Document:-
A/CN.4/SR.1995

Summary record of the 1995th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

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.

said that he welcomed the basic approach of relying as much as possible on the Nürnberg Principles[6] and the 1954 draft code, and maintaining the distinction between war crimes and offences against the peace and security of mankind. Even if it was sometimes difficult to decide into which category a particular crime fell, that system had historic roots and brought out the fact that all the crimes covered by the draft code were considered and treated as crimes against humanity. It also had the merit of being based on common values and not depending on the establishment of an international criminal court, and it emphasized that the prevention and prosecution of the crimes in question were essential elements in strengthening international peace and security.

3. Close observance of the Nürnberg Principles also made it clear that the code dealt with the responsibility of individuals for international crimes, not with that of States. That did not, of course, preclude the possibility that an act entailing the international criminal responsibility of an individual might, if carried out on behalf of a State, also entail the international responsibility of that State. The punishment of a State official for an international crime did not relieve the State concerned of its responsibility under international law. That was clearly the position under the Nürnberg Principles and the 1949 Geneva Conventions,[7] and in particular under article 91 of Additional Protocol I of 1977[8] to those Conventions, and it might be well to include a similar provision in the draft code. There was no need to place the word "individual", in draft article 3, in square brackets; that would only weaken the article.

4. While State responsibility and the international criminal responsibility of the individual had different legal foundations, they were nevertheless closely related, since the responsibility of State officials for offences against mankind gave rise to one of the legal consequences of State responsibility for international crimes. For example, the notion of a universal offence, the fact that the State could not invoke immunity with respect to criminal acts by its officials, and the duty to extradite, all quite clearly derived from the responsibility of States for international crimes. Nevertheless, he shared the view that article 3 should be confined to individuals and avoid any reference to wrongful acts carried out on behalf of the State. Although it was probably true that most of the serious crimes listed in the draft code could be committed only by individuals in a position to exercise State authority or administrative power, there were other examples, such as the *I. G. Farben* case (see A/CN.4/398, para. 197). Consequently, it would be preferable to refer only to the responsibility of individuals in article 3, especially as the draft thus far remained silent on the criminal responsibility of other possible entities: organizations, associations, etc. If article 3 did refer only to individuals, however, the Commission might consider it necessary, when enumerating the offences, to define more precisely the individuals who could be held responsible. Perhaps it might also be necessary to distinguish between those participating in, and those organizing or ordering, criminal activities.

5. Referring to draft article 1, he agreed that it would be preferable to give a generic definition based not only on the seriousness of the acts, but also on their effects with respect to the fundamental rules of the international community and to the survival of mankind; but he feared it might be difficult to agree on a formula of that kind which would not be open to abuse. Consequently, he could agree for the time being to the solution proposed by the Special Rapporteur, which was both simple and flexible, since it would necessarily be accompanied by a precise list of offences. Whether or not that list was exhaustive was not important; it would be exhaustive for the time being. However, nothing would stop States later on from adopting additional protocols or adding offences to the original list if they thought it necessary. Such additional protocols had become an established institution in international relations, and the same procedure had been followed in regard to the list drawn up at Nürnberg.

6. In principle, he had no difficulty with draft article 2, although the first sentence might be redrafted to state that an act which constituted an offence against the peace and security of mankind was a crime under international law, independently of national law. In any event, a provision of that kind was needed somewhere in the draft. With regard to the second sentence, he endorsed the proposal to replace the word "prosecuted" by "punishable". Perhaps, too, a paragraph could be added stipulating that States undertook to enact the necessary legislation to give effect to the provisions of the code and, in particular, to prescribe effective penalties, so as to make it clear that States were under an obligation to implement the provisions of the code and to co-operate to that end.

7. He endorsed the principle of the universal offence set out in draft article 4, which stated the duty of States to try or to extradite the alleged perpetrator of an offence against the peace and security of mankind. The new text of the article was an improvement, but something more might be needed. First, he understood paragraph 1 as stating a general duty of co-operation in the prosecution of criminals, including the collection and exchange of information and evidence; that was of paramount importance. Secondly, the draft article did not mention asylum. The 1967 Declaration on Territorial Asylum[9] contained a provision to the effect that States could not grant asylum to any person against whom there was serious evidence of the commission of a crime against peace or against humanity (art. 1, para. 2). That would, of course, be an important corollary to the duty to extradite, and a number of recent cases and calls for co-operation in combating terrorism showed the need to take the matter into consideration. Thirdly, the Commission should not overlook the question of the priority of requests for extradition. As a rule, persons accused of having committed a crime against peace or against humanity or a war crime should be extradited to the country in which the crime had been committed or which had suffered by it. That had been the practice, at

[6] See 1992nd meeting, footnote 12.

[7] See 1994th meeting, footnote 7.

[8] See 1992nd meeting, footnote 10.

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

least to a certain extent, since the Second World War, and it had been followed in several General Assembly resolutions, in particular resolution 3 (I) of 13 February 1946 on the extradition and punishment of war criminals and resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (para. 5). It was very doubtful whether it would be possible to raise constitutional objections to the extradition of a criminal responsible under the code, and he did not believe that State sovereignty could be invoked legally to protect criminal behaviour constituting an offence against the peace and security of mankind. In a way, that was the essence of the statement contained in draft article 2.

8. The approach adopted by the Special Rapporteur in draft article 4 had the advantage of reflecting very closely the stand taken thus far by States in regard to such crimes. It also reflected recent trends. If States contemplated universal jurisdiction in respect of crimes such as torture, hijacking or the taking of hostages, it would be difficult to question such jurisdiction for the prosecution of offences listed in the code. There remained the danger that the same crime could be punished differently in different countries; but that was a common problem with universal jurisdiction over other crimes, which should not hinder criminal prosecution and which sometimes arose under national criminal laws. Yet that need not prevent the Commission from considering ways and means of alleviating the problem as far as possible. In any event, to rely on universal jurisdiction and keep the door open for the establishment of an international criminal court, as article 4 did, was a realistic approach that made it possible to proceed with the drafting of the code. He did not share the view that the drafting of the code depended on the decision whether or not to establish an international criminal court. That had not been the case with the 1949 Geneva Conventions, the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, or the 1979 International Convention against the Taking of Hostages.[10] The drafting of the code would give the Commission and States ample time to reflect on the establishment of an international criminal court.

9. He approved of the provisions of draft articles 5, 6, 7 and 8, but had some difficulty with draft article 9. First, he did not believe that it was possible to unify judicial practice in different countries or to determine the jurisprudence of an international criminal court by means of the somewhat sketchy provisions contained in the article. With regard to the various exceptions listed, there was no need for a clause on individual self-defence, since the question of self-defence could hardly arise in connection with the offences covered by the draft code. He agreed with previous speakers that the case of *force majeure* could not be cited as an excuse for committing such offences. The difficult question of the extent to which error might preclude criminal responsibility should be left to the judge. He could not accept a general rule to the effect that an error of law precluded criminal responsibility, since most legal systems appeared to adopt the opposite view. The extent to which an error of fact was relevant depended greatly on the specific circumstances of the case, so that it did not seem possible to state a general rule on the subject. In general, the question of error would have to be decided in relation to the extent to which the error had the effect of excluding intent, and that could only be decided by the court hearing the case. The question of coercion or state of necessity came down to the effect which a superior order might have, and it would be advisable to refer to article 8 of the Nürnberg Charter[11] on that point. To be accepted as an exception, coercion should be of such a degree as to make free decision by the individual impossible. While he could see the relationship between coercion and the order of a superior, it might be preferable to retain a general provision on superior order, because of the importance of such an order in regard to the offences listed in the draft code.

10. In conclusion, he supported the Special Rapporteur's decision not to include attempt and complicity in the part of the draft code dealing with general principles.

11. Mr. JACOVIDES, after commending the Special Rapporteur for his fifth report (A/CN.4/404), which was as remarkable as those which had preceded it, reaffirmed the positions he had explained in his statements at the Commission's previous two sessions.

12. With regard to the English title of the draft code, he had in the past expressed the view that the word "offences" should be replaced by "crimes". In the course of its deliberations, the Commission had concluded that the draft code dealt not only with "crimes" as distinct from "delicts" in the sense of article 19 of part 1 of the draft articles on State responsibility,[12] but also with the most serious of such crimes. Moreover, the use of the word "crimes" would bring the English text into line with the French and Spanish. It would also be more accurate legally and more weighty politically. Consequently, he supported Mr. Calero Rodrigues's proposal (1994th meeting) that the Commission should formally propose such a change to the General Assembly.

13. The definition contained in draft article 1, while acceptable as far as it went, could be improved by the inclusion of a reference to the seriousness of the crimes in the article itself, rather than in the commentary. Of course, the more substantive question of the nature of the crimes defined in the code, to which some time had been devoted at the previous session, was still pending.

14. Draft article 2 correctly rested on the assumption of the primacy of international criminal law and was in conformity with Article 103 of the Charter of the United Nations.

15. In draft article 3, the replacement of the word "person" in the former text by "individual" related to the sensitive key issue of whether the code was to be restricted to individuals, or whether it should also cover the criminal responsibility of other entities, particularly States. The Commission had earlier expressed to the

[10] United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

[11] See 1992nd meeting, footnote 6.

[12] See 1993rd meeting, footnote 7.

General Assembly its prevailing opinion in support of the principle of the criminal responsibility of States.[13] After extensive discussion in the Commission and the Sixth Committee of the General Assembly, during which it had been made clear that the criminal responsibility of States would be dealt with under the topic of State responsibility, it had been agreed that, for the time being and without prejudice to the position of many members of the Commission, the scope of the draft code would be restricted to the criminal liability of individuals[14] in order to enable the Commission's work to go forward. The hope had been expressed that that compromise on the draft code would serve to expedite the work on State responsibility. Notice had been given that, if that did not prove to be the case, those members of the Commission who held strong views on the matter would revert to the question of the criminal responsibility of States in the context of the draft code.

16. He thought it necessary to remind the Commission of that compromise and understanding, in view of certain opinions on draft article 3 expressed at previous meetings. Compromises were based on give and take by each side, and he therefore found much merit in Mr. Mahiou's suggestion (1993rd meeting) that the former text of draft article 3 should be retained, or that the words "person" and "individual" should at least be placed in square brackets in the new text, to indicate that the understanding continued to apply. If work on article 19 of part 1 of the draft articles on State responsibility did not proceed satisfactorily, Governments and members of the Commission who had reason to feel strongly on the matter should not be deemed to have forfeited the right to reopen the issue in the context of the draft code. It was to be hoped that a new special rapporteur for the topic of State responsibility would be appointed soon and that he would bear those important considerations in mind.

17. Draft article 4 also dealt with a very sensitive and important point. He still believed that, to be complete, the code must include the three elements of crimes, penalties and jurisdiction. Whether it was politically feasible under present conditions to establish an international criminal court was questionable. His own view was that the Commission should aim at the optimum legal outcome, bearing in mind its mandate to develop international law progressively, without closing the door to possible compromises or other adjustments.

18. With regard to the text of article 4, a number of valid points had been raised during the debate. While having no objection to the use of the expression *Aut dedere aut punire*, he thought that the concept of a "universal offence" should not be downgraded. He also agreed that it would be more accurate to replace the words *aut punire* by *aut judicare* and that the duty of a State to arrest the offender should also be appropriately expressed. He endorsed the Special Rapporteur's suggestion in the commentary (para. (4)) that States should introduce into their internal legislation the procedural and substantive rules of the code, as well as a uniform scale of penalties. That would be a step in the right direction, regardless of whether national or international criminal jurisdiction was eventually accepted.

19. As for draft article 5, he had no difficulty in accepting the notion of the non-applicability of statutory limitations to offences against the peace and security of mankind. For the sake of clarity, however, the words "because of their nature" might perhaps be deleted from the text of the article and be included in the commentary.

20. He had no objections to either the former or the new text of draft article 6. If there was to be an international criminal court, it would no doubt have its own rules and procedural guarantees ensuring due process; but the Special Rapporteur had been right to rely on distillation of the jurisdictional guarantees formulated in a number of international legal instruments, in case the code was to be applied by national courts. It could indeed be argued that the minimum guarantees to which every human being was entitled amounted to peremptory norms.

21. Similarly, no one could disagree with the rule against double jeopardy stated in draft article 7. That principle was firmly rooted in national criminal law, but the question arose how to apply it in international criminal law. So long ast the choice between international criminal jurisdiction and national criminal jurisdiction had not been made, difficulties could arise in practice. His own preference was for an international criminal court, which would serve to avoid those difficulties. However, as long as national or parallel jurisdictions could be exercised on the basis of universality, he agreed with those speakers who had held that the crime for which an alleged offender had been convicted or acquitted must be the same as that with which he was subsequently charged if he was to be able to invoke the rule in article 7. The wording of article 7 would have to remain pending until the fundamental question as to who was to exercise jurisdiction under the code was finally settled.

22. He had spoken in the past in favour of the principle of non-retroactivity stated in draft article 8. When the rule *nullum crimen sine lege* was applied to international criminal law, the term *lex* had to be interpreted as including not only treaty law, but also custom and the general principles of law recognized by the international community. Justice had to prevail over the letter of the law, or, as Hans Kelsen had put it: "in case two postulates of justice are in conflict with each other, the higher one prevails".[15] When the draft code came to be completed and all the offences it covered were properly defined, that question would no longer be of practical importance. But the higher interests of the international community dictated that an element of flexibility should be preserved, so that the letter of the law could not prevail over justice. He therefore agreed that the principle set out in paragraph 2 of draft article 8 should be maintained.

23. The provisions of draft article 9 should be strictly and narrowly construed. In view of the gravity of the

[13] *Yearbook . . . 1983*, vol. II (Part Two), pp. 14-15, para. 54.

[14] *Yearbook . . . 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

[15] "Will the judgment in the Nuremberg trial constitute a precedent in international law?", *The International Law Quarterly* (London), vol. I (1947), p. 165.

crimes involved, a proper balance should be struck between the interest sacrificed and the interest safeguarded. In other words, the emphasis should be on responsibility and punishment, not on the exceptions to responsibility. He therefore urged the restoration of the former text of the article, which provided that, subject to the qualifications expressly stated, "no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind". In any case, the Drafting Committee should make an effort to arrive at a properly balanced text.

24. He reiterated his reservations regarding the Special Rapporteur's narrowing of the scope of the draft code to the "individual" (art. 3). The plea of self-defence might perhaps be logically advanced by the leaders of a State accused of aggression to relieve them of their individual criminal responsibility, but it was no less logical for those of the State suffering the aggression, subject, of course, to their behaviour.

25. He supported the substance of draft articles 10 and 11, while reserving his position on their drafting and position in the code. On the conclusion of the debate, draft articles 1 to 11 should be referred to the Drafting Committee, and it was to be hoped that the Committee would be able to deal with them fully during the current session.

26. Before concluding, he wished to speak from the heart. Seen from the point of view of the victims of gross violations of international law relating to peace and security, the project on which the Commission was engaged was much more than an academic exercise. In his own country, Cyprus, which had been the victim of a brutal military aggression and continuing occupation, massive violations of human rights had been committed, as had been amply proved by the quasi-judicial inquiry made by the European Commission of Human Rights, to which he had referred at the previous session.[16] The findings of that inquiry, contained in a report adopted in 1976, amounted to an indictment of the cruelties inflicted by the invading Turkish Army in 1974 and subsequently. Nearly 13 years after that documented international crime, and in spite of numerous United Nations resolutions and various decisions of other international bodies, including the Non-Aligned Movement and the Commonwealth, the situation of Cyprus remained without remedy. Indeed it had been further aggravated by illegal attempted secession and the systematic efforts of the occupying Power to alter the demographic composition of the island and impose partition and an unworkable system of ethnic separation. For a variety of reasons, the members of the international community had been either unable or unwilling to act effectively to implement the resolutions they had adopted. Cyprus was a test case for the application of international law and the effectiveness of the United Nations; for when such grave injustices were tolerated or condoned they were bound to be repeated elsewhere. "Who today remembers the Armenians?", Hitler had asked rhetorically, before launching his campaign of genocide and other grave crimes before and during the Second World War.

27. It would be naïve to imagine that the draft code, when completed, would be a panacea for the grievances of Cyprus or solve the many other similar problems existing in the world, any more than the Definition of Aggression[17] adopted in 1974—just before the aggression against Cyprus. He believed, however, that a respected body of experts in international law such as the Commission, if it succeeded in preparing a code providing for appropriate penalties and jurisdiction, could at least make an important contribution towards building an international legal order and deterring actual and would-be aggressors and other violators of its provisions. The international community expected no more from the Commission; but the Commission would be failing in its duty if it did less.

28. Mr. HAYES said that there was a clear need for a code of offences against the peace and security of mankind, given the areas of uncertainty, differences of view and lacunae in the international criminal law relating to war crimes and crimes against humanity. Ideally, the Commission should draft a convention providing a thematic definition of offences against the peace and security of mankind, prescribing the penalties to be imposed on persons or States committing such offences and establishing an international jurisdiction competent to adjudicate on them and to hand down and enforce penalties. In practice, however, the Commission had rightly concluded that a comprehensive and universally acceptable definition of offences against the peace and security of mankind was not currently feasible, and that it should start by determining the areas of consensus and draw up a list of crimes generally accepted as offences against the peace and security of mankind, to be supplemented by a number of principles. Furthermore, since an international criminal jurisdiction might not prove acceptable, the Commission should perhaps await the comments of Governments before deciding how to proceed on that matter.

29. Turning to the Special Rapporteur's fifth report (A/CN.4/404), he observed that draft article 1 derived from the conclusion that a thematic definition of offences against the peace and security of mankind was not possible at the present stage. While the text adequately reflected that situation, some concepts, such as that of seriousness, should be added. But it would not be appropriate to include some criteria and omit others. As to the wording of the article, he agreed that the phrase "under international law" might not be necessary. He also agreed that the list of offences should not be exhaustive.

30. In draft article 2, the second sentence did not seem necessary. But if it was to be retained, the word "prosecuted" should be replaced by "punishable".

31. Draft article 3 was also based on the assumption that it was currently impossible to provide for the criminal responsibility of States. That being understood, the article should not be confined to persons acting as servants of a State. The word "individual" should be replaced by "natural person", which was the expression commonly used inter-

[16] *Yearbook . . . 1986*, vol. I, p. 121, 1962nd meeting, para. 32 and footnote 10.

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

nationally to distinguish individuals from corporate bodies.

32. Paragraph 1 of draft article 4 assumed national jurisdiction, while paragraph 2 had been included to keep open the possibility of international jurisdiction. If the Commission decided to proceed on the basis of international jurisdiction, the article would take quite a different form, since provision would have to be made for the possibility of that jurisdiction not being generally accepted. He agreed with other speakers that the words *aut punire* in the title of the article should be replaced by *aut judicare*. It would also be advisable to insert the word "alleged" before "perpetrator" in paragraph 1, and to replace the word "arrested" by "found". He noted that the new text of the draft article contained no reference to a "universal offence". The purpose of paragraph 1 was to establish an adequate universal jurisdiction in order to prevent offenders from taking advantage of differences in national legislation to avoid extradition. That idea appeared sufficiently important to be included somewhere in the draft code, perhaps at the end of the new paragraph 1. As for the idea of imposing an obligation to extradite or establishing priorities between applications for extradition, that was a very difficult area of law in which countries had been slow to change traditional rules, and it was to be feared that the Commission would not be able to bring about the desired changes through the provisions of the code.

33. With regard to draft article 5, like Mr. Tomuschat (1993rd meeting), he had doubts about the advisability of eliminating statutory limitations, because of the risk of a miscarriage of justice through flawed evidence. But in many national jurisdictions there were no statutory limitations for the most serious offences, such as those covered by the draft code. Moreover, in the case of such offences, the danger of flawed evidence was reduced and the adjudicating court could be left to weigh the value of the evidence, which would be better than imposing limitations. He could therefore accept article 5.

34. The new text of draft article 6 was an improvement on the former text. The opening sentence could, however, be clarified by inserting the word "jurisdictional" before "guarantees" and by replacing the word "extended" by "due". Furthermore, the words "to ensure a fair trial" should be added at the end of that sentence.

35. Draft article 7 would be useful if the code was to be implemented by national courts, in which case the criteria applied might vary. If implementation was to be by an international court, the article was unnecessary. Nevertheless, the *non bis in idem* rule was such an important safeguard that an attempt should be made to prevent individuals from being tried twice for the same offence, once by an international court and once by a national court. That could be done by giving international decisions precedence over national decisions.

36. In draft article 8, paragraph 1 could be made clearer by redrafting it to read:

> "1. No person shall be convicted of an offence against the peace and security of mankind in respect of an act or omission which, at the time of commission, did not constitute such an offence."

Paragraph 2, which in any event was difficult to draft satisfactorily, would then be unnecessary.

37. The new text of draft article 9 was an improvement on the former text. He agreed with other members of the Commission, however, that self-defence did not seem an appropriate exception where offences against the peace and security of mankind were concerned. The same applied to an error of law; even in war, the basic wrongfulness of such acts should be obvious to the perpetrator. The concepts of coercion, state of necessity and *force majeure* needed further elaboration. He agreed with previous speakers that the idea of a superior order was covered by the concept of coercion. The Commission should resist the temptation to include a provision dealing with such a controversial issue.

38. The whole of article 9 could be expressed in terms of exceptions to intent, rather than exceptions to responsibility. The concept of intent was included in all criminal codes in regard to serious offences and should be included in the draft code, reference being made to such factors as mental incapacity.

39. With regard to draft article 10, consideration might be given to the need in the part of the code on general principles for a provision on complicity in an offence and conspiracy. He had no reservations on the text of draft article 11.

40. Mr. NJENGA commended the Special Rapporteur for his lucid and thought-provoking fifth report (A/CN.4/404), which would be of great assistance to the Commission in dealing with an important and complex topic. Any constructive criticisms he might now offer on some of the draft articles did not in any way detract from his appreciation of that report.

41. He found the definition in draft article 1 inadequate, because it was purely descriptive. He did not share the Special Rapporteur's reasoning that, because of the subjective nature of what the international community might consider at any particular time to be the most serious crimes, it would be pointless to introduce the concept of seriousness into the definition. The seriousness of the crimes and the threat they represented for human society were the very essence of the draft code, which would be of little use if that element were omitted from the definition.

42. Draft article 2, which proclaimed the primacy of international law over internal law, was a fundamental provision. A number of useful drafting suggestions had been made, to which he subscribed, including the suggestion that the word "prosecuted", in the second sentence, should be replaced by "punishable". He also agreed with Mr. Koroma (1994th meeting) that the expression "internal law" should be replaced by the more appropriate term "municipal law".

43. With regard to draft article 3, he noted that, although it had been agreed that the draft code should be restricted *ratione personae* to individuals, it was nevertheless the view of the majority that States could also be held responsible; a State could, indeed, be the major author of an act against the peace and security of

mankind. Moreover, the Commission itself, during the first reading of part 1 of the draft articles on State responsibility,[18] had unanimously adopted article 19, which removed all doubt about the question of the criminal responsibility of States. He reminded the Commission of the statement he had made on the subject at the thirty-seventh session, in 1985.[19] The text now proposed for article 3 unfortunately lent itself to the *a contrario* argument that a State which specifically authorized the commission of an offence was not liable, because the article referred only to the responsibility of individuals. Admittedly, it was very difficult to bring States to account for offences against the peace and security of mankind, but some provision had to be included on the subject and he suggested that the Commission might incorporate in article 3 a clause to the effect that its provisions were without prejudice to the criminal responsibility of States.

44. He saw no valid reason for deleting the first sentence of paragraph 1 of the former text of draft article 4 and suggested that it be restored; in fact, he preferred the former text, with its title "Universal offence". The new Latin title added nothing to the substance and could cause confusion by stating an obligation to extradite or to punish, rather than to try. As to the substance of the article, he agreed with the Special Rapporteur that, pending the unlikely event of the establishment of an international criminal court, the provisions of article 4 provided the only means of giving practical effect to the code.

45. States should be encouraged to extradite individuals who had committed offences against the peace and security of mankind, so as to avoid treatment of those crimes as political offences, and especially because the production of evidence and the conviction of the offender would be much easier in the country where the offence had been committed. Besides, in some countries, such as Kenya, criminal jurisdiction was strictly territorial. Draft article 4 should therefore place more emphasis on extradition, and if, for any reason, it was not possible—for instance in countries whose constitutions prohibited the extradition of nationals—there should be a duty not only to try but, on conviction, to impose severe penalties.

46. He found the drafting of article 5 adequate. It was worth noting that the common-law systems did not have statutory limitations in criminal law, and any distinction between war crimes and crimes against humanity in that regard was artificial: there should be no time-limit for the prosecution of such grave offences.

47. The new text of draft article 6 was an improvement on the former text, and the safeguards listed would be minimum guarantees in any court purporting to apply due process. In the highly charged atmosphere of trials for offences against the peace and security of mankind, particularly in the country where the offence had been committed, the accused needed all the guarantees he could get to ensure a fair trial. It would nevertheless be going too far to elevate those procedural guarantees to the status of *jus cogens*. He suggested the addition of the right of appeal to the list of guarantees in the article. The International Covenant on Civil and Political Rights specified in article 14, paragraph 5, that: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." There was a similar provision in article 8, paragraph 2 (*h*), of the American Convention on Human Rights.[20]

48. The rule stated in draft article 7 was common to all jurisdictions. However, the mass nature of offences against the peace and security of mankind should not be disregarded. The fact that someone had been tried and convicted—or acquitted—of a massacre of civilians in one place did not exonerate him for offences committed in another. On that point, article 29 of the Charter of the Nürnberg Tribunal[21] provided that if, after any defendant had been convicted and sentenced, "fresh evidence" was discovered which "would found a fresh charge against him", such action could be taken as might be considered proper "having regard to the interests of justice". It should therefore be made clear that the rule in draft article 7 did not preclude the trial of an accused for as many crimes as he had allegedly committed, by as many courts as were competent to try him. Of course, sentences already served could be taken into consideration in any subsequent judgments.

49. He endorsed the new formulation of draft article 8. He was, however, in complete disagreement with the new text of draft article 9, which seemed to him to undermine the spirit and the letter of the draft code. The acts covered by the code were very grave crimes, and no excuses should be allowed to exonerate their authors. Moreover, the discussion on article 9 had clearly shown that it could not be retained, at least in its present form. The correct principle was that stated in the former text: "Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. . . ."

50. He could not see how self-defence by an individual could possibly justify the commission of a crime against humanity. Coercion or state of necessity, if a grave, imminent and irremediable peril existed, might be a justification; so might *force majeure*, in which case an individual could not, of course, be held responsible for the consequences of his act. As to error, only error of fact could be admitted as an exception, because it disproved criminal intent. An error of law was no excuse, particularly in view of the nature of the offences in question. Finally, the plea of superior order, unless it amounted to coercion, had already been rejected at the Nürnberg and Tokyo trials. Those so-called defences were in fact no more than attenuating circumstances relevant in establishing the sentence.

51. The text of draft article 10 was well balanced. A superior could not be allowed to turn a blind eye to the criminal acts of his subordinates, and the examples taken by the Special Rapporteur from trials of war

[18] See 1993rd meeting, footnote 7.

[19] *Yearbook . . . 1985*, vol. I, pp. 47-48, 1885th meeting, paras. 1-2.

[20] The "Pact of San José, Costa Rica", signed on 22 November 1969 (to be published in United Nations, *Treaty Series*, No. 17955).

[21] See 1992nd meeting, footnote 6.

criminals were entirely convincing. He also endorsed the formulation of draft article 11.

52. Mr. SOLARI TUDELA said that he approved of the method adopted by the Special Rapporteur for defining offences against the peace and security of mankind, in draft article 1, by reference to the provisions of the code in which those offences were enumerated. But in view of that method, the list of offences with which the definition was linked called for some comments.

53. During the discussion, the question had been raised whether the list would be exhaustive or not. An exhaustive list would clearly have the advantage of enabling States to be certain that only the offences listed could be regarded as offences against the peace and security of mankind. It would, however, restrict the application of the code, since it would prevent the punishment of new types of offence which might well be of equal seriousness. Mr. Francis (1994th meeting) had mentioned the possibility of finding a formula by which, although the list was exhaustive, all loopholes could be blocked if new crimes appeared: that would be done not by referring to the general principles of law, but by inviting an organ of the United Nations, such as the Security Council, periodically to review the list of offences. Thus the code itself would be accompanied by a mechanism enabling either a new court or the Security Council to extend the list of offences, it being understood, of course, that only the most serious crimes would be included. That might not be the ideal solution, but the proposal at least pointed in the right direction.

54. He also approved of the wording of draft article 2, since it was essential to establish the primacy of international criminal law over internal criminal law, failing which the Commission's efforts would be in vain.

55. In draft article 3, the Special Rapporteur had adopted a pragmatic approach by limiting the subject-matter of the code to individuals: in the present state of international law it did not seem possible to extend its field of application to States.

56. Draft article 4 called for several comments. First, he supported the amendment proposed by Mr. Reuter (1993rd meeting, para. 23), which appeared to be unanimously approved. In referring to the duty of States to extradite, it was better to speak of the accused, rather than of the perpetrator of an offence, in accordance with the terminology generally used in international conventions on the subject. Secondly, article 4 raised the problem of the laws in force in many States which prohibited extradition in certain cases; it should therefore be couched in more explicit terms. Moreover, like other provisions of the draft code, the article illustrated the need to establish an international criminal court. It was hard to imagine that a State party to the code would extradite an individual accused of an offence against the peace and security of mankind at the request of another State, unless his act had been characterized as such an offence by an international court. In the absence of such a court, the practical application of article 4 seemed hazardous.

57. The Special Rapporteur was right to enumerate a certain number of jurisdictional guarantees in draft article 6. Paragraph 3 might also mention the right of the accused to the services of the lawyer of his choice and his right to communicate with his lawyer after arrest, even if those guarantees were implicit in subparagraphs (*b*) and (*c*).

58. The principle of criminal law stated in draft article 8 was affirmed in several international instruments, as indicated in paragraph (1) of the commentary, to which he would like to add the American Declaration of the Rights and Duties of Man,[22] which was older than the Universal Declaration of Human Rights.[23]

59. With regard to draft article 9, it seemed difficult to accept self-defence as an exception to responsibility: an offence against the peace and security of mankind was, by its nature, one that could not be excused on grounds of self-defence.

60. In conclusion, he supported the other draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404).

61. Mr. YANKOV expressed his appreciation of the Special Rapporteur's response to the comments and suggestions made during the debates in the Commission and the Sixth Committee of the General Assembly. His fifth report (A/CN.4/404) went a long way towards dispelling any possible confusion between the present topic and that of State responsibility, as it placed more emphasis on the responsibility of individuals. In his previous reports, the Special Rapporteur had followed too closely some of the elements of article 19 of part 1 of the draft articles on State responsibility,[24] thereby creating some danger of confusion between the two topics, whose common ground *ratione materiae* tended to blur their dissimilarity *ratione personae*.

62. The new draft articles, being confined to the international responsibility of individuals, had the advantage of clarity and consistency. That did not mean that the link between the notion of "international crimes" within the meaning of article 19 of the draft articles on State responsibility and that of "offences against the peace and security of mankind" should be entirely ignored, although it would be dangerous to link the two notions too closely—a danger which the fifth report avoided thanks to the general principles it formulated.

63. Turning to the draft articles submitted in the report, he found the definition in draft article 1 satisfactory, at least at the present stage. That definition was general and concise, and contained an implicit reference to the offences to be listed elsewhere in the code. He believed that the list of offences should be as precise as possible and be exhaustive, subject to future revision if new crimes having the same characteristics emerged. At a later stage of the work on the draft articles, an attempt should perhaps be made to add certain essential general criteria to the definition, such as the seriousness of the

[22] Resolution XXX of the Ninth International Conference of American States, adopted at Bogotá (Colombia) on 2 May 1948; for the text, see Pan American Union, *The International Conferences of American States, Second Supplement, 1942-1954* (Washington (D.C.), 1958), p. 263.

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

[24] See 1993rd meeting, footnote 7.

offence, the extent of its effects and the intent of the perpetrator. The Special Rapporteur appeared to have abandoned that idea on the grounds that such general criteria were of a subjective nature. For his part, he believed that the reality of the serious common dangers to all mankind, and the fact that the international community agreed to characterize the acts in question as crimes, justified the elaboration of general criteria which it would be useful to include in the definition.

64. Draft article 2 was generally acceptable. The concept of the autonomy of international criminal law which it stated derived from the judgment of the Nürnberg Tribunal and had been confirmed by the Commission in Principle II of the Nürnberg Principles.[25] That concept stemmed from the more general principle of the relationship between the international legal system and the internal law of States as two systems of law which were distinct and autonomous, although not entirely isolated from each other. It followed from that principle that, as the Special Rapporteur rightly pointed out in his report, in a case of conflict between international criminal law and the internal law of a State, the *non bis in idem* rule could not be invoked (see para. (7) of the commentary to art. 2).

65. Doubts had been expressed about the need for the second sentence of draft article 2. He thought the Commission should retain that provision, which was based on Principle II of the Nürnberg Principles: it clarified the rule laid down in the first sentence and stated more explicitly the principle of the autonomy of international law.

66. The new text of draft article 3 was preferable to the former text, because it avoided all ambiguity about the content of the draft code *ratione personae*. Confining the code to the responsibility of individuals did not exclude the responsibility of States for acts which, under article 19 of part 1 of the draft articles on State responsibility, constituted offences against the peace and security of mankind. Moreover, an offence committed by an individual acting as an organ or agent of a State might also be imputable to that State; the responsibility of the individual was therefore parallel to the responsibility of the State. In the commentary to article 19 of the draft articles on State responsibility, the Commission had stated that punishment of individuals having committed offences against the peace and security of mankind "does not *per se* release the State itself from its own international responsibility for such acts".[26] The fact was that, under the existing system, States and individuals were at different levels; the legal grounds for their international responsibility, the rules applicable and the mechanisms of enforcement were different. Thus the existence of two different régimes of international criminal responsibility corresponded to the reality of existing international law. An individual could indeed act as an organ or agent of a State, in which case his crime should be imputed to that State. But an individual, or group of individuals, could also act on their own account, in which case the act was not an act of the State. Those points should be explicitly stated in draft article 3 and elaborated in the commentary.

67. The new text of draft article 4 adequately set out the substance of the fundamental principle involved, namely the duty to extradite or to try by due process of law, as a logical consequence of the universal character of offences against the peace and security of mankind. It was especially necessary to affirm the duty to extradite, because by their nature such offences were politically motivated, and if that duty were not affirmed, such political offences would not lead to extradition. That exception to the general rule was justified by the universal nature of the offences, which should also prevent their perpetrators from enjoying the right of asylum.

68. The question of extradition should be considered having regard to territorial jurisdiction, the principle being that the author of an international crime must be tried and punished in the State where the crime was committed and under the laws of that State. In the case of crimes committed in the territory of several States, the competent court could be determined by agreement between the States concerned. An *ad hoc* international tribunal could be set up, as in the case of the Nürnberg and Tokyo Tribunals. Draft article 4, paragraph 2, provided for the possible establishment of an international criminal jurisdiction, but did not preclude the setting up of *ad hoc* international tribunals, which might prove easier than the establishment of a permanent international criminal court of a supranational character.

69. The duty of States to try and to punish—or to extradite—should be set out in the part of the draft code dealing with general principles, although the rules relating to competence might be placed in the part specifically concerned with questions of jurisdiction. He suggested that the title of article 4 should be "Duty to try or to extradite".

70. He found draft article 5 acceptable. It reflected the current trends in international law, as confirmed by a number of international instruments, including General Assembly resolutions and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, by many national laws, and by judicial practice. As the Special Rapporteur stated in the commentary (para. (1)), statutory limitations constituted "neither a general nor an absolute rule". But no matter what number of States had become parties to the 1968 Convention, it would be well for the draft code to confirm the rule of the non-applicability of statutory limitations to offences against the peace and security of mankind. On the other hand, the words "because of their nature", at the end of draft article 5, were unnecessary and might even weaken the text: there was no need to refer to the nature of such offences in order to justify the non-applicability of statutory limitations to them.

The meeting rose at 1 p.m.

[25] See 1992nd meeting, footnote 12.

[26] *Yearbook . . . 1976*, vol. II (Part Two), p. 104, para. (21) of the commentary.