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Summary record of the 1993rd meeting

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27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that new members' comments on earlier draft articles would be particularly useful to the Drafting Committee. The course which had been adopted would serve to avoid objections on their part when the revised articles came back from the Committee.

The meeting rose at 11.40 a.m.

1993rd MEETING

Thursday, 7 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, M. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Organization of work of the session (*concluded*)*

[Agenda item 1]

1. The CHAIRMAN drew attention to document ILC(XXXIX)/Conf.Room Doc.1, which reproduced the schedule of work for the current session adopted by the Commission at its 1991st meeting, on the understanding that it would be applied flexibly as required by the progress made.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 11[5] (*continued*)

2. Mr. THIAM (Special Rapporteur), repairing an omission in his introduction of his fifth report (A/CN.4/404) at the previous meeting, said that draft article 7, which was a new article devoted to the *non bis in idem* rule, seemed more opportune than ever. At the previous session, some members of the Commission had been reluctant to accept the principle of the universality of an offence, arguing that the plurality of courts—or the co-operation or intervention of several courts in trying one and the same offence—might make the offender liable to several penalties, which would violate the *non bis in idem* rule. In view of the long discussion which had then taken place, and after due reflection, he had concluded that the rule could have a place in the draft code, although that would depend on whether the idea of establishing an international criminal court was adopted or not. If it were adopted, it would be difficult to invoke the rule in question, since by virtue of the primacy of international criminal law, the court would be competent, on principle, to try international crimes. In the absence of an international criminal court, however, the inclusion of the rule seemed necessary.

3. He did not think it would be useful to spend any more time on the controversies provoked by the application of that rule in internal law and in international criminal law. In the present instance the rule came not within the framework of internal law or of *droit international pénal,* which dealt with international crimes strictly speaking, but within that of *droit pénal international,* which the legal system familiar to him distinguished from the former branch of international law and which was intended to settle conflicts of criminal law between States.

4. Mr. TOMUSCHAT said that the Special Rapporteur's well-drafted fifth report (A/CN.4/404) and lucid presentation provided a good basis for a fruitful debate. He had already discussed the general issues at the Commission's 1985 and 1986 sessions, so he would confine his remarks to the draft articles submitted in the report.

5. Referring to draft article 1, he noted that it had been suggested that it might be preferable to speak of "crimes" against the peace and security of mankind rather than "offences", in which case the title of the draft code in English would have to be changed. So far as the definition itself was concerned, it would be better if it consisted solely of a reference to the list of offences against the peace and security of mankind to be included in the code. A substantive definition might create the false impression that the category of offences was not closed, whereas what was needed was an exhaustive list of offences that could not be extended by way of judicial interpretation.

6. He fully agreed with the rule stated in the first sentence of draft article 2, but considered that the second sentence would be improved if the word "prosecuted" were replaced by "punishable". That would serve to underline that two legal orders—the international legal order and rules of internal law—coexisted.

7. He welcomed the specific reference to "any individual" which had been introduced into draft article 3. That would make it quite clear that the code dealt with the criminal responsibility of individuals.

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* Resumed from the 1991st meeting.

[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 . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1992nd meeting, para. 3.

8. In draft article 4, he considered that rather more precise rules were needed, especially in view of the danger of political manipulation. The value of the code would be enhanced if it included provision for an international criminal court, to which a number of Governments had already given their agreement, and which would provide a test of the seriousness of the intentions of States. Objectiveness and impartiality in the application of the criminal law were of paramount importance, for in the absence of those qualities, the code would be meaningless. The choice not only of judges, but also of the prosecution, was important. He was not advocating *realpolitik*, but not every judicial system could be fully trusted to be totally objective and impartial *vis-à-vis* foreigners regarded as enemies of the State. That was why many constitutions barred the extradition of nationals. Moreover, it was easy to bring a charge against an individual. Being deprived of the traditional protection of immunity, cabinet ministers or civil servants might be compelled to answer an accusation that they had committed a crime against the peace and security of mankind and would become liable to arrest and detention even when performing their functions abroad as agents of the State they represented. All those considerations pointed to the fact that an international criminal court was an essential element of the system to be established under the code.

9. In any event, the system the Special Rapporteur proposed would have to be refined and co-ordinated with the existing rules on jurisdiction. The question to be decided was whether to replace, or supplement, existing régimes. Genocide, for instance, was recognized as a crime against humanity, but the relevant provisions conferred jurisdiction primarily on the State in whose territory the genocide had been committed. A distinction, or a series of distinctions, might well have to be drawn. The Special Rapporteur had stressed the indivisibility of the concept of an offence against the peace and security of mankind, but nuances could be perceived: for instance, grave violations of the rules of war in a specific instance did not affect the international community to the same extent as the launching of a war. Hence there was a need for more detailed rules on jurisdiction. Furthermore, pending the establishment of an international criminal court, a transitional régime could be introduced. The International Law Association, for example, had proposed the creation of an international commission of criminal inquiry, which would elucidate the circumstances surrounding an alleged offence against the peace and security of mankind.[6] Such an inquiry could serve to pin-point responsibility, while at the same time exposing the author of the offence to national and international criticism with a very useful preventive effect.

10. While he basically agreed with the rule laid down in draft article 5, his agreement was not unqualified, for that rule depended to a large extent on the seriousness of the crimes to be listed in the code, and it might therefore be necessary to revert to article 5 after that list had been adopted. The practical difficulties of gathering evidence must also be borne in mind: indeed, the rules on statutory limitations derived to some extent from those difficulties. If evidence was taken years, or even decades, after the crime had been committed, witnesses became unreliable and no really useful trial could take place.

11. Draft article 6 had been greatly improved by the introduction of the basic guarantees for a fair trial. The Special Rapporteur had rightly taken as his guide the guarantees laid down in the International Covenant on Civil and Political Rights; that instrument, which had been adopted by the General Assembly in 1966 and to which 85 States were now parties, was the right standard to apply.

12. The provision in draft article 7 was a necessary element of any civilized system of international law and should be retained. Draft article 8, the new text of which was based on article 15 of the International Covenant on Civil and Political Rights, likewise had his support.

13. An initial question concerning draft article 9 was whether a list of exceptions to criminal responsibility was really necessary. The answer depended to some extent on whether jurisdiction would be conferred on an international criminal court or on national courts. In the former case, exceptions to criminal responsibility would have to be provided for in the rules to be applied by the court, since it could rely on no other text. In the latter case, it could be left to internal law to determine the permissible defences. Such a system could, however, seriously jeopardize uniformity in the application of the law, for judges would respond differently, according to their national laws and practices, to the same defence put forward by an accused, whose conviction might thus depend on the accidental determination of the forum. In principle, therefore, he agreed with the Special Rapporteur on the need to establish a list of defences.

14. Another question raised by article 9 was whether to include a rule to the effect that an offence against the peace and security of mankind could only be committed with intent, never negligently. The rule proposed by the Special Rapporteur with regard to error suggested that an individual could be charged with negligent acts, since error provided a defence only if, and to the extent that, the error was unavoidable. His own view was that offences against the peace and security of mankind generally presupposed that the author had acted wilfully, deliberately and in full knowledge of what he was doing. He did not exclude the hypothesis of extreme instances in which an act of negligence deserved to be characterized as an offence against the peace and security of mankind, but thought the matter called for further consideration.

15. As to the list of exceptions to criminal responsibility proposed by the Special Rapporteur, he doubted whether an act characterized as an offence against the peace and security of mankind could ever be justified on the grounds of self-defence. In particular, military activities undertaken in response to aggression by another State did not normally constitute such an offence, but war crimes could never be justified by Article 51 of the Charter of the United Nations. There again, however,

[6] See the Association's work on this subject in ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 421 *et seq.*, and *Report of the Sixty-first Conference, Paris, 1984* (London, 1985), pp. 263-264.

he would not categorically deny that there might conceivably be instances in which a plea of self-defence was justifiable. To be on the safe side, therefore, provision for such a plea should be retained.

16. *Force majeure* certainly did play a part in inter-State law, as well as in relations between individuals in civil and common law. If, for reasons of *force majeure*, a State failed to comply with an obligation under international law, it might be relieved of that obligation. In the case of individual criminal responsibility, however, an offence against the peace and security of mankind presupposed human conduct, whether in the form of an act or of an omission; but in the case of *force majeure* no human conduct was involved, only the forces of nature. Careful thought should therefore be given to the need to include *force majeure* as an exception; his own view was that it could be dispensed with.

17. With regard to coercion and state of necessity, he noted that the requirement that a grave, imminent and irremediable peril must exist, included in the earlier text of the article (former art. 8, subpara. (*b*)) submitted in the Special Rapporteur's fourth report (A/CN.4/398, part V), had been deleted. In his view, however, it was a useful requirement and should be retained.

18. He agreed with the rule on error as far as errors of law were concerned; the Commission might wish to consider at a later stage whether also to include the defence of insanity. The position with regard to error of fact was different, however, for as he had mentioned, offences against the peace and security of mankind usually presupposed criminal intent. Consequently, an error might wipe out the particularly reprehensible character of the act concerned. Supposing, for instance, that a pilot intending to drop a bomb on enemy troops dropped it instead on a city which was not a military target, and supposing further that he was misled by a navigational error, he should not be treated as a war criminal. A difficult question of principle was involved, which called for further discussion; it was important to decide whether criminal intent was a necessary element of an offence against the peace and security of mankind, so that error would relieve the offender of criminal responsibility.

19. Lastly, with regard to the exception made for orders of a Government or of a superior, he feared that the reference to moral choice might introduce a serious ambiguity into the provision.

20. Mr. REUTER, after commending the Special Rapporteur for his learning, good sense and industry, observed that only the criminal responsibility of individuals was in question at the current stage. While he welcomed that decision, he wondered whether the new text of draft article 3 was sufficient, since the question of the criminal responsibility of the State, as enunciated in article 19 of part 1 of the draft articles on State responsibility,[7] remained before the Commission. He would therefore prefer that the relations inevitably existing between the criminal responsibility of the individual and that of the State should not be excluded forthwith; if the criminal responsibility of the individual called for punishment, so did that of the State. It remained to be seen whether it was possible to formulate general rules concerning punishment of the State. Personally he doubted it, and he therefore suggested that it should be specified that the new text of draft article 3 was without prejudice to any decisions the Commission might take on the question of the criminal responsibility of the State. In other words, he would be inclined to accept individual criminal responsibility applying to agents of the State even if, for one reason or another, the Commission or the Sixth Committee of the General Assembly decided not to deal with the criminal responsibility of the State.

21. He approved of the Special Rapporteur's proposed procedure of laying down the general principles and then drawing up a list of criminal acts, which would, ideally, be an exhaustive list, although that would be difficult to establish. He was not certain, however, that all the general principles would apply to each of the crimes identified. Consequently, he thought that a provision should be inserted in the general principles indicating that they applied to the different crimes listed, subject to any specification or modification relating to any one of them.

22. With regard to draft article 4—a key article, since it concerned the obligation to extradite or try the offender—the Latin title *Aut dedere aut punire* was not satisfactory: the obligation to try the offender should take precedence over the obligation to punish.

23. He interpreted paragraph 1 of article 4 as meaning that the obligation to try or extradite the offender was subject to his arrest. But what would happen if States acting in bad faith did not arrest the perpetrator of a crime because they were not under an obligation to do so? He therefore suggested—although he would not press the point—that the text of the paragraph should be amended to read:

> "1. Every State has the duty to try or extradite any individual within its jurisdiction who has committed an offence against the peace and security of mankind."

He also hoped that, failing agreement on the point, the Commission would, for the time being, refrain from pronouncing on the question of establishing an international criminal court—the solution he would prefer. On the other hand, it might already consider including in the draft code a provision limiting the competence of the international criminal court to the most serious crimes; or it might provide for the possibility of making reservations to the future instrument; or again, it might explore the possibility of extending the authority of national courts, while legally preserving their individual character, so that they could try the offences listed in the code.

24. Mr. MAHIOU congratulated the Special Rapporteur on the precision, conciseness and rigour of his fifth report (A/CN.4/404).

25. Referring to draft article 1, he recalled that he had previously supported the idea of including the notion of seriousness in the general definition of offences against the peace and security of mankind. In the light of the Special Rapporteur's written and oral explanations,

[7] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

however, he was willing to support the simple broad definition now proposed, on the understanding that the offences covered, which would be the most serious offences, would be enumerated in a list.

26. Draft article 2 raised the problem of the relationship between internal law and international law, and paragraph (7) of the commentary thereto gave a clear account of the difficulty. The instrument in course of preparation could indeed be meaningful only if States applied it honestly. But that would not always be the case, for the characterization of offences against the peace and security of mankind under internal law or international law would leave many loopholes, especially if characterization under internal law were to take precedence over characterization under international law. Moreover, if the choice between national jurisdiction and international jurisdiction were left open, States would probably prefer to try in their national courts the perpetrators of the crimes coming under their internal law, for instance if that law prescribed lesser penalties. Article 2 therefore required further consideration. As to the commentary, he found it useful and interesting, but would prefer all quotations to be removed from the final version, so that it would essentially reflect the opinion of the Commission.

27. On draft article 3, his opinion was slightly different from that of the Special Rapporteur and Mr. Tomuschat, and he would prefer the article not to prejudge the content of the code. In view of the differences of opinion on the very complex question whether to deal only with the criminal responsibility of individuals or also with that of States, and in view of the link between article 19 of part 1 of the draft articles on State responsibility, adopted by the Commission on first reading,[8] and the draft code under consideration, it would be better to reserve the future decision and not rule out forthwith the possibility of also dealing with the criminal responsibility of States. The debates in the Commission and in the Sixth Committee of the General Assembly had shown that the question was far from being settled and that, although the Commission had decided at the first stage to confine the draft code to the criminal responsibility of individuals, that was only for practical reasons and considerations of efficiency. He therefore proposed that the Commission should revert to the former text of draft article 3 or place the words "person" and "individual" in square brackets in the new text. When the time came, and a decision had been taken, the superfluous word and the square brackets could be deleted. It would also be possible to adopt the solution proposed by Mr. Reuter and specify that the provisions of the code were without prejudice to any decisions the Commission might take concerning the criminal responsibility of States.

28. With regard to draft article 4, he was grateful to Mr. Reuter for raising the question of the Latin title. As to his remarks on the link between arrest and extradition or trial, he thought it was more a matter of drafting than of substance, which the Special Rapporteur would no doubt be able to deal with.

29. Paragraph (6) of the commentary to draft article 4 was too negative in his opinion; while he understood the difficulties and objections that had been put forward concerning the establishment of an international criminal court, he hoped that the Commission would retain the two options proposed, since the debate remained open both in the Commission and in the General Assembly.

30. Draft article 6 was important in view of judicial practice and the polemics occasioned by trials held in the distant or more recent past. The only question that arose was whether to formulate the article very broadly, as in the former version, or in more detail, enumerating the jurisdictional guarantees which every accused should enjoy. Personally, although he found the former version too elliptical, he was not sure that it was necessary to enumerate all the jurisdictional guarantees. Thus, while he supported paragraphs 1 and 2 of the new text, he had some doubts about the wording of paragraph 3. It might be better to adopt a flexible and open formulation, even if that made it necessary to refer to the existing international conventions on the matter and to general principles of law. He had no fixed opinion on the question, and was well aware of the difficulties involved.

31. Convinced by the Special Rapporteur's written and oral explanations, he accepted draft article 7, which had its place in the future instrument; but the justification for the article would of course depend on whether an international criminal court was established or not.

32. Having been among those who had advocated a positive formulation, he could only approve of the new text of draft article 9, though he was well aware that the number and nature of the exceptions to be provided for in the code were still open to discussion. With regard to the exception of self-defence, and noting that, according to paragraph (2) of the commentary, what was meant was self-defence by the individual, he questioned whether that was really the case where acts in response to aggression were concerned. Was it not rather self-defence by the State, the nation or the people? With regard to error of law or of fact, after hearing Mr. Tomuschat's comments he would like the Special Rapporteur to clarify the meaning, nature and scope of error and its consequences.

33. As to draft article 10, he agreed that it would be useful to provide a separate basis for the responsibility of the superior and to distinguish it from the notion of complicity (para. (6) of the commentary). That would be a good solution, although he was prepared to support any formulation by which the separate responsibility of the superior could be referred to under the general theory of complicity.

34. Mr. BENNOUNA said that he would speak only on a few specific points; for the rest, he shared the views already expressed by other members of the Commission. In any case, the draft articles proposed would further the progress of the draft code considerably.

35. He had been considering the relationship between the draft code and *jus cogens*, which was a complex and controversial concept. If there was to be a universal offence, there must also be a universal rule of law. That

[8] *Ibid.*

was a difficult point to deal with, because of the political nature of the question and the legal complexity of a concept which had never before been a subject for the development and codification of law. That observation led him to reflect on the means of reconciling the universality of the offence and of the rule with the consensual nature of an instrument whose adoption would require the assent of States. In that connection he reminded the Commission of the difficulties encountered during the Third United Nations Conference on the Law of the Sea concerning affirmation of the concept of the "common heritage of mankind" in the text of the 1982 Convention. Two ways of proceeding had been open to the Conference: one had been to adopt the Convention by consensus, which would have been consistent with the quest for universality, but which had failed; the other had been to establish the peremptory character of the concept in the text of the Convention itself, which had been the solution adopted.

36. At the present stage of its work, the Commission also faced a difficulty caused by the need to draft principles without having a general idea of the offences to be covered by the code, some of which might be more important than others for safeguarding the peace and security of mankind. That difficulty weighed on the draft articles, and above all on the definition of the offences concerned.

37. Draft article 1 had the merit of simplicity. The absence of a consensual approach might be regretted, but the solution of enumeration was understandable. Nevertheless, the article also had the disadvantages of simplicity: would the enumeration be exhaustive or not? Everyone knew that the list of offences might get longer: the modern world was the scene of an increasing number of acts such as mercenarism and terrorism, so it was not impossible that new types of crime might appear. That being so, how could the Commission be sure that the code would cover unforeseen circumstances?

38. Moreover, certain crimes were already the subject of particular conventions: the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, and the Convention on the Prevention and Punishment of the Crime of Genocide, for example; and an *Ad Hoc* Committee of the United Nations was working on a draft convention on mercenarism. The Commission would therefore have to construct some sort of bridges between the draft code, which was of a general character, and those instruments. He had no categorical answer to that problem, but would suggest an enumeration to be followed by a phrase such as: ". . . without prejudice to any new characterizations that may be established by general rules recognized by the international community as a whole." Of course, those rules, like the code itself, would have to be of a peremptory nature.

39. The same difficulty arose with regard to draft article 4, which would play a fundamental part if the idea of establishing an international criminal court was not adopted. That idea might be intellectually tempting, but he remained sceptical about the practical possibility of setting up such an institution in the absence of an outburst of fraternity transforming international relations, and unfortunately such movements resulted more often from suffering than from enthusiasm, as was shown by the establishment of the Nürnberg Tribunal at the end of the Second World War. The Commission should therefore go more deeply into the affirmation made in paragraph 1 of the former draft article 4, which had appeared to be a postulate as compared with the consensual character of the draft code. There again, how could a rule of *jus cogens* be reconciled with the consensual character of the future instrument? From the notion of a universal offence there followed the notion of universal prevention and punishment. Should that not therefore be more clearly affirmed by saying that an offence against the peace and security of mankind was a breach of rules recognized by the international community as a whole, from which no State could derogate?

40. Mr. BARSEGOV said that the Soviet Union's attitude to the preparation of the draft code was dictated by the ever-growing significance of international legality and the international legal order, as had been pointed out in particular in the Soviet memorandum entitled "The development of international law".[9] The drafting of a code of offences against the peace and security of mankind was of particular importance and current interest because of the preventive role the code would be called upon to play. Its object was, indeed, to prevent international crimes such as nuclear war, aggression, State terrorism, genocide, *apartheid*, the use of mercenaries and other crimes liable to injure civilization itself.

41. Referring to General Assembly resolution 41/75 of 3 December 1986, and in particular to the fourth preambular paragraph, he said that the Assembly was inviting the Commission to attach the greatest importance to its work on the topic in order to complete the draft code, and to continue by elaborating an introduction as well as a list of offences, taking into account the progress already made (para. 1). He was convinced of the usefulness of drawing up such a list, but thought that it presupposed the drafting of a coherent definition. It was desirable that the definition should reflect the most characteristic and significant features of those categories of acts, which attacked the very foundations of human existence, injured the vital interests of the international community and were regarded as criminal by that community as a whole. He was aware of the difficulties raised by such a definition, but hoped that other members of the Commission would agree with him on that point. The Commission could then continue its work, reserving the possibility of reverting to a more elaborate definition at a later stage.

42. In preparing the draft code, the Commission should be guided by the main instruments of international law, such as the conventions and resolutions adopted by the General Assembly relating to nuclear war, aggression, State terrorism, genocide, *apartheid*, etc., to each of which crimes he would revert later in greater detail.

43. The Special Rapporteur had rightly set out the principle of the criminal responsibility of the individual, and he himself approved of the new text of draft article 3.

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[9] Document A/C.6/41/5.

44. The basic idea of draft article 4 was not in doubt: the principle *aut dedere aut punire* was designed to render imprescriptible the punishment of persons who had committed offences against the peace and security of mankind. But the idea expressed in the article needed to be made more precise, for as at present drafted the text raised several questions. For example, the expression "perpetrator of an offence against the peace and security of mankind" presupposed that the guilt of the person concerned had already been established and that a judgment had been rendered against him; hence he could not be tried again for that offence. Nor was it clear for what purpose he would be extradited to another State: would it be in order to be tried or to serve his sentence? It might also be asked to what State he would be extradited: the State in whose territory he had committed the offence or the State of which he was a national?

45. It sometimes happened that the problem of extradition was linked with political motives, and experience in the matter led him to suggest a new paragraph 2 worded as follows:

> "2. Persons accused of having committed an offence against the peace and security of mankind shall be tried by a competent court of the State in whose territory the offence was committed."

That principle of territorial jurisdiction, recognized in international law and widely applied in internal law, could even be regarded as a general principle of law within the meaning of Article 38, para. 1 (*c*), of the Statute of the ICJ; and from the point of view of general humanitarian morality, it was only right that a criminal should be punished according to the law of the country upon whose people he had inflicted suffering. In that connection he reminded the Commission of the bases laid down in the Charter of the Nürnberg Tribunal[10] and confirmed by the subsequent development of international law. As the Special Rapporteur had noted, however (para. (3) of the commentary to art. 4), it was not impossible that the extradition of persons charged with crimes committed for political motives might meet with difficulties. It would thus be advisable to include the following provision:

> "For the purposes of extradition, offences against the peace and security of mankind shall not be considered to be political crimes."

If there was reason to believe that, for example, a State which had organized genocide would not take the necessary steps to bring the person concerned to trial, he could be tried by the courts of the State in which he had been detained; that was fully in conformity with the principle *aut dedere aut punire*. The clause he had proposed would form paragraph 3 of draft article 4, and paragraph 2 of the text submitted by the Special Rapporteur would become paragraph 4.

46. He was in favour of strengthening the preventive character of the code and, in the present circumstances, the essential potential of the code should lie in paragraph 1 of article 4, which should be worded as clearly as possible.

[10] See 1992nd meeting, footnote 6.

47. To that provision was linked draft article 5, on the non-applicability of statutory limitations, which was one of the central provisions of the draft code. The Special Rapporteur noted in the commentary that there was no uniformity on statutory limitations, and that certain States provided in their law for a limitation applicable to the kind of offences with which the Commission was concerned. In the Soviet legal system, the non-applicability of statutory limitations to offences against the peace and security of mankind rested on intangible foundations constituted by humanitarian morality and a will to prevent any repetition of such offences in the future. As the conscience and morality of the people could not accept that the perpetrators of the most serious crimes of all should go unpunished, the Presidium of the Supreme Soviet of the Soviet Union had in 1965 adopted a special decree providing for the punishment of persons guilty of offences against the peace and security of mankind or of war crimes, irrespective of when the offence had been committed. He then quoted a passage from that decree which showed that the Soviet Union, in establishing the non-applicability of statutory limitations, had relied upon general principles recognized by international law, as stated in the Charter of the Nürnberg Tribunal and in the resolutions of the General Assembly.

48. That principle of international law was confirmed by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which had come into force in 1970. It was impossible for States which applied statutory limitations not to take that Convention into account: evidence of that was provided by the Klaus Barbie trial. If the Commission confirmed the principle in draft article 5, it must be logically consistent and supplement that article with a provision to the effect that national legislations must accept and adopt that rule of international law. The necessary provision might read:

> "States are required to adopt constitutional provisions or to take any legal or other measures that may be necessary to ensure that statutory limitations do not apply to judicial proceedings or to measures of prevention and punishment relating to offences against the peace and security of mankind."

49. With regard to draft article 6, on jurisdictional guarantees, his main concern was to ensure better co-ordination between the draft code and the relevant instruments of international law, in particular those which had acquired a universal character. Specifically, the principle of the equality of all before the law, enshrined in article 14 of the International Covenant on Civil and Political Rights, must be reflected in the code.

50. The text of draft article 7 should be more precise, in order to make it quite clear that no one could be tried twice for the same offence. Nevertheless, if the perpetrator of a crime had been prosecuted for committing an act punishable under ordinary law—murder, for instance—that did not mean that he could not be prosecuted for the same act on a different charge, such as that of committing an offence against the peace and security of mankind.

51. The text of draft article 8, on non-retroactivity, should be no obstacle to the prevention and punishment of acts already characterized as offences against the peace and security of mankind under the terms of conventional or other rules of international law in force.

52. Draft articles 9 and 10 injected into the draft code principles of criminal law relating to quite different categories of crime, the automatic transposition of which into the code would undermine the raison d'être of the instrument being drawn up. Besides, those two draft articles conflicted directly with the useful provisions proposed by the Special Rapporteur for other articles. For instance, how could there be self-defence in the case of aggression, recourse to nuclear weapons or genocide? It seemed clear that the Commission should be guided in those instances by the Charter of the Nürnberg Tribunal, which the Special Rapporteur had followed in drafting article 11.

53. Mr. BEESLEY said that he had some general observations to make in the light of the interesting statements made by previous speakers on a topic that was generally admitted to be as difficult as it was important.

54. The problems involved were not only substantive, but also procedural, and the procedural problems had to be dealt with if the code was to achieve its intended purpose. The Commission had been instructed to build an edifice without knowing on what foundation. For instance, it was essential to determine whether the Commission was contemplating the establishment of an international criminal court or whether the application of the code was to be left to national courts. That fundamental question would have to be considered when examining every article of the draft code and might even be seen as a prior condition on which acceptance of the Commission's recommendations by Governments would depend.

55. The draft code was intended to apply to individuals, but the question whether its provisions would also apply to States was going to be left open; that would appear also to leave open the question whether the courts of one State would be able to find another State criminally responsible. The Commission must try to settle that question and submit its proposed solution to States: it would then be for Governments to decide whether the proposed solution was acceptable or not. Of course, that difficulty would be removed by the establishment of an international criminal court, but so far that was not being considered.

56. The problem of the application or implementation of the code also had a bearing on the question whether a relaxed approach could be adopted to the degree of specificity of the list of offences and of possible defences. It had to be borne in mind that marked differences existed between the various legal systems on points of criminal law: for example, the presumption of innocence was not accepted in the same way in all systems. Hence the Commission would have to call upon expertise in criminal law before it completed its task; otherwise, the final product might not be accepted.

57. Another problem was that of offences not committed deliberately, which would arise if it was intended that the draft code should cover acts committed by negligence or in error. The approach to that type of offence was not at all uniform in the various legal systems. Most of them drew a distinction between civil wrongs and criminal wrongs; some established a gradation, so that in grave cases a civil wrong could become a crime.

58. Turning to the notion of non-retroactivity, the usefulness of which was undeniable, he observed that there had been cases of international tribunals applying international criminal law retroactively. The problem therefore required a cautious approach.

59. The approach to extradition varied from one State to another, particularly as to the effect of nationality. National courts certainly could not be expected to apply the law uniformly in that matter.

60. The idea of making the list of offences non-exhaustive also raised some problems. Such a list could probably be applied by an international tribunal, but not by national courts. To give but one example, one man's freedom fighter was another man's terrorist. Such concepts as aggression and genocide overlapped with notions of human rights, the laws of war and humanitarian law. Hence the Commission would have to consider whether it was going to develop an umbrella convention, leaving the more specific points to specialized instruments. In such matters as human rights, outer space and the environment, the process of codification had begun with a declaration of principles, which had later developed into substantive law. But he did not believe that such an approach was suitable for offences against the peace and security of mankind.

61. It was necessary to decide whether it was intended that the code should be applied by an international tribunal or by national courts, for that choice would have an effect on the terms in which every single article was drafted.

The meeting rose at 1 p.m.

1994th MEETING

Friday, 8 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.
