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Summary record of the 1967th 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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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 RAPPORTEUR (*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).

against arbitrary action, the Commission must consider building into the code some provisions analogous to the statutory limitation periods contained in most criminal codes. The matter deserved further study, particularly in the light of the poor ratification record of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

4. Turning to the application of criminal law in space, and referring to the idea of universal jurisdiction as discussed by the Special Rapporteur (*ibid.*, paras. 173-176), he pointed out that, in the past, universal jurisdiction had rarely been exercised by regular national courts. The examples cited by the Special Rapporteur (*ibid.*, paras. 174-175) had involved tribunals specially constituted to deal with unique situations. As for the Special Rapporteur's conclusion (*ibid.*, para. 176) that the absence of an international jurisdiction led ineluctably to vesting jurisdiction in national courts, he was not convinced of that. The problem was to define the tribunals and the circumstances under which they were deemed competent. The precise nature, implications and modalities of universal jurisdiction were in fact little understood outside commercial régimes. Did national courts have jurisdiction over the kind of crimes being dealt with? At whose instance could alleged perpetrators be prosecuted, that of private citizens or that of the authorities of a foreign State? Could alleged perpetrators be prosecuted *in absentia*? Could those questions be left to municipal law, which would ordinarily govern them? If they were, the result would be chaos.

5. Several models for universal jurisdiction existed in international law. Articles 9 and 10 of the Harvard Law School draft convention on jurisdiction with respect to crime⁴ narrowly circumscribed the circumstances under which a State could exercise universal jurisdiction. In volume II of their treatise on international criminal law, M. C. Bassiouni and V. P. Nanda⁵ emphasized international criminal law as realized by means of a necessary link with municipal criminal law and municipal judicial organs. The American Law Institute, in its draft revision of the *Restatement of the Foreign Relations Law of the United States*, pointed out that the new section 404 of the law recognized the existence of certain offences which, under international law, any State might punish, even though it had no links of territory or nationality with the offenders. He noted in that connection Mr. Tomuschat's point (1966th meeting) that not even in the Convention on Genocide had the principle of universal jurisdiction been accepted. He agreed with Sir Ian Sinclair (1964th meeting) that the subject should be studied most carefully, and that the Commission must avoid encouraging what would be chaotic enforcement efforts at best, and vendettas at worst.

6. He also agreed that the Commission should ask the General Assembly whether it should proceed with the drafting of the statute of an international criminal

court, or even inform the Assembly that it would do so. Regarding Mr. Balanda's point (1966th meeting) that political offences should not be allowed as exceptions to extradition for the purposes of the code, he said that would be very problematic but was worth studying, along with the entire question of extradition.

7. With regard to the determination and scope of responsibility, he appreciated the Special Rapporteur's intellectual rigour in distinguishing between justification, extenuating circumstances and exculpatory pleas. After providing illustrations of how those definitions would in his view be applied, he said that, while he agreed with the Special Rapporteur's conclusion in the matter (A/CN.4/398, para. 181), the question of the acceptance or rejection of exculpatory pleas by judges in the national courts warranted further study.

8. Regarding coercion, state of necessity and *force majeure*, he said that the judgment cited by the Special Rapporteur that "No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever" (*ibid.*, para. 192) appeared to conflict with the conclusion that crimes against humanity and crimes against peace should be excluded from those exceptions since they were out of proportion to any other act (*ibid.*, para. 198). That conclusion bore closer scrutiny, since, even in respect of a crime against humanity, a person who was being coerced would not be deterred by anything in the code. He referred in that connection to Mr. Calero Rodrigues's example of a guard in a concentration camp. The same was true of *force majeure* at least.

9. Regarding error, he was generally in agreement with the Special Rapporteur's conclusion (*ibid.*, para. 216) but, as Mr. Tomuschat had noted, further study was needed, particularly with regard to errors of fact.

10. On the matter of superior order, he welcomed the Special Rapporteur's distinction between, on the one hand, cases involving coercion and error, and on the other, invocation of the order alone as justification. With regard to coercion, the Special Rapporteur made an important point concerning the strictness of the Nürnberg Charter compared with the flexibility of the Nürnberg Principles (*ibid.*, para. 221). As for error, he agreed with the general principle stated in the report (*ibid.*, para. 230). In that connection, he referred to L. C. Green's *Superior Orders in National and International Law*,⁶ a thorough comparative study of a number of countries' legal systems which the Special Rapporteur might find interesting. In particular, the study concluded that, in assessing whether the order obviously involved the commission of a criminal act, the court must consider whether the order was so obvious to other persons in circumstances similar to those of the accused. He agreed with the Special Rapporteur's broad conclusion (*ibid.*, para. 233) that "an order is not in itself a justification".

11. Mr. SUCHARITKUL said that the final version of the draft code should contain a list of acts constituting offences against the peace and security of mankind, as well as provisions on general principles, penalties and the creation of an international court.

⁴ *Research in International Law*, part II: "Jurisdiction with respect to crime", *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 29 (1935), pp. 440-441.

⁵ *A Treatise on International Criminal Law*, vol. II, *Jurisdiction and Co-operation* (Springfield (Ill.), Charles C. Thomas, 1973).

⁶ Leyden, Sijthoff, 1976.

12. Turning to the draft articles submitted by the Special Rapporteur, he said that the definition laid down in draft article 1, though satisfactory, could perhaps be amplified by a provision to the effect that offences against the peace and security of mankind were "the most serious" crimes under international law.

13. Draft article 3 dealt with both responsibility and penalties, two concepts that might well go hand in hand. The responsibility in question was, of course, that of the individual, not that of the State. So far as penalties were concerned, the Special Rapporteur had rightly refrained from entering into detail, for if the Commission decided to deal with the question of the penalties applicable, it would end up by asking whether or not the code should provide for the death penalty or imprisonment for life, and that would be going too far. It would be better to leave it to the court having jurisdiction to decide, in each case, what penalty to impose. The wording adopted by the Special Rapporteur, namely "Any person ... is ... liable to punishment", therefore seemed sufficient, although it could if necessary be supplemented by some examples of penalties.

14. The Special Rapporteur had rightly specified, in paragraph 2 of draft article 4, that the provision in paragraph 1 did not prejudice the question of the existence of an international criminal jurisdiction. Ideally, of course, it should be possible to establish an international court; but that would be difficult to achieve in practice, particularly since it was hoped in some quarters to apply the code to States in their capacity as legal persons. The question of the criminal responsibility of States, however, came within the remit of another Special Rapporteur and therefore did not have to be considered in connection with the draft code.

15. In the absence, or pending the establishment, of an international criminal court, national courts should be able to try offences against the peace and security of mankind, which, as stated in draft article 4, paragraph 1, were universal offences. In that connection, he pointed out that, under the Constitution of the United States of America (article 1, section 8, tenth paragraph), Congress was authorized to define and punish acts of piracy on the high seas and any other offence against the law of nations. Also there were numerous crimes, including those covered by the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft⁷ and by the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,⁸ that were punishable, at least in theory, on the basis of universal jurisdiction.

16. Draft article 5 stated the general principle that no statutory limitation should apply to offences against the peace and security of mankind, because of their nature. In that connection, a degree of caution was indicated. Given the significant evolution of the concept of mankind with the passage of time—it had initially been linked to citizenship but had subsequently acquired a biological dimension—it was quite possible that an act that had not constituted an offence at the time it had been committed could become one as a consequence of

the adoption of a different definition of an offence against the peace and security of mankind.

17. Fortunately that principle, which could prove dangerous at times, was tempered by the principle of the non-retroactivity of criminal law, as provided for under draft article 7, which stipulated that no person could be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind. Just like the jurisdictional guarantees provided for under draft article 6, the rule *nullum crimen sine lege, nulla poena sine lege* was designed to protect any person accused of an offence against the peace and security of mankind. But the victims of such offences also had to be protected. He therefore also supported paragraph 2 of article 7, which was entirely equitable since it was directed not at persons against whom charges or a prosecution had been brought, but at those who had already been tried and convicted.

18. Draft article 8 also had his support. The right to self-defence was a natural right of both the individual and the State, and it was therefore normal for the exercise of that right to constitute an exception to the principle of responsibility. The order of a Government or of a superior, referred to in subparagraph (c), could relieve the perpetrator of an offence against the peace and security of mankind of criminal responsibility only if he had acted under threat of a grave, imminent and irremediable peril. As for an error of law or of fact, obviously it could constitute an exception to the principle of responsibility only if it was unavoidable for the perpetrator of the offence. The reference to coercion was more open to question. His own view was that, if the perpetrator of a crime was subjected to total physical coercion (*vis absoluta*), he was no longer truly the perpetrator but became an instrument, and so could not be held responsible.

19. Draft article 9, which provided that criminal responsibility could be imputed to the superior, was satisfactory, even though it could be said to depart from the principle that criminal responsibility was strictly personal and that no one could be held responsible for the acts of others.

20. The provisions relating to participation in responsibility, and in particular to conspiracy and complicity, had their proper place among the general principles and could be included, for instance, in draft article 3.

21. Turning to chapter II of the draft, he said that the distinction drawn by the Special Rapporteur in draft article 10 between crimes against peace, crimes against humanity and war crimes was fully justified. Apart from the fact that it was in conformity with State practice, that distinction reflected the differences that existed between the various offences against the peace and security of mankind in terms of exculpatory pleas, extenuating circumstances, justifying facts and even penalties. Justifying facts, for instance, could be invoked only for war crimes; and the penalties for the three categories of crimes were not the same.

22. As to crimes against peace, the subject of draft article 11, aggression, the threat of aggression and interference in the internal or external affairs of another

⁷ United Nations, *Treaty Series*, vol. 704, p. 219.

⁸ *Ibid.*, vol. 860, p. 105.

State were undoubtedly, by their very nature, extremely serious acts. But that was not true of terrorist acts. Only the most serious acts should figure in the draft code.

23. It was also not true of the offences dealt with in draft article 13. Any serious violation of the laws or customs of war was a war crime, but not every war crime was an offence against the peace and security of mankind. It would therefore be better to delete the reference to the laws or customs of war, which varied considerably according to time and place, and to keep to the criterion of seriousness. Only the most serious war crimes could rank among offences against the peace and security of mankind.

24. Finally, in elaborating the draft code, the Commission should not take solely as its basis the 1954 draft code, the Definition of Aggression,⁹ the 1907 Hague Regulations respecting the Laws and Customs of War on Land¹⁰ and the 1949 Geneva Conventions¹¹ and their 1977 Additional Protocols.¹² It should also take account of the relevant General Assembly resolutions to which Mr. Illueca (1961st and 1964th meetings) had referred. Some members of the Commission had questioned the intrinsic value of those resolutions. Mr. McCaffrey, for instance, had argued that, as the General Assembly was not a legislative body, the texts it adopted did not always have legal force and did not necessarily bind all States. That opinion was not shared by the international community as a whole, the Group of 77 in particular taking a different view. Even though they did not all have the force of law like the Universal Declaration of Human Rights, the resolutions of the General Assembly carried undeniable weight, for example the declaratory, hortatory or codifying resolutions, or the resolutions designed to crystallize rules of law or, again, the resolutions that promoted the progressive development of international law. Accordingly, the Commission should take them into account.

25. Mr. MALEK said that he would confine himself to a few brief comments on certain points raised during the discussion.

26. According to some members of the Commission, certain acts, including international terrorism, traffic in human beings, drug trafficking and slavery, should be classified as crimes against humanity, in which category the Special Rapporteur also proposed to include serious damage to the environment. Admittedly, in moral and human terms, it would be highly desirable for all such acts, which were of an extremely serious nature, to be treated as crimes against humanity; but it had to be recognized that the only acts that could be included in the draft code were those covered by the definition of a crime against humanity whose main elements had formed part of international law for a fairly long time. Technically speaking, it was difficult to see how drug trafficking, for instance, or in some cases even international terrorism, could be classified as crimes against humanity when they were characterized by the fact that

they had been committed for specific, and restrictively determined reasons of a social, political or other nature. By the same token, slavery, though abhorrent, could not be classified as an offence except where, as in the case of the kind of slavery covered by the draft code—namely the “enslavement ... [of] elements of a population on social, political, racial, religious or cultural grounds” (art. 12, para. 3)—it embodied the various elements peculiar to a crime against humanity as adopted in all official and doctrinal definitions laid down since the Nürnberg trial.

27. The principle of the non-applicability of statutory limitations to offences against the peace and security of mankind was laid down in draft article 5. He would not restate the legal bases for the principle, but would merely point out that it was self-evident and could not be disregarded or opposed on any valid ground. When any of the offences in question went unpunished, whether by virtue of statutory limitations or for any other reason, there was often a violent and far-reaching reaction. Often, the effect was to deliver the guilty parties over to the victims or to persons connected to the latter by blood, race or religion. Such people tended never to forget, nor to retreat before any legal or other obstacle in inflicting on the guilty parties the punishment they deserved.

28. The principle of the non-applicability of statutory limitations seemed to draw its strength less from the legal sources that went to justify it than from the spontaneous support of the universal conscience which revolted against the idea that such serious crimes could be allowed to go unpunished. It was not only the enduring consequences of a war which had ended nearly half a century earlier that had to be borne in mind, but also the consequences of the numerous conflicts being waged in various areas of the world, including that by which Lebanon was now being torn asunder. Future generations there would retain the terrifying memory of the acts of cruelty that were being committed and of those who committed, aided and abetted them. It was to be hoped, therefore, that the Commission would in due course adopt article 5 as drafted without opposition and without introducing any amendment to restrict its scope.

29. There was a clear statement in draft article 7 regarding the principle of the legality of the charge, but the principle of the legality of the penalty had apparently not been mentioned. It was, of course, an extremely complex matter in the context of international criminal justice, but the Special Rapporteur might perhaps wish to revert to it at a later stage. In fact, the Commission should review article 5 of the draft code as adopted on first reading at its third session, in 1951. The article, which it had been very hesitant to delete in 1954, read:

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.¹³

It had been argued, in support of the deletion of the article, that it did not take sufficient account of the generally recognized principle *nulla poena sine lege*, since the court exercising jurisdiction would be free to

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁰ See 1958th meeting, footnote 7.

¹¹ *Ibid.*, footnote 6.

¹² See 1959th meeting, footnote 6.

¹³ *Yearbook ... 1951*, vol. II, p. 137.

determine the penalties to be applied. That criticism was perhaps partially justified; but at least article 5 as thus drafted would have the merit of underlining the real and effective nature of the provision which was currently the subject of draft article 3 and read: "Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment." It would make it clear that the offences set forth in the code would never intentionally go unpunished.

30. It was likewise doubtful whether leaving it to the court which had jurisdiction to determine the penalty could be contrary to the *nulla poena sine lege* principle. If the jurisdiction of a national court had been recognized, that court would apply the penalties provided under internal law. If an international criminal court were created and its jurisdiction to try the offences covered by the code were recognized, it would apply the penalties prescribed, either by the international law in force, which contained useful indications in that regard and provided for various penalties—even the death penalty for crimes against peace, war crimes and crimes against humanity—or by any international instrument by which it was directly bound, such as the instrument creating it or conferring jurisdiction upon it. It was difficult to see how, at the current stage, the Commission could take account of the principle of the legality of penalties except by adopting a general provision of the kind envisaged in the above-mentioned article 5, particularly if it decided to include States among the perpetrators of offences punishable under the code.

31. The question of the creation of an international criminal court had been raised by many members of the Commission, who had referred, sometimes emphatically, to the close connection between such a court and the draft code. Indeed, if the preparation of the draft code was to serve any real purpose, it would be necessary, simultaneously, to determine the authority that would be called upon to apply it. That was a matter of paramount importance. In that connection, the Commission should, in its report on its thirty-eighth session, draw the attention of the General Assembly to resolution 1187 (XII) of 11 December 1957, in which the General Assembly had decided to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of the draft Code of Offences against the Peace and Security of Mankind. It should also underline the close connection between the code and the establishment of an international criminal court and should submit its observations on the matter with a view to encouraging the General Assembly either to set up a special committee to prepare a draft statute for an international criminal court, as it had done in 1950 and 1952, or to entrust the task to the Commission itself. It should not be forgotten that, at its second session, in 1950, the Commission had expressed the view that it was desirable and possible to establish an international judicial organ for the trial of persons charged with crimes over which jurisdiction would be conferred upon that organ by international conventions.¹⁴

32. Mr. ROUKOUNAS, referring to draft articles 2 and 4, said that, under the terms of article 2, the

characterization of an act as an offence against the peace and security of mankind was independent of internal law; in other words, internal law could not be invoked against international law nor have the effect of "decriminalizing" an act characterized as an offence under the code. It followed that individuals had international obligations which took precedence over the obligations incumbent on them at the national level, even if, during the 1950s, neither the then Special Rapporteur nor the Commission had referred expressly to the primacy of international law. The proposed wording, therefore, provided a way of dealing indirectly with the relationship between international law and internal law.

33. He had two remarks to make in that connection. First, it was the independence of international law with regard to penalties that was referred to in the 1951 draft, and it was understandable that, at the time, a penalty imposed by international courts had had to be legalized, so to speak. An international court could therefore impose a penalty irrespective of whether similar penalties existed under internal law. The Special Rapporteur referred to "characterization" rather than to "penalties" because the Commission had, for the time being, taken the characterization of an act as a crime as its working hypothesis. Secondly, the question arose whether the Commission, by using that wording, was also resolving the various matters concerning the relationship between international law and internal law from the internal law standpoint; for quite apart from the fact that internal law could not be invoked against international law, and although taking account of it, the Commission also had to ensure that international law did not clash with internal law. Very many, if not most, of the offences included in the draft code were already covered by international law, and States knew that they had to comply with their international obligations in that regard.

34. It would therefore be useful to consider the position in the light of internal law. A comparative study would show that three possibilities were open to States: (a) the exact terms of the international instrument—which did not have to be a treaty—could be incorporated in their respective criminal codes, possibly with penalties being added; (b) only a part of the international instrument could be incorporated in their criminal codes, to fill a *vacuum legis*; (c) a general reference to the laws and customs of war could be included in their criminal codes.

35. Even though the formal incorporation of the international instrument into internal law was not required under all constitutional systems, in practice internal law and, in the case in point, criminal law should include rules identical or parallel to those contained in the international instrument. That was first of all because the punishment of international crimes by national courts—when there was such punishment—was the rule, and punishment by an international legal organ was the exception, thus far at least. Even after the Second World War, a number of crimes had been tried by domestic courts. Also, in order to ensure that statutory limitations did not apply, the international instrument had to be accompanied by provisions in the national

¹⁴ *Yearbook ... 1950*, vol. II, p. 379, document A/1316, para. 140.

criminal law defining the crime and laying down the penalty. The same applied to extradition, in the case both of the requesting State and of the State to which the request was made.

36. He therefore considered that it was necessary to supplement or replace draft article 2 by a provision that would impose an obligation on States to take all necessary measures at the internal level to ensure recognition of the characterization of the offence and any penalty provided for under the code. In that way, the Commission would get round the fact that internal law could not be invoked against international law. He even wondered whether it would not be advisable also to consider the question of a State absolving itself or any other State of liability, to which reference was made in articles 51, 52, 131 and 148, respectively, of the four 1949 Geneva Conventions.

37. Turning to draft article 4, he said that he favoured the establishment of an international criminal court to try and punish universal offences. In the mean time, such offences would be tried by national courts, vested with a kind of international function. He wondered, however, whether the word "arrested", in the second sentence of paragraph 1, had a special meaning. With regard to universal jurisdiction, which of course was not the rule in contemporary international relations, he recalled that when Additional Protocol I¹⁵ to the 1949 Geneva Conventions had been drawn up, extradition and the question of universal jurisdiction in general had been the subject of lengthy and difficult negotiations that had resulted in the drafting of article 88, which dealt in fairly vague terms with co-operation between States. That was a clear indication that, in some cases, there was universal jurisdiction, whereas in others States were encouraged to co-operate in the punishment of international crime.

38. Universal jurisdiction should not always necessarily be confused with the principle *aut dedere aut judicare*. A comparison of article V of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* with articles VI and VII of the Convention on the Prevention and Punishment of the Crime of Genocide revealed the differences of interpretation to which that maxim could give rise. The Commission could therefore confine universal jurisdiction to those areas where it already existed, such as genocide and *apartheid*, and then consider whether, for other crimes, such as those covered by the 1949 Geneva Conventions and their 1977 Additional Protocols, it could envisage either universal jurisdiction or the broadest possible co-operation among States, until such time as it had completed the definition of each offence and the list of offences to be included in the code.

39. Mr. EL RASHEED MOHAMED AHMED expressed his support for the Special Rapporteur's general approach with regard to the general principles. He proposed to refer once again to the principles of Islamic law, wishing to inject some spiritual content into the discussion.

40. War in Islam was essentially defensive. Aggressive war was repugnant in the eyes of God. The Koran said: "Fight for the sake of Allah those that fight against you, but do not attack them first. Allah does not love the aggressors."¹⁶

41. International law had prohibited wars of aggression. Nevertheless, armed conflict was an enduring phenomenon, shorn of the chivalrous element of a declaration of war. If war was to be considered illegal, then the consequences of it should be borne by the warmongers. For that reason, Islamic law lent support to the Principles of Nürnberg.

42. Moreover, responsibility in Islamic law was strictly personal. The notion of collective responsibility was unknown, except in the single case where a person was killed in a given place and it was proved that the inhabitants knew, or should have known, the killer and had not identified or surrendered him.

43. He had already expressed his agreement (1963rd meeting) with the definition in the report of offences against the peace and security of mankind and their subdivision into three categories. Peace, however, had not been defined. While it was true that offences against the peace and security of mankind were international crimes, defined by international law, nevertheless the terminology used was inevitably borrowed from internal law. Difficulties of interpretation were therefore bound to arise, except in the unlikely event of an international criminal forum being set up. In the event of the principle of universal jurisdiction being agreed upon, it would be only natural for judges to be influenced by their own education and training. International law had not emerged from a vacuum. The Statute of the ICJ itself referred, in Article 38, paragraph 1 (c), to the application by the Court of "the general principles of law recognized by civilized nations".

44. In the absence of authoritative interpretation, a general glossary would seem to be necessary. It would not be enough, however, to mention in the commentary that the meaning of a term or expression was not the same as in domestic law. Since the draft code consisted only of a list of offences, it did not contain rules of procedure; but it was procedural law that provided the constitutional guarantees for the offender. Accordingly, he supported Mr. Illueca's suggestion (1964th meeting) that the draft code itself should set forth guarantees.

45. With regard to non-retroactivity, the position in Islamic law was not very different from that under common law. There was a difference in that respect between crimes punished under provisions of the Koran or the Sunna and offences left to be sanctioned by the temporal ruler as and when circumstances demanded. The law providing for the latter kind of offence had to be published before it was applied. In that respect the situation was similar to that of the Continental legal systems.

46. However, the concept of justice applied at Nürnberg did not correspond exactly to the concept of justice

¹⁵ See 1959th meeting, footnote 6.

¹⁶ *The Koran*, sura 2, verse 190 (translated by N. J. Dawood, *op. cit.* (1963rd meeting, footnote 9), p. 352).

in Islamic law. Although the procedure was criminal in nature, the sentence had to be circumscribed. It had to take into consideration the right of the victim, while maintaining an equitable balance between the right of the community to bring the accused to justice and the right of the accused to be protected from arbitrary action.

47. Hans Kelsen had said that, "in case two postulates of justice are in conflict with each other, the higher one prevails";¹⁷ but the Islamic solution to which he had just referred was much more logical. It was an equity-oriented formulation which indicated the test to be applied to evaluate the two conflicting postulates. The conclusion reached by the Special Rapporteur on that point was the best compromise in the circumstances, subject to adopting Mr. Jagota's suggestion (1965th meeting, para. 50) that the expression "general principles of international law", in draft article 7, paragraph 2, be replaced by "generally recognized principles and rules of international law".

48. As far as statutory limitations were concerned, most schools of Islamic jurisprudence did not recognize limitation, except within very narrow confines. Those who recognized the operation of the rule of limitation did so in cases (such as the consumption of alcohol) which, by their nature, were difficult to prove after a lapse of time. They also felt that belated prosecution was apt to be motivated by spite or some other ulterior motive. With regard to such crimes as murder, however, no limitation was admitted.

49. As for jurisdiction, Islamic law generally favoured the territorial principle, on practical grounds.

50. An international criminal court would be very difficult to establish; the difficulties of such a scheme had been clearly explained by Mr. Balanda (1966th meeting). In the mean time, the system of universal jurisdiction would have to suffice. A number of conventions, such as those relating to piracy, in fact provided for universal jurisdiction. He did not believe that the draft code would be without usefulness if an international forum were not established. It would not be effective, however, if it were not applied in one way or another. In the circumstances, the solution proposed by the Special Rapporteur was the only feasible one.

51. It remained to complete the code by specifying penalties. The Commission would have to address itself to that task. It was the absence of penalties, rather than the lack of an international forum, that would deprive the code of its effectiveness.

52. On the subject of defences, superior order called for a number of observations. Responsibility in Islamic law was strictly personal. The defence of superior order was not admissible, for the Prophet had said: "Verily, there is no obedience to the order of any creature in disobedience of God." The Caliph Abu Bakr had said in his inaugural speech: "Obey me so long as I obey God. If I disobey God, I claim no allegiance from you." Whatever the order received from a superior, it had to be examined in the light of that higher law: whether one

called it the law of God or natural law, its normative value was not entirely man-made.

53. Again, in Islam, every ruler was responsible for his subordinates. Nevertheless, criminal liability attached to the ruler only if it was proved that he knew, or had reason to know, of the unlawful act and could have prevented it. He accordingly agreed with Mr. Ushakov (1965th meeting) and Mr. Sucharitkul that responsibility should be purely personal, but that a superior who knew of and had the power to stop atrocities, but had remained silent, was criminally responsible.

54. Turning to the draft articles, he stressed the need to define peace and security in article 3. In regard to article 7, he reiterated his support for Mr. Jagota's suggestion concerning paragraph 2. In article 11, the definition of aggression seemed inconsistent with the general theme of the Special Rapporteur's fourth report (A/CN.4/398) and with the Commission's decision to adopt the principle of individual rather than State responsibility. For article 12, paragraph 2, he preferred the second alternative. He also favoured the second alternative of article 13, which was more comprehensive.

55. Chief AKINJIDE recalled that, in his earlier statement (1964th meeting), he had referred to the problems that would be created by any reference to the "customs of war", as opposed to the more precise "rules of war", which created no such difficulties. Customs of war varied from one period of history to another. They had been very different in the Middle Ages from those of modern times, and no one could tell what they were likely to be in 50 or 100 years' time.

56. An instrument containing references to the customs of war would be difficult to ratify for countries with a written constitution. Moreover, in most countries an act of parliament would have to be passed to implement the convention that was expected to emerge from the present draft. Any crime provided for by that instrument must be covered by a specific provision: a vague reference to the customs of war was inadequate.

57. In many developing countries, the principle *nullum crimen sine lege* was being honoured more in the breach than in the observance. Military Governments, in particular, frequently created crimes and penalties by decree, and often gave them retroactive effect.

58. On the question of responsibility, he stressed the need to establish degrees of responsibility. Clearly, a commander who ordered a criminal action and a recruit who merely obeyed orders could not be held responsible to the same degree. Both the crime and the punishment had to reflect that difference. The draft international convention against the recruitment, use, financing and training of mercenaries¹⁸ at present under consideration by the General Assembly thus differentiated between various degrees of responsibility. The same was true of the 1977 OAU Convention for the Elimination of Mercenarism in Africa.¹⁹ In the trials of mercenaries in Angola, that differentiation had been applied in practice.

¹⁸ See 1960th meeting, footnote 8.

¹⁹ OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

¹⁷ See 1962nd meeting, footnote 11.

59. He agreed with the misgivings of Sir Ian Sinclair (1964th meeting) and Mr. McCaffrey regarding the system of universal jurisdiction. If that system were to be adopted, it would lead to enormous problems. It was worth noting that article 14 of the draft international Convention against the recruitment, use, financing and training of mercenaries adopted the principle of territoriality.

60. With regard to statutory limitations, he pointed out that there were cases in which limitations had to remain applicable. At the national level, an individual sometimes was not prosecuted because it was considered desirable in the public interest not to do so. Cases of that sort depended on the gravity of the offence, the circumstances and the general atmosphere.

61. Draft article 11, paragraph 8, which defined mercenarism, was based on the definition in article 47, paragraph 2, of Additional Protocol I²⁰ to the 1949 Geneva Conventions. Its terms, however, were out of date and should be revised in the light of the present-day experience of developing countries. Among other things, the element specified in subparagraph (iii) of "desire for private gain" as the motivation of the mercenary would have to be amended, since it would place an intolerable burden on the prosecution. Besides, mercenaries had been known to be motivated by considerations other than private gain.

62. The CHAIRMAN, speaking as a member of the Commission, said that his remarks would pertain to the whole of the Special Rapporteur's fourth report (A/CN.4/398). He wished first to emphasize the distinction that should be drawn between States and individuals. Some crimes could be committed only by States: that applied to aggression and, in general, to all crimes against peace, including terrorism and mercenarism as envisaged by the Special Rapporteur, in the commission of which the State played a leading role. Other crimes, such as war crimes, could be attributed to individuals. That differentiation should be borne in mind and would form the basis of any amendments to the draft articles that he might suggest.

63. In the case of a crime that could be committed only by a State, to whom should the act and responsibility for it be attributed? In the case, for example, of aggression, there could be no individual aggressors. Aggression was therefore attributable to the State, which had acted through its agents, who were individuals. Accordingly, the same conduct could be attributed to the State and the individual. Individuals were not responsible for the crime of aggression as individuals, but were responsible for having enabled the State to commit the crime in question. Thus the same conduct gave rise to the commission of a crime under international law and to the attribution of consequences to the State, on the one hand, and to individuals—as the agents of the State—on the other. Those consequences were, in the first case, the ones provided for in draft articles 1, 6, 14 or 15, as applicable, of part 2 of the draft articles on State responsibility²¹ and, in the second case, the

penalties to which individuals would, where appropriate, be liable, on which issue the Commission had yet to take a decision. In the light of that fact, several articles in the draft code should be amended. With regard to draft article 3, for instance, he wondered whether the Commission had already decided to punish States guilty of crimes such as aggression. How could their responsibility be engaged? Perhaps a second sentence could be added to article 3, reading: "Individuals whose conduct is attributable to the State and has caused the latter to commit the offence in question shall likewise be responsible."

64. As for the division of offences into three categories, he considered that draft article 10 would serve no useful purpose, even if the Commission decided to retain that division, particularly since the division itself could give rise to objections as to whether it was in keeping with other concepts. As he had already pointed out,²² it was no easy matter to give uniform content to the topic under the title "peace and security". It was an acknowledged fact that more security was not synonymous with peace. The expression "peace and security" denoted an indivisible concept of a situation whose peace and security components were not readily distinguishable from one another. Yet a distinction was drawn between crimes against peace, which of necessity were detrimental to security, crimes against humanity, which could be presumed to affect its peace and security, and war crimes, which were also prejudicial to peace and security although the "peace" element might be entirely lacking, since the crimes in question were committed in wartime. The fault lay in history, which had handed down to the Commission a form of wording taken from a report addressed by Judge Francis Biddle to President Truman (see A/CN.4/387, para. 21) and perhaps more in keeping with the thinking of the time than with logical reasoning. He wondered, therefore, whether the Commission should not try to find another title for the draft code, such as code of crimes against the security of mankind, a formula that would justify the tripartite classification of crimes against peace, crimes against humanity and war crimes, all of which endangered the security of mankind.

65. Turning to the draft articles submitted by the Special Rapporteur, he noted that the content of former draft article I had been incorporated into the present draft article 1, as amplified by draft article 2. Both provisions were acceptable to him.

66. So far as crimes against humanity were concerned, he agreed that a "mass element" was not essential to the definition of genocide, given that the act of causing harm to a single individual constituted an offence against mankind. What really mattered was intent. If there was reliable evidence of a plan to exterminate a particular group, few cases would be needed for the crime of genocide to have been committed. In the absence of such evidence, the intent would have to be gleaned from what Mr. McCaffrey (1962nd meeting) had termed a "systematic pattern".

67. With regard to *apartheid*, he preferred the second alternative submitted by the Special Rapporteur for

²⁰ See 1959th meeting, footnote 6.

²¹ *Yearbook ... 1985*, vol. II (Part Two), pp. 20-21, para. 106 (art. 1) and footnote 66 (arts. 6, 14 and 15).

²² See *Yearbook ... 1985*, vol. I, p. 50, 1885th meeting, para. 19.

paragraph 2 of draft article 12, because the code should be complete in itself and not refer to other instruments. The device whereby the activities of certain States would be objectively characterized as criminal was useful and would make it possible to stigmatize South Africa's conduct.

68. The code should also deal with serious damage to the environment. However, paragraph 4 of draft article 12 could be recast in the light of the conventions that imposed an obligation on States parties to preserve the environment.

69. The second alternative of draft article 13, dealing with war crimes, was preferable in his view, and Mr. Malek's proposal in that connection (1958th meeting, para. 6) merited consideration. Also, he had no objection to the retention of the expression "war crimes". As for nuclear weapons, he recognized that their use could be viewed differently according to whether it was a case of aggression or defence. However, it was a feature of such weapons that they could cause irreversible damage to the environment, not only that of the belligerent parties, but that of mankind as a whole, which seemed to him to be a consideration of paramount importance.

70. Noting that the provisions of draft article 14, dealing with other offences, concerned the individual responsible, to the exclusion of the State, he said that he agreed on the need to find flexible forms of responsibility in view of the special gravity of the offences in question. He did not, however, think that the Commission should go so far as to include the concept of conspiracy. So far as attempt was concerned, the possibility of voluntary withdrawal should not be forgotten: the *iter criminis* could come to an end either as a result of circumstances beyond the control of the offender or as a result of the exercise of his free will, namely his desistance. Many criminal codes encouraged withdrawal by reducing or abolishing the penalty applicable to a person guilty of attempt.

71. He had already referred to the general principles covered by draft article 3. Draft article 4 dealt with universal jurisdiction and left the way open for the possible establishment of an international criminal court. At its second session,²³ the Commission had already come out in favour of the establishment of an international judicial organ to try genocide and other crimes. It was a solution that gave rise to problems, but those problems would perhaps not be insuperable. The trouble with establishing an international judicial organ was that it might remain idle. It was doubtful whether the individuals responsible for State crimes or crimes directly imputable to the State would be brought before such a court by the States of which they were the leaders unless trials *in absentia* were authorized, in which case the body in question would become engaged in hectic activity, trying heads of State and other authorities accused on more or less political grounds. Initially, therefore, universal jurisdiction seemed to be the best solution, despite the drawbacks to which several members had referred. The Commission should concentrate on that solution rather than any other. Who in fact

could say whether international co-operation would yield satisfactory results?

72. He agreed with draft article 5, given the particularly serious nature of the offences in question, as well as with draft article 6 and paragraph 1 of draft article 7. The flaw in the Nürnberg and Tokyo trials derived from the non-application of the principle *nullum crimen, nulla poena sine lege*. It had been said that justice had prevailed over principle at the time. That principle, however, was an achievement of liberal criminal law, designed to lay down objective rules and protect the individual against abuse of authority. Sources of law as vague as natural law, or even the general principles of international law, did not satisfy that obligation. Paragraph 2 of draft article 7 therefore gave him cause for concern, as he did not altogether understand how a very general principle could be applied to criminal conduct. Consequently, the reference to general principles did not seem to be in keeping with the *nulla poena sine lege* principle. Penalties would also have to be provided for if that principle was not to be violated, in which connection the Commission should indicate the main lines to be followed in national legislation. The Commission was not under the same constraint as the Nürnberg International Military Tribunal had been. The Commission was drawing up a detailed code in accordance with current legal techniques without fear that some unknown crime would go unpunished because it failed to comply with the general principles of international law.

73. With regard to the exceptions provided for in draft article 8, which apparently applied only to the individuals responsible for State crimes and not to their perpetrators—an expression that should be replaced by "persons responsible"—the objection raised by Mr. Ushakov (1965th meeting) seemed justified, since the argument of self-defence could be adduced by the State. However, individuals would not be absolved on that account from all responsibility in the case of war crimes, even if the State to which they were answerable was acting in self-defence. Furthermore, in the case of State crimes for which individuals were responsible, the official position of individuals seemed to be more than an exception: it was a pre-condition for a State crime to exist. Subparagraph (a) was therefore acceptable. On the other hand, it was difficult to see why *force majeure* was included in subparagraph (b), since it was divorced from the will of the person who committed the offence, and in the absence of intent there could be no crime. In that connection, he drew attention to article 31 of part 1 of the draft articles on State responsibility, which dealt with *force majeure*. The reference to state of necessity seemed tautological, since a state of necessity in fact arose out of the existence of a grave, imminent and irremediable peril. As to the imminent nature of the peril, it would be better to provide that the situation had to be such that the interest could be protected only by a breach of the obligation, since there might be cases where the obligation would inevitably be violated without the danger being imminent. Nor was the requirement of a grave and imminent peril in keeping with *force majeure*, which implied an irresistible force. The very notion of peril seemed inseparable from that of choice, which was more characteristic of a state of

²³ See footnote 14 above.

necessity than of *force majeure*. He also wondered what role coercion proper played alongside of state of necessity, which involved mental coercion, and of *force majeure*, which involved physical coercion.

74. He approved of subparagraphs (c) and (d), subject to his remark regarding the imminent nature of the peril. Lastly, he pointed out that the Spanish text of subparagraph (e) (i) stated the opposite of what the Special Rapporteur had sought to express in a provision which still raised some doubts in his mind. While the solution adopted for chapter V of part 1 of the draft articles on State responsibility was understandable, in the case of human beings the question was whether they should be required to show heroism and even sacrifice their lives for the sake of compliance with a *jus cogens* obligation. How could the extent of the interests at stake be measured? He had no definite view on the matter, but would invite members to reflect upon it further.

75. The solution proposed in draft article 9 was, in his view, satisfactory.

The meeting rose at 1.10 p.m.

1968th MEETING

Tuesday, 17 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (continued)* (A/CN.4/396,¹ A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE

ARTICLES 2 TO 6 AND 20 TO 28

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report (A/CN.4/L.399) and the texts of articles 2 to 6 and 20 to 28 adopted by the Committee.

* Resumed from the 1947th meeting.

¹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the report set out the complete texts of the draft articles for adoption on first reading. It included articles already adopted—to which some drafting adjustments had been made—as well as articles adopted by the Drafting Committee at the present session. It had been necessary to renumber certain articles, whose previous numbers appeared in square brackets.

3. Before turning to the articles adopted by the Committee at the present session, he drew attention to certain drafting changes made to previously adopted articles to secure greater consistency in terminology. For example, the introductory phrase appearing in many articles of part III, "Unless otherwise agreed between the States concerned", had been added to article 14 [15]. In articles 13 [14] and 17 [18], the words following that introductory phrase had been aligned with those in other articles in part III, so that they now read: "the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to ...". Article 16 [17] had been adjusted to include the usual phrase "which is otherwise competent". Changes to previously adopted articles that were consequent upon the adoption of new articles would be noted in the discussion of those new articles.

4. In view of the limited time available, he would not refer specifically to the titles of the articles recommended by the Drafting Committee, although certain changes had been made to the titles originally proposed.

ARTICLE 2 (Use of terms)

5. He introduced the text proposed by the Drafting Committee for article 2, which read:

Article 2. Use of terms

1. For the purposes of the present articles:
 - (a) "court" means any organ of a State, however named, entitled to exercise judicial functions;
 - (b) "commercial contract" means:
 - (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
 - (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
 - (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

6. The Special Rapporteur had proposed a definition of the term "State property" for inclusion in paragraph 1;² but in the light of the discussion and of the articles in parts III and IV relating to property of the State, the Drafting Committee had considered it unnecessary to include such a definition in article 2. The relevant articles themselves were believed to provide sufficient guidance as to what was meant by "State property" in the context of each article.

² See 1942nd meeting, para. 5.