminals who were on their territory and bringing them before such an international criminal court? Once the criminals had been convicted, where would they serve their sentence? How could the principle of two-tier jurisdiction be observed at the inter-

national level? Would the international court pass judgment at first and at final instance?

23. On another point, he observed that the draft, and particularly articles 11 and 13, gave the impression that the offence would be completed once a person had carried out the act deemed to be a crime. Under internal law, however, the act was not sufficient in itself: it had to be accompanied by the mental element of intent. If intent was to be included, therefore, would it apply to all offences? Or should the Commission, in order to underline the autonomy of the code in relation to internal law, go so far as to hold that there was an offence as soon as the act had been committed, even where the mental element was lacking?

24. Paragraph 2 of article 7 should perhaps be redrafted because, at the stage envisaged in that paragraph, the person in question had not been convicted and was therefore still presumed to be innocent. It would suffice in that connection to replace the words "guilty of an act or omission" by "prosecuted for an act or omission". Lastly, the subject of draft article 9 was concerned with participation in a crime and did not warrant a separate article.

25. With regard to the possibility of making the use of weapons of mass destruction a crime, his only comment was that it would be regrettable not to mention it in a code of offences against the peace and security of mankind, even if it was embarrassing for political reasons, and that the Commission could be found wanting if it were to remain silent. *Apartheid* should, of course, also be included.

26. Mr. ARANGIO-RUIZ said that there seemed to be some degree of misunderstanding concerning his earlier remarks about the universal jurisdiction formula as opposed to the international criminal court formula. The establishment of an international court undoubtedly represented the ultimate goal of the world community, but it would be unwise not to appreciate with all possible accuracy—or worse, to minimize—the obstacles to the attainment of such a goal. Yet that was precisely what scholars and diplomats had been doing unconsciously since the 1940s and 1950s, by accepting too easily the alleged but non-existent analogy between the situation that had obtained in 1945 and the present situation of international society. It was for that reason that he had discussed at length the nature of the Nürnberg and Tokyo Tribunals in his previous statement (1962nd meeting). Taking the Nürnberg Principles and trials as precedents inevitably led to ambiguity, for, notwithstanding its essential conformity to political expediency and to justice, the Nürnberg experience could not serve as a precedent for the international criminal court that should be established for the implementation of the code.

27. For that reason, it had to be acknowledged that the problem confronting the Commission was not international but supranational. In fact, perhaps a better term would be "infranational". None of the States participating in the European Community, for example, really felt that its sovereignty had been reduced. The reason lay essentially in the fact that the Community's institutions operated in respect of physical and juridical

persons who were, after all, only the common, private subjects of the member States. But the international court necessary for implementing the code would have to deal in many cases with persons who were at the summit of the political organization of sovereign States. It might even have to summon sovereigns themselves. There was no real comparison with the Court of Justice of the European Communities or with the *tribunaux arbitraux mixtes* established by the peace treaties following the First World War.

28. Precisely on the basis of such a premiss, he had ventured to predict that it would be very unlikely that sovereign States would, at a sufficiently early stage, accept such a set of supranational institutions as an international criminal court and the ancillary institutions required for the court to carry out its functions in respect of the "authorities", to use provisionally the 1954 terminology criticized by Mr. Ushakov (1965th meeting).

29. It was therefore only on the basis of such discouraging realities that he had suggested that the forms of implementation of the code would inevitably be those currently available. He had none the less placed a number of tentative qualifications on the idea of the universal jurisdiction formula. First of all, there should be a gradual approach to such a system and very strict distinctions should be drawn between the various offences. For some offences, a high degree of co-operation among national institutions responsible for the administration of penal justice could be achieved at a relatively early stage. For others, the means of implementation of the code would doubtless have to remain those currently in place within the organized international community. There were obviously certain crimes against peace and crimes against humanity which involved the policies of some Governments to such an extent that there would hardly be any hope of obtaining any participation from them in efforts for prosecution and repression by national courts. That would undoubtedly represent an extremely serious gap in the system of implementation of the code. The same problem would none the less have to be faced within the framework of the more appropriate international criminal jurisdiction solution, an alternative which did not seem to stand a better chance of acceptance or effectiveness for crimes of that type.

30. In conclusion, he recalled that one of the best international lawyers of the time had written 20 years earlier that it would probably take 100 years for "federal analogies" to become valid in international law and international organization. There was thus a point at which both formulas faced almost the same difficulties.

31. Mr. TOMUSCHAT said that the general principles set forth by the Special Rapporteur could be considered as the corner-stone of a future international criminal code. They went beyond the field of substantive law on certain points, in particular the basic rule on jurisdiction contained in draft article 4, whereby every State would have the right—in fact the duty—either to try or to extradite any person charged with an offence against the peace and security of mankind. Such a rule of universal jurisdiction was appropriate for the gravest crimes, a description which applied to most of the of-

fences included in the draft code. In some other instances, however, the character of the offence was very far from being of such gravity as to warrant a worldwide system of jurisdiction. For example, a matter of interference in a State's affairs, which was such a cloudy notion, could never be entrusted, as far as interpretation and application were concerned, to national tribunals: their diverging ideologies would make the question of guilt or innocence essentially and issue of political discretion.

32. Besides, to declare every State competent to try an alleged perpetrator of an offence against the peace and security of mankind would lead to chaos. It would be much wiser to base jurisdiction on a genuine connection, as did the ICJ in a different context, or at least on a reasonable connection. Otherwise, a race could well start to obtain the extradition of persons whom the State arresting them did not wish to try; or again, a State on one continent might call for the extradition of persons charged with committing atrocities on another continent.

33. Moreover, any attempt to establish rules determining jurisdiction as between States in the matter was likely to prove of no avail. An international criminal court was the best solution, but for his part he would be content with an international commission of inquiry to establish the facts in each case and publish a report.

34. Acceptance of an international jurisdiction would be a test of whether the draft code was taken seriously or whether it was mainly intended as a tool to be used against the weak but never against the powerful. Criminal law rested upon the principle of equality and any bias in applying it was a denial of justice. To his mind, the code had to be accompanied by appropriate enforcement machinery; otherwise, it would hardly be worth formulating.

35. In the field of human rights, it was appropriate to proceed step by step, identifying and framing the legal rules first and only then considering the establishment of implementation machinery. The position with respect to the present topic, however, was totally different. Criminal law in a sense ensured the individual's enjoyment of human rights, but at the same time interfered with the basic rights of those who were prosecuted. The utmost care should therefore be exercised to avoid any harmful effects. Consequently, the draft code should be accompanied by a draft statute of an international criminal court.

36. Turning to the provisions of the draft code, he agreed with the basic idea embodied in draft article 2, which did away with safeguards afforded by the rules of domestic law. In the event of grave abuses of the sovereign rights of a State, those who had perpetrated them as State agents were precluded from invoking the usual privileges of State sovereignty.

37. Draft article 3, on the other hand, left much to be desired. In the case of State responsibility, it was perhaps sufficient to identify a number of objective criteria or elements of the internationally wrongful act. But in the present instance, where the criminal responsibility of the individual was at stake, subjective factors came into play: punishment presupposed guilt,

and the subjective element took the form of criminal intent or simple negligence. For practically all the offences listed in the draft code, intent would be necessary: mass crimes could not be the result of negligence. That point would have to be clarified explicitly, in order to avoid misunderstanding.

38. Having already spoken on the question of establishing an international criminal court, he would not dwell on draft article 4. Draft article 5 was acceptable in so far as it applied to the offences listed in article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, but he doubted whether the same held true for all crimes against peace. For example, the offence of interference in a State's affairs was much less serious than murder—a crime to which statutory limitations would apply under internal law. One should also remember the need to facilitate reconciliation. The recent return to democracy in Uruguay had been made possible by the promise not to prosecute for certain serious crimes committed under the previous régime. Whatever the objections to forgetting crimes in such cases, it was plain that a multiplicity of trials would prevent the healing of wounds. Hence he was reluctant to accept a rigid rule which would not permit reconciliation in that kind of situation. The question also arose as to who would be able to grant pardon under the draft code. The principle of universal jurisdiction would, unfortunately, appear to stand in the way of measures of clemency.

39. On the subject of draft article 6, he fully endorsed the remarks made by Mr. Illueca (1964th meeting). The guarantees of a fair trial had been spelled out by the international community in article 11 of the Universal Declaration of Human Rights⁶ and article 14 of the International Covenant on Civil and Political Rights.⁷ The Covenant had received world-wide recognition and had more than 80 States parties. Since that international standard existed, it should be mentioned in the draft article.

40. Draft article 7 dealt with an issue which lay at the heart of the legal debate in the Nürnberg trial, namely application of the law *ex post facto*. In that regard, he would simply point out that the purpose of drafting the present code was precisely to remedy the shortcomings of trials of that type by codifying offences against the peace and security of mankind. When the code came into force, the issue of application of the law *ex post facto* would no longer arise.

41. As he interpreted article 7, it meant that punishment of a person guilty of an offence against the peace and security of mankind would be lawful only in accordance with the provisions of the code, unless the specific requirements of paragraph 2 were met. In fact, it was the code itself that would bring into being, in law, the category of offences in question, and that point should be expressly stated in the article. On the other hand, Mr. Illueca had been right to say that paragraph 2 should be aligned with article 15, paragraph 2, of the International Covenant on Civil and Political Rights,

which contained the concluding phrase "recognized by the community of nations".

42. He agreed with many of the rules proposed in draft article 8; but it was essential to remember that the draft code dealt with the criminal responsibility of the individual. In that respect, the introductory words of the article could lead to misunderstanding, with their misplaced reference to "self-defence in cases of aggression". In the first place, self-defence against aggression was not itself aggression that needed to be justified. In the second place, the only relevant act of self-defence in the present context was individual self-defence. Mr. Ushakov (1965th meeting) had therefore been right to suggest that the text should be amended to clarify the distinction between those two kinds of self-defence.

43. Great care should be taken with the drafting of article 8. The negative form was used throughout and could be interpreted as meaning that the presumption of innocence did not apply, a presumption that was an essential achievement within a civilized community and must be retained in the present context.

44. *Force majeure*, dealt with in subparagraph (b) of draft article 8, had no place in the draft code, which related only to acts or omissions of the individual. Under criminal law, no individual could be charged with the consequences of *force majeure*. The provision on error, in subparagraph (d), was also very doubtful. Since *mens rea* was a general requirement and negligence was not sufficient for there to be an offence, an error of fact would often take away the gravity of the offence. One could imagine a case of artillerymen firing at what they believed to be enemy soldiers but actually hitting a civilian target. Were they to be held responsible for having committed a war crime? Lastly, subparagraph (e) of the article stood in need of redrafting, if only because the rules of *jus cogens* were concerned with inter-State relations and hence could not be invoked under criminal law. Clearly, article 8 as a whole needed a thorough re-examination in order to make it conform to the generally recognized principles of criminal law.

45. Mr. CALERO RODRIGUES said that the Special Rapporteur had submitted a set of general principles which were strictly connected with the international crimes under consideration and, for the purpose of formulating them, had taken care to rely on the general principles of domestic law. Not all those principles, however, could be transposed into international law, nor were they all applicable to the offences listed in the draft code.

46. With regard to the juridical nature of the offences, draft article 1 (Definition) was an improvement over the earlier text, contained in the second alternative of former draft article 3 (A/CN.4/387, chap. III). The Special Rapporteur's approach thus avoided the drawbacks of a general definition. It should be noted that national criminal codes did not normally define a crime in general terms: they simply set forth in the different articles the definition of each of the crimes in question.

47. He also agreed with the rule embodied in draft article 2 (Characterization) and the proposition, as stated in the first sentence, that the characterization of an act

⁶ See footnote 4 above.

⁷ See 1964th meeting, footnote 5.

as an offence against the peace and security of mankind, under international law, was independent of the internal order. As to the second sentence and the problem of double jeopardy, or *non bis in idem*, mentioned by Sir Ian Sinclair (1964th meeting), some redrafting was necessary to clarify that there was no question of going back on that established principle.

48. On the subject of the application of the code in space, he noted that in principle the code was intended to apply universally, or more precisely, in the territories of all the States parties. The question then arose of indicating the competent jurisdiction. In that connection, the principle *aut dedere aut judicare* was applied, for example in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁸ when States agreed to consider certain acts as crimes under their respective national laws. The principle was thus applied under classical “international criminal law”, but the present topic came rather under the heading of “inter-State criminal law”, “supranational criminal law” or “universal criminal law”. The problem was not one of choice of law but rather of the delegation of powers on the part of States.

49. The two previous speakers had suggested that the provisions of draft article 4 were premature and had convincingly demonstrated the impossibility of applying the system of universal jurisdiction. Theoretically at least, an international criminal court was the only acceptable solution.

50. As to the application of the code in time, Kelsen and other writers had held that non-retroactivity was not a principle of international law. With reference to the Nürnberg trial and the principle *nullum crimen sine lege*, it had been said that the term *lex* could be considered in a broad sense, so as to include customary law, general principles, natural law, rules of morality, and so on. The explanation was perhaps ingenious, but it was not convincing. It would be better not to try to solve that problem in the draft but simply to specify that the code would apply only to offences committed after its entry into force.

51. The idea of the non-applicability of statutory limitations was acceptable in view of the gravity of the offences concerned. Most national criminal codes applied the principle of a graduation of statutory limitations according to the gravity of the offence. Moreover, the non-applicability of statutory limitations to war crimes and crimes against humanity could be regarded as an existing principle of international law, despite the somewhat limited acceptance of the 1968 Convention on the subject.

52. In regard to the scope of the code *ratione personae*, the Commission had decided, as a working hypothesis, to limit the application of the code to individuals, and in the course of its work that hypothesis had become more convincing. The Commission could therefore request the General Assembly to confirm that choice.

53. The concept of international crimes was set forth in article 19 of part 1 of the draft articles on State

responsibility and, if it were maintained, the provisions of that article would apply to crimes imputable to States. The present draft code covered international crimes committed by individuals.

54. The wording of draft article 3 would have to be reviewed. It provided that any person who committed an offence against the peace and security of mankind was responsible therefor, which was not always true, for the person committing the act could well adduce some justification.

55. The most important general principle, however, was that of imputability. For a person to be punishable, the crime must exist and that person must be responsible. Generally speaking, in criminal law the question of attribution of responsibility or imputation of a crime to a person covered two kinds of situations: first, cases in which a person could not be held responsible for subjective reasons, in other words reasons attaching to the person (*in personam*); secondly, cases involving objective “justifying facts” attaching to the act (*in rem*). The first category, *in personam*, included mental incapacity, coercion—whether physical or moral—and error. The second category, *in rem*, included superior order, self-defence and state of necessity.

56. The Special Rapporteur’s approach in his fourth report (A/CN.4/398, paras. 177 *et seq.*) was somewhat different, for he spoke of “justifying facts”, which eliminated the wrongful character of the act, and “exculpatory pleas”, which concerned the scope of responsibility. In the latter case, the basis of responsibility was not affected: the wrongful act existed, but the perpetrator could not be punished.

57. The concept of extenuating circumstances was close to that of exculpatory pleas and the Special Rapporteur rightly said (*ibid.*, para. 181) that the question could not be dealt with at the present stage, when penalties were not yet under consideration. For his own part, he none the less wished to enter a reservation regarding the Special Rapporteur’s statement, in connection with the imposition of penalties, that:

... If, as seems likely, the present draft is to be limited to a list of offences, leaving it to States to decide on their prosecution and punishment, then it will be for States to apply their own internal laws in the matter of criminal penalties. ... (*Ibid.*)

58. The Special Rapporteur mentioned six possible justifying facts (*ibid.*, para. 190): coercion; state of necessity and *force majeure*; error; superior order; the official position of the perpetrator of the offence; and reprisals and self-defence; but he excluded reprisals and self-defence, which would not apply to all offences under the code (*ibid.*, paras. 250 and 253). He also concluded that the official position of the perpetrator could not be invoked as a justifying fact, a conclusion which he himself endorsed. Nevertheless, a provision on the subject was necessary, bearing in mind the general rules of immunity. Such a provision could perhaps take the form of a separate paragraph in article 3 defining the responsibility of the perpetrator. Accordingly, four justifying facts remained: coercion; superior order; state of necessity and *force majeure*; and error.

59. He had serious doubts about the wording of draft article 8, which enunciated a general principle of non-

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

exception and then proceeded to confirm the principle for each possible case by accompanying the confirmation with an exception to the exception. For example, the provision that "Coercion, state of necessity or *force majeure* do not relieve the perpetrator of criminal responsibility" was followed by the phrase: "unless he acted under the threat of a grave, imminent and irremediable peril". The same clause was attached to the provision concerning the order of a Government or of a superior. In the case of error, the addition was "unless, in the circumstances ... it was unavoidable for him".

60. He would suggest that, instead, each justifying fact should be stated in positive terms and clearly defined. For instance, in the case of coercion, the draft code should state that, in order for a justifying fact to be considered as such, the perpetrator must have been under a "grave, imminent and irremediable peril". By way of comparison, he pointed out that some criminal codes, including that of Brazil, stated that only "irresistible coercion" could be considered as a justifying fact. The same applied to a superior order, which could constitute an admissible defence if, as stated by the Special Rapporteur, it took the form of an act of coercion (*ibid.*, para. 225). The offences dealt with in the draft code were so serious that an order by itself could not constitute a justifying fact. Only when it amounted to coercion could an order be admitted as an exception to responsibility.

61. In regard to state of necessity, the Special Rapporteur affirmed that "there should be no disproportion between the interest sacrificed and the interest protected" (*ibid.*, para. 196). That would seem to apply also to coercion: a person whose life was threatened did not have a legal obligation to forfeit it in order to save the life of others. Indeed, that problem could even arise in connection with acts of genocide.

The meeting rose at 1 p.m.

1967th MEETING

Monday, 16 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. Koroma, Mr. Laclela Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

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 RAPPOREUR (*continued*)

PART IV (General principles) *and*

PART V (Draft articles) (*concluded*)

1. Mr. McCaffrey said that he would make some general and very preliminary comments on the general principles contained in part IV of the fourth report (A/CN.4/398).

2. Referring to the two principles relating to the application of criminal law in time, he said that, with regard to the rule *nullum crimen sine lege*, he agreed with the Special Rapporteur's conclusion that the protection of the individual against arbitrary action should be the lodestar of the Commission's work (*ibid.*, para. 156), particularly if no international criminal court was to be established. Similarly, he endorsed the conclusion that a flexible content should be assigned to that rule (*ibid.*, para. 157). He also agreed generally with the statement—cited in the report (*ibid.*, para. 161)—by the United States Judge Francis Biddle, which raised the question whether the principle *nullum crimen sine lege* related to natural law or to positive law. That question, however, would not be an obstacle once the code was drawn up, since the offences would be clearly defined. He further shared the view expressed by the Special Rapporteur that the word "law" should be understood in its broadest sense (*ibid.*, para. 163). The Commission should avoid an unduly narrow interpretation of the rule *nullum crimen sine lege*. In any event he doubted whether that rule would raise problems with regard to the code, since the current situation was quite different from the one which had obtained in 1945, and there was generally greater agreement in the international community with regard to legal principles. The rule *nulla poena sine lege*, on the other hand, might raise problems, since it would necessarily involve an attempt to set parameters for penalties.

3. With regard to the principle of statutory limitations in criminal law he did not believe it was entirely accurate to state (*ibid.*, para. 165) that that concept was unknown in Anglo-American law, since it did indeed exist in current American law, for example. Obviously, the concept of statutory limitations was less problematic with regard to individuals than with regard to States. Even with regard to individuals, however, he was not convinced that policy considerations underlying statutory limitations, such as stale evidence and procedural guarantees, were wholly inapplicable to the subject at hand. If the individual was to be protected

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).