Document:-
A/CN.4/SR.1994

Summary record of the 1994th 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:-
1987 vol. I

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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.

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*)

1. Mr. CALERO RODRIGUES said he regretted the fact that the unduly general term "offences" continued to be used in the English title and text of the draft code and suggested that it should be replaced by the term "crimes", as in the French and Spanish versions.

2. Noting that the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) were presented under the heading "Chapter I. Introduction" and that that chapter was subdivided into two parts ("Definition and characterization" and "General principles"), he suggested that the draft should be rearranged in accordance with the usual practice, which was to divide drafts into parts and parts into chapters. He also saw no reason for separating articles 1 and 2 from the remaining articles and suggested that they should all come under a single heading, namely "General provisions".

3. Draft article 1 was quite satisfactory. Although it was not, strictly speaking, a definition, it did apply an objective criterion for determining what constituted a crime against the peace and security of mankind, as was done in criminal law.

4. Draft article 2 specified that the characterization of an act as an offence against the peace and security of mankind was independent of internal law, as was appropriate in a code that would become effective under an inter-State agreement. There was, however, no need for the second sentence.

5. Draft article 3, which defined the scope of the code *ratione personae*, now made it clear that the code would apply to "individuals". That removed any ambiguity to which the use of the term "person" in the former text might have given rise. It would have been ill-advised to extend the scope of the code to the criminal liability of States; moreover, historically, all the major trials held following the Second World War had been instituted against individuals. He nevertheless suggested that article 3 should contain a new paragraph 2 reproducing the text of draft article 11: "The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility." That provision had a logical place in an article entitled "Responsibility and penalty".

6. In draft article 4, which dealt with the very sensitive issue of a universal offence, the proposed new title should read: *Aut dedere aut judicare*, and not *Aut dedere aut punire*. Although a State had a duty to bring the individual in question to trial, it would have a duty to punish only if the individual was found guilty. Since objections had been raised to the use of a Latin title, the Drafting Committee might replace the title by a formula expressing the duty of States to try or to extradite the individual concerned.

7. The question of a universal offence also arose in connection with instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[6] under which States parties had an obligation to legislate against torture. The draft code would contain provisions that would be directly applicable to individuals; hence the question of the body that would be responsible for its implementation. The best solution would naturally be to set up an international criminal jurisdiction for the purpose. However, since many Governments were unlikely to accept that solution, the only alternative was to leave implementation to national courts. The Special Rapporteur had not prejudged the issue. He himself considered that, if the draft code did not provide for an international jurisdiction, it would have to be determined which State's legal system would be competent.

8. With regard to the wording of draft article 4, he agreed with Mr. Reuter (1993rd meeting) that it was inaccurate to refer to a perpetrator "arrested" in the territory of a State. The provision was intended to apply to a perpetrator found in the territory of a State. If he was not already under arrest, it was the duty of the State to arrest him.

9. Extradition raised the problem of the prohibition of the extradition of nationals that was contained in the constitutions of certain countries. The establishment of an international criminal jurisdiction might obviate that problem and it would then not even be necessary to use the term "extradite".

10. He suggested that draft article 4 might be amended to read:

> "Every State has the duty to take all the necessary measures to ensure that persons accused of crimes against the peace and security of mankind are brought before the judicial authority competent to try those crimes under the present Code."

11. As to draft article 5, which he found acceptable, he said that limitations in criminal law were related to the gravity of the offence. Since all crimes against the peace and security of mankind were extremely serious, statutory limitations should not be applicable to them. The argument that it might be difficult to bring a perpetrator to trial after many years should not affect that principle.

12. He had doubts about the long, non-exhaustive list of jurisdictional guarantees contained in draft article 6

[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.

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

and would prefer the former text, which merely affirmed the principle involved. By definition, trials would be held in accordance with procedural rules, which might be national or international. If such rules were to be international, they would have to be defined and it was at that stage that the various guarantees should be set out in detail.

13. He agreed with the principle embodied in draft article 7, but had some doubts about the way it was worded. Since the draft code was supposed to be autonomous and governed by international law, it was difficult to see how a trial could be prevented because a State had exercised its jurisdiction by applying its national law. The text of article 7 should be reworded to make it clear that it did not rule out the possibility of a second trial, only the duplication of sentences. A person who had already served a term of imprisonment for a crime would be entitled to have the time served deducted from the new sentence. That was the system provided for under the Brazilian criminal code when an offender had already served a term of imprisonment abroad for the same offence, and he believed that that approach was also followed in other legal systems.

14. As to draft article 8, he agreed with paragraph 1, but had doubts about paragraph 2, which would allow trial and punishment for an act or omission which, at the time of commission, had been "criminal according to the general principles of law recognized by the community of nations". Punishment could be inflicted only for acts which were characterized as crimes by a specific instrument. The draft code was such an instrument and only the acts to which it referred could be made punishable. In that connection, it was worth recalling the criticisms levelled against the trials of major war criminals held following the Second World War.

15. With regard to draft article 9, he suggested that self-defence should be excluded from the list of exceptions to criminal responsibility. The Special Rapporteur had previously accepted self-defence as an excuse only in cases of aggression. He himself could not imagine self-defence as justifying any of the acts to be listed in the draft code.

16. If coercion was to be considered an exception, the perpetrator of the criminal act in question had to be able to show that he would have been in "grave, imminent and irremediable peril" if he had put up any resistance. Coercion might be combined with superior order. A simple order could, of course, not rule out responsibility, but if coercion had been applied to have an order obeyed, then it was coercion and not the order which could be invoked as a justification.

17. He was of the opinion that no reference should be made to state of necessity, only to *force majeure*. In every situation involving state of necessity, the individual always had a choice, but that was not true in the case of *force majeure*. Experience also showed that the concept of state of necessity could lead to abuses. Moreover, few national systems of criminal law recognized that concept.

18. The reference to error should include only errors of fact, not errors of law. The crimes to be defined in the draft code would invariably be very serious crimes for which no plea of error could be allowed.

19. He suggested that the list in draft article 9 should contain other exceptions relating to the age of the accused, insanity and related conditions. Should minors and insane or intoxicated persons be held criminally responsible? The matter had to be carefully considered.

20. He also believed that chapter I of the draft code should deal with attempt and complicity. In draft article 14 as submitted in his fourth report (A/CN.4/398, part V), the Special Rapporteur had treated those matters as "other offences". That position was untenable. Attempt was not a separate crime: it was the commencement of the execution of a crime; it was part of a crime. The question that arose was one of determining how much responsibility attached to the author of an attempt and how the penalty for the crime should be applied to him. As for complicity, the question was how to attribute responsibility to several persons for the same crime. In both cases, there was only one crime. Accordingly, the proper place for those questions was in the general provisions of part I, not in the part of the code which described specific crimes. Moreover, that was the approach adopted in many criminal codes. In the Italian penal code, for example, attempt was dealt with in article 56 and complicity in articles 110 *et seq.* of Book I, namely the general part of the code. A similar arrangement was adopted in the Brazilian, French, Mexican and Venezuelan codes, as well as in those of the German Democratic Republic and the Federal Republic of Germany.

21. Mr. Sreenivasa RAO said that the present topic had to be considered in the context of a predominantly State-oriented system in which international law and internal law influenced one another. The present State system did not allow the establishment of an international criminal jurisdiction that would be independent of States. The Commission should concentrate on the content of the code and on mechanisms for its implementation and decide on the format in which the code and its implementation should be presented.

22. The basic mechanism for the implementation of the code should be States and their judicial institutions, the important principle being the duty to try or to extradite. As to the content of the code, various types of conduct had already been recognized as crimes or offences against the peace and security of mankind and that list was based on a growing consensus derived from existing international treaties and conventions, General Assembly resolutions and the legislation of many countries. To that list must be added the serious offences which had recently been recognized as terroristic and which were regarded as non-political for the purposes of extradition.

23. States alone could be the mechanism for enforcing or implementing the code, since only they now had the necessary infrastructure: investigating agencies, means of gathering evidence and presenting it in court, and systems for trial and punishment. Once that was accepted, account had to be taken of the recent development of two principles. The first was that of territoriality, which did justice to the availability of evidence

and responded to the need to placate the outraged conscience of society. The second, namely the principle of "subjective-objective territoriality", was also known as the "principle of effect" and was an extension of the first. It came into play when an offender, using the territory of one State, affected—or intended to affect—the peace, good order and security of another State or States and their peoples. That doctrine of effect had recently been incorporated in an extradition treaty concluded by Canada and India.

24. The commentaries to the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) often gave a detailed account of doctrinal differences without attempting to reconcile them. He would have preferred the commentaries to contain a composite statement of the concepts involved in each article; if the Special Rapporteur had to describe conflicting points of view, he should at least try to reconcile them and indicate which one he preferred.

25. Draft articles 1 and 2 appeared to suffer from the need to reconcile conflicts between the international and internal systems of law. There was, however, no need for such conflicts to be reflected in the draft code. Those two draft articles and the commentaries thereto should be re-examined from the point of view of the harmonization of the two systems of law. As to draft article 2, the principle of the avoidance of double jeopardy, which was a cardinal principle of criminal justice, had to be respected as fully as possible.

26. With regard to draft article 4, the concept of universal jurisdiction included in the former text should be retained and mentioned either in the title or in the body of the new text. The need to give priority in appropriate cases to extradition rather than the duty to try an offender, particularly where the principle of effect became relevant, should also be emphasized. Paragraph (3) of the commentary referred to the difficulty of securing extradition, especially when offences were politically motivated. That difficulty could, however, be overcome if, as had been suggested, the political plea were disallowed in the case of offences covered by the code. He also considered that the Special Rapporteur should develop the theme of the last sentence of paragraph (4) of the commentary and wholeheartedly endorsed the last sentence of paragraph (5). A number of treaties on the suppression of terrorism were being negotiated and that indicated a willingness on the part of States to surrender criminals where offences against the peace and security of mankind were involved. He noted that, in paragraph (6) of the commentary, the Special Rapporteur had asked whether the international community was ready for an international criminal jurisdiction. That question showed that he realized that the international community was not ready for such a jurisdiction. There was therefore no dichotomy or conflict in conception and international law would be implemented through internal and internationally agreed mechanisms.

27. Draft article 5 stated a very important principle and, while the common law knew no such limitations for crimes other than the natural limitations imposed by the need to secure reliable evidence, he fully endorsed that principle, which had its place in the code. It was immaterial, in his view, whether a substantive or a procedural rule was involved and there was no need to address that issue, as the Special Rapporteur had done in paragraph (1) of the commentary. If, as he assumed, the first sentence of paragraph (4) of the commentary meant that, for the purposes of the code, war crimes and crimes against humanity were the same, that point should be brought out more clearly.

28. In draft article 6, he would prefer the expression "with regard to the law and the facts", in the introductory clause, to be replaced by "with regard to due process of law", which was a well-known legal concept, at least in common law. He also noted that, while the Special Rapporteur had identified a number of the basic principles involved, he had not mentioned that of the burden of proof borne by the prosecution.

29. The principle *non bis in idem*, laid down in draft article 7, should be given more detailed consideration.

30. Draft article 8 likewise stated an important principle, which involved the concepts of fairness and moral culpability. If an act deemed to be an offence at a particular time had been committed wilfully and with intent, it became a crime punishable by law. In the absence of consensus on the moral culpability of conduct prior to the enactment of the code, retroactivity would of course not apply.

31. Draft article 9 required careful examination. He rejected self-defence as a proper exception to the application of the code, but considered that coercion and *force majeure*, both of which concerned the establishment of *mens rea*, could be included, as could error of law and error of fact. The reference to moral choice in the exception relating to the order of a Government or of a superior should, however, be deleted, without prejudice to the basic concept of moral culpability, which formed the very foundation of criminal law and the establishment of criminal intent.

32. Draft article 10 should also refer to the well-known concepts of "actual knowledge", "constructive knowledge" and "contributory negligence". Lastly, draft article 11 had a place in the code.

33. Mr. FRANCIS said that he would favour a parallel jurisdiction under the code, rather than an exclusively national or international jurisdiction. In that way, both institutions—a national tribunal and some kind of international tribunal—would bear the burden of enforcing the code. He also considered that, if the code was to have teeth, there should be no derogation from the principles it embodied. He agreed on the need to avoid any possibility of double jeopardy. It had, however, rightly been said that, if an accused had been tried for murder under national law, that should not preclude his trial for another offence, so far as its characterization under the code was concerned, arising out of the same incident. The validity of that proposition was borne out by the 1949 Geneva Conventions.[7]

34. One of the difficulties with which the Commission was faced stemmed from the fact that it had not yet

[7] Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

been decided whether the code would be applicable to States and whether, for example, the courts of one State could attribute liability to another State. If, however, the code were to apply solely to individuals, what would be the position if a head of State were brought to justice under the code as an individual? Perhaps the objectives of the code would be better served if the individual in question were not tried in his own country, where the offence had presumably been committed. It required no stretch of the imagination to foresee what would happen if a South African head of State were brought before his country's courts for acts arising out of the situation prevailing there at present.

35. It had been suggested that the international community was not ready for an international criminal jurisdiction. Such a jurisdiction did not, however, have to be a permanent one. A possible solution would be to establish *ad hoc* tribunals, thereby avoiding expenditure for permanent staff. He had in mind, for example, some arrangement along the lines provided for in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide.

36. It had also been suggested that the Commission could confine itself to producing an exhaustive list of offences against the peace and security of mankind and then leave the matter to national courts. In his view, however, it was essential not to foreclose the role of the Security Council, which should be free, in the same way as for the Definition of Aggression,[8] to determine whether acts other than those specified in the code constituted offences against the peace and security of mankind.

37. Turning to the draft articles submitted in the fifth report (A/CN.4/404), he noted that, in his oral introduction, the Special Rapporteur had said that he had avoided the concept of seriousness in draft article 1 (1992nd meeting, para. 7). Such a concept would, of course, be out of place in a definitional article, but it could be a separate element of the general principles set forth in part II of the draft. In that connection, he would point out that, as stated in its report on its thirty-fifth session, the Commission had already unanimously agreed on the importance of seriousness as an element in crimes against the peace and security of mankind.[9] Furthermore, article 19 of part 1 of the draft articles on State responsibility[10] provided that, under certain conditions, the most serious breaches of international obligations would constitute a crime on the part of a State, other breaches that did not attain that degree of gravity being termed delicts. When he had presented the Commission's report to the General Assembly in 1983, in his capacity as Chairman of the Commission, there had not been a single objection to that notion, and he would therefore invite the Special Rapporteur to give the matter some further thought. The words "because of their nature" in draft article 5 also referred, in his view, to the serious nature of the acts in question. Perhaps the first sentence of paragraph (1) of the commentary to draft article 1 could be formulated in such a manner as to constitute a principle within part II of the draft.

38. He also considered that related offences such as complicity should be referred to in the general principles and that more detailed provisions on the various elements involved in such related offences should be included in the body of the draft. The same approach could be adopted with regard to exceptions.

39. Mr. KOROMA noted that the Commission's earlier drafts had been criticized for the assumption that a mechanism was not necessary to enforce the principles enunciated therein and on the ground that they made no provision for legality or due process. So far as the latter expression was concerned, he would prefer to retain the Special Rapporteur's wording in draft article 6, which seemed to him to be more neutral and appropriate, since the expression "due process of law" suggested by Mr. Sreenivasa Rao was peculiar to one system of law.

40. He agreed entirely with Mr. Calero Rodrigues that complicity and attempt, as inchoate offences, should be dealt with in the general part of the code, rather than in the part relating to particular offences.

41. The draft code dealt not with an abstract issue, but with a highly topical matter and it behoved the Commission to make every effort to complete its work in good time if it was not to be subjected to further criticism. It should therefore make recommendations for the establishment of an international criminal court, without which the offences of aggressive war, war crimes and crimes against humanity could not be prevented. It would then be for States to accept or reject those recommendations; but if they were viable and well balanced, they stood a good chance of being accepted by the international community.

42. He did not agree that the English title of the topic should be brought into line with the French and Spanish versions. "Offence" was a generic term, embracing both felonies, namely serious crimes such as murder or treason, and misdemeanours, i.e. less serious crimes. It also denoted a breach of the criminal law. On both linguistic and substantive grounds, therefore, the present English title should be retained.

43. Turning to draft article 1, he said that the true meaning of the provision could be discerned only by referring to the commentary, whereas, in his view, each article should be autonomous so that the reader could immediately seize the intent. An offence against the peace and security of mankind had two main constituent elements, seriousness and utmost gravity, and those two elements should be referred to in the body of the definition and not be left to the commentary. An added reason for making such a reference was that seriousness was a subjective concept, as the Special Rapporteur had pointed out in the commentary (para. (1)). Therein lay the danger, for public opinion was fickle. If, however, the two elements of seriousness and utmost gravity were written into a definitional article, the treatment of offences against the peace and security of mankind would no longer be left to the whims and fancies of public opinion. On that basis, he would suggest

[8] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex (art. 4).

[9] *Yearbook . . . 1983,* vol. II (Part Two), pp. 13-14, paras. 47-48.

[10] See 1993rd meeting, footnote 7.

for the Special Rapporteur's consideration that draft article 1 be reworded to read:

"An offence against the peace and security of mankind is a very serious act or an act of the utmost gravity which is in violation of international law."

44. While he agreed with the thrust of draft article 2, he would suggest that it should be redrafted along the lines of article 4 of part 1 of the draft articles on State responsibility[11] to the effect that municipal or internal law could not be invoked to prevent an act or omission from being characterized as an offence against the peace and security of mankind. There again, he would prefer the traditional term "municipal law" to "internal law".

45. With regard to draft article 3, he considered that, in terms of both the codification and the progressive development of international law, the Commission should be ambitious and not confine the code to individuals. He saw no reason to omit all reference to the State, particularly since many States seemed to be prepared to submit themselves to appropriate proceedings, judging by events in the Commission on Human Rights and the European Commission of Human Rights. The Special Rapporteur should therefore be invited to submit a provision that would include a reference to State responsibility and the matter could then be decided by the international community. The Commission need not for the time being concern itself with penalties.

46. Draft article 4, which provided that an offence against the peace and security of mankind was a universal offence, went to the heart of the matter. The planning and execution of aggressive wars, persecution on religious or racial grounds, and war crimes deserved the attention of the international community and every State had a duty to try or to extradite any perpetrator of an offence against the peace and security of mankind. However, unless the provisions in question were backed up by an enforcement mechanism, through either national courts or an international criminal court, they would lose their deterrent effect. For the time being, therefore, the Commission should accept the proposal that a State should either try or extradite an offender, while at the same time strongly recommending the establishment of an international criminal court to try such offences. The present climate for such a proposal was propitious and it should be submitted for the approval of the international community.

47. The Special Rapporteur was to be congratulated on submitting draft article 6, since jurisdictional guarantees exemplified the common-law maxim that justice must not only be done, but also be seen to be done. Safeguarding the jurisdictional guarantees of the accused was a measure of civilization. He could not, however, agree that those guarantees should be elevated to the status of *jus cogens.*

48. The title of draft article 9 should be re-examined, and separate provisions drafted for the various defences.

49. Mr. BEESLEY said that the Commission might wish to consider the possibility of a national court on which a judge from the jurisdiction of the accused would sit together with one or more judges from a jurisdiction whose jurisprudence differed from that both of the accused and of the national court in question. That might make for a more realistic approach to the problem of establishing an international criminal tribunal, as well as for certainty and fairness.

The meeting rose at 1.10 p.m.

[11] *Ibid.*

1995th MEETING

Tuesday, 12 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

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

Gilberto Amado Memorial Lecture

1. Mr. CALERO RODRIGUES noted that 1987 was the hundredth anniversary of the birth of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission. He proposed that the informal consultative committee on the Gilberto Amado Memorial Lecture should consist of Mr. Jacovides, Mr. Koroma, Mr. Reuter, Mr. Yankov and himself.

It was so agreed.

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. GRAEFRATH, after congratulating the Special Rapporteur on his fifth report (A/CN.4/404),

[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.