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# 1996th MEETING

*Wednesday, 13 May 1987, at 10 a.m.*

*Chairman*: Mr. Stephen C. McCAFFREY

*Present*: Prince Ajibola, Mr. Al-Baharna, 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.

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**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. YANKOV, continuing the statement he had begun at the previous meeting, said that draft article 6 embodied an important general principle of international criminal law and would serve as a basis for the elaboration of the requirements for a fair trial. However, procedural safeguards should be as comprehensive and as precise as possible and the article should therefore contain some additional requirements based on the provisions of some of the international instruments referred to by the Special Rapporteur in paragraph (1) of the commentary and on the relevant provisions of national penal codes. Accordingly, he suggested the inclusion of a reference to the procedural rights of the accused during the preliminary examination, which in some national legal systems was part of the judicial procedure itself, and in others had an autonomous character but was linked with the proceedings; a reference to the prohibition of the use of coercion to extract confessions; and a provision safeguarding the right of appeal to a higher court.

2. The new draft article 7 was well placed within the set of general principles, even though the rule it stated was already referred to in paragraph (7) of the commentary to draft article 2, relating to conflicts between national and international criminal jurisdictions.

3. As for draft article 8, the new text submitted by the Special Rapporteur did not solve the problems raised by the wording of paragraph 2, which contained a safeguard clause concerning the general principles of law recognized by the community of nations. That notion was much too vague and might give rise to conflicting interpretations inconsistent with the fundamental rule *nullum crimen sine lege*. The offences covered by the draft code had to be defined very precisely. If an act or omission had, at the time of its commission, been recognized by the "community of nations" as such an offence, there would be no need for a provision along the lines of paragraph 2, since the act or omission would have been characterized as such at that time. In view of the fact that a provision identical with paragraph 2 was contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, he thought that the question should be given further consideration, for, in matters of criminal law, precision was of the essence.

4. Turning to draft article 9, he found that the new text represented a significant improvement over the former text. He nevertheless stressed that the formulation of exceptions should be precise, that the list of exceptions should be exhaustive and that, in view of the important role of intent in the commission of the offences under consideration, the number of exceptions should be limited to some very specific cases of *force majeure* and coercion, as, for example, when the perpetrator of an offence had been subjected to irresistible and unforeseen force that had deprived him of any choice, in which case he would have to establish that his life or personal safety had been threatened. Error of fact could hardly be considered an exception even in strictly qualified circumstances. Self-defence and state of necessity could also not be invoked as exceptions in the case of the offences under consideration. The Commission would therefore have to give article 9 further consideration if it was to arrive at a more precise and coherent set of exceptions. The question of extenuating circumstances should also be considered separately.

5. There had been proposals to add to the list of exceptions considerations such as age, insanity and state of health. Those proposals should be examined with the utmost care. A political leader who committed large-scale crimes against humanity might be regarded as insane. The obvious case was that of Hitler, whose sanity had been doubted by many people. In cases of that kind, it was difficult to see how a plea of insanity could be accepted as an excuse. The essential point to be borne in mind was that intent was the essential attribute of offences against the peace and security of mankind.

6. The wording of draft article 10 was based on recent treaty practice and the jurisprudence of the trials of war criminals. He pointed out that complicity was not a separate crime: under most legal systems, including that of his own country, attempt, preparation, participation, incitement, complicity and conspiracy were not regarded as separate crimes and were accordingly listed in the general part of the penal code. However, there might be cases where such preparatory acts involved a much greater public danger and could then be made punishable as separate crimes. Complicity in, or

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[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.

preparation of, international terrorism was a case in point. Perhaps the Commission had had such considerations in mind when it had included in article 2, paragraph (13), of the 1954 draft code a provision stating that conspiracy, direct incitement, complicity and attempt constituted separate offences. He urged further consideration of that difficult problem.

7. Draft article 11 was acceptable. It was modelled on article 7 of the Charter of the Nürnberg Tribunal[6] and article 6 of the Charter of the Tokyo Tribunal,[7] as well as on Principle III of the Nürnberg Principles.[8] The question of compliance with a superior's orders and the possibility of admitting extenuating circumstances also needed to be considered.

8. In conclusion, he said that draft articles 1 to 11 not only were an important part of the draft code, but also constituted a good legal basis for the interpretation of the provisions on the nature of the offences, the functioning of jurisdiction *ratione personae* and *ratione materiae*, and the principle of territoriality. He was therefore of the opinion that the draft articles should be referred to the Drafting Committee. At the same time, he recommended that, in future reports, the Special Rapporteur should provide more comparative law analysis, offer more information on the historical background of specific provisions and go into greater detail on the interpretation of the terms used in some of the draft articles.

9. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur, whose fifth report (A/CN.4/404) once again reflected his mastery of a particularly difficult topic. At the current stage, the draft articles on general principles were an essential element for further and more detailed consideration of the major problems of principle and method whose solution would determine how effective the code would be as an instrument for the prevention and punishment of offences against the peace and security of mankind. Three of the problems dealt with in those draft articles, in the commentaries thereto and by other speakers had been the particular focus of his attention: the definition of offences against the peace and security of mankind (art. 1); the respective roles of international law and internal law (arts. 2 and 4); and the scope of the code *ratione personae* (art. 3). Those problems were of such great importance that it might be preferable for the four draft articles to constitute part I of the draft.

10. He agreed with the Special Rapporteur's approach of not giving a general definition of offences against the peace and security of mankind in draft article 1 and of referring to the provisions that followed. Apart from offering the advantage of not requiring an extremely problematical general definition, that method met the need for certainty that was particularly acute in criminal law, as well as the need not to pave the way for unwarranted additions to the list of offences to be included in the code. Although he could see why Mr. Bennouna (1993rd meeting) considered it essential, for the purpose of the characterization of the offences covered by the code, to lay broader legal foundations than those of a mere convention, he thought that, as matters now stood, it would be wiser to establish a conventional basis. Other sources of law, such as United Nations resolutions and declarations, would naturally have a role to play; together with the purely conventional sources of law, they might gradually lead to the formulation of unwritten rules of a universal character. In the subject-matter of concern to the Commission, however, additions to the list of offences should be made in the most formal manner possible, namely by treaty, protocol or convention, since it was the certainty of law and the principle *nulla poena sine lege* that were at stake.

11. Apart from one reservation that he would explain later, he also agreed with the idea of focusing the provisions of the code on offences committed by individuals, whether agents of the State or private persons acting individually or collectively, and of leaving aside international crimes committed by States. However, he also shared Mr. Graefrath's view (1995th meeting) that the text of the code should make it clear that the responsibility of individuals was without prejudice to the responsibility of the State of which they were the agents.

12. Draft articles 2 and 4, which were closely linked, gave rise to some problems relating not so much to the articles themselves as to the general trend that had prevailed until now among Governments in connection with the relationship between international law and internal law. In view of the way in which that relationship operated in the case of instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[9] which were precedents that the Commission should take into account, it had to be decided just how much importance should be attached to the notion of the independence or autonomy of international law, which, according to draft articles 2 and 4, would ensure that the code took precedence over the internal law of States.

13. In his view, international law alone, as an inter-State system, could not guarantee the law-making power and full implementation of the code; national legal systems would have to continue to be involved, whether or not it was possible to establish an international court of criminal justice—something that would be advisable for the implementation of the code. In the absence of the necessary international institutions, national legal systems would have to conduct operations to find, identify, arrest, extradite, imprison, charge, defend, try and sentence offenders and enforce penalties. Even if an international court of criminal justice were in fact set up, such action by national legal systems would be the only conceivable way of guaranteeing the implementation of the code, since an international criminal jurisdiction would not have all the services and powers necessary to hold trials and enforce sentences.

14. The fact was that, however independent and autonomous it might be, international law did not

[6] See 1992nd meeting, footnote 6.

[7] *Ibid.*, footnote 11.

[8] *Ibid.*, footnote 12.

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

directly affect individuals and therefore depended on internal law in that regard: internal law was an essential complement of international law. That complementarity did not necessarily mean that internal law was subordinated to international law. It could be said that international law depended on internal law, since, even if a rule of international law gave a State certain rights and obligations, that State's ability to exercise those rights or fulfil those obligations depended on the acts and omissions of individuals, who, in a State subject to the rule of law, were governed by the rules of internal law. That was all the more true in the case of rules of international law which were intended to prevent or prosecute criminal acts by individuals who held power in a country. If the rules of international law to be enunciated in the code were to be enforced, it was therefore not enough to say that they were autonomous and independent of the position under internal law with regard to the acts and omissions to which they applied.

15. Mr. Graefrath had suggested that there should be a provision making it an obligation for States to adopt the necessary legislative measures for the implementation of the code. That had also been the intention of the drafters of the Conventions on genocide and torture, which did refer to legislative, administrative, judicial and other measures, but were far from complete on that point. It was not necessary to reject those examples rather than follow them, as Mr. Calero Rodrigues (1994th meeting) would like. The solution was not merely to affirm the autonomy and supremacy of international law or to draft more or less detailed provisions on the measures to be taken to implement the code; it was rather to affirm that States signing the code would be expressly bound to incorporate its provisions in their criminal law. Such a requirement might appear to be excessive, but the code's effectiveness would depend on it being incorporated in the legal systems of States. When ratifying the code, States would either show that they were willing to make it an integral part of their legal system, or refuse to do so and it would have to be concluded that they preferred to do without the code, which would then have a not very clearly defined place in a proudly autonomous and independent international order that would not have the means to achieve its ends. In such a case, it would not play the role of deterrence and justice referred to by Mr. Njenga (1995th meeting).

16. The optimism with which it was hoped to solve the problem by proclaiming the autonomy and supremacy of international law could be explained by the fact that doctrine had, perhaps too slavishly, followed the statements made by the eminent participants in the Nürnberg trial. Since 1945, it had been widely held that the Nürnberg experience had established the supremacy of international law as far as offences against the peace and security of mankind were concerned, as shown by the views of Pierre-Henri Teitgen, the then French Minister of Justice, and Francis Biddle, the United States judge on the Nürnberg Tribunal, cited by the Special Rapporteur in paragraph (3) of the commentary to article 2. In retrospect, however, he thought that that was where the mistake had been made. Recalling the first statement he had made on the draft code at the Commission's thirty-seventh session,[10] in which he had referred to his country's responsibilities during the Second World War, he said that the precedent of the Nürnberg trial was not valid in every respect. It was valid in moral and political terms and even in terms of natural law, but not in legal terms. From the point of view of positive law, there had been no demonstration of the supremacy of international law over internal law. At Nürnberg, there had been no conflict between international law and internal law, but rather a conflict between civilization and barbarism and between the internal law of some States, which had followed basic principles of humanity and justice, and the internal law of the Nazi régime and the Fascist régime. In the 1945 London Agreement for the prosecution and punishment of the major war criminals,[11] the Allies had established rules of international law which applied *inter se* and under which they had been mutually bound to try certain individuals according to certain civilized principles of criminal law; but those rules had not bound them either to the State which they had occupied or to the international community as a whole. The problem of the respective roles of international law and national legal systems had not been solved at Nürnberg.

17. The concept of the supremacy of international law could not be relied upon to solve that problem, nor could the theory of the more or less spontaneous duality of functions of State bodies. The code therefore had to make it a requirement that some rules should be incorporated in national legal systems. That approach would offer the advantage of making internal criminal law perfectly suited not only to the definition and characterization of the offences, but also to the other basic principles enunciated in the draft articles under consideration.

18. The reservation to which he had referred at the beginning of his statement related to the distinction between an offence committed by an individual acting as a State agent and an offence committed by a State. That distinction was entirely relevant and reference should be made in the draft code to the responsibility of individuals, whether State agents or private persons. It should, however, be borne in mind that that distinction was sometimes of a very relative nature and that the personality of the agent and the international personality of the State were so closely linked in fact and in law that, in the case of the most serious offences, it was sometimes the *de facto* punishment of the State that made it possible to prosecute the individual. Capital punishment could, of course, not be imposed on a State; but at Nürnberg it had been because the State had, so to speak, been decapitated that it had been possible to prosecute individuals who had held the highest ranks in the State apparatus. He was therefore of the opinion that, in the case of extremely serious offences, the distinction was a relative one, although he recognized that offences committed by individuals had to be dealt with in the code, while the question of offences committed by States came under article 19 of part 1 and the provisions of parts 2 and 3 of the draft articles on State responsibility.

[10] *Yearbook . . . 1985*, vol. I, pp. 65-67, 1887th meeting, paras. 25 *et seq.*

[11] See 1992nd meeting, footnote 6.

19. Mr. ILLUECA thanked the Special Rapporteur for submitting a report (A/CN.4/404) that would enable the Commission to make headway in the formulation of the draft code. For the time being, he would comment only on some aspects of the draft articles, but reserved the right to revert to the present topic at a later stage.

20. If the code was to be an effective instrument of prevention and deterrence, it had to contain provisions on the following points: the definition and characterization of offences against the peace and security of mankind; attributability and the resulting responsibility of individuals, States and organizations; applicable penalties; and an international criminal jurisdiction. Noting that, for practical reasons, the Commission had decided to focus at the current stage on the criminal responsibility of individuals, without prejudice to the possibility of considering the question of the criminal responsibility of States at a later stage, he pointed out that, under article 19 of part 1 of the draft articles on State responsibility,[12] an international crime attributable to a State could, for example, result from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*" (para. 3 (*c*)).

21. With regard to draft article 3, it must be borne in mind that there were organized groups of individuals which had weapons and resources enabling them to engage in unlawful activities and which were also capable of violence. At present, there were many criminal organizations made up of drug traffickers, mercenaries, racists and other individuals who took part, as perpetrators, instigators or accomplices, in the commission of serious offences against national, ethnic, racial and religious groups which might be characterized as offences against the peace and security of mankind. In that connection, he referred to article 6 of the Charter of the International Military Tribunal,[13] which stated that the Tribunal "shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations", committed crimes against peace, war crimes or crimes against humanity; to article 9, which stated that: "At the trial of any individual member of any group or organization, the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization"; and to article 10, which provided that: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. . . .". He also recalled that, in its judgment, the Tribunal had referred to Law No. 10 of the Control Council for Germany,[14] which provided in article II, paragraph 1 (*d*), that membership in categories of a criminal group or organization declared criminal by the Tribunal was recognized as a crime, and that the Tribunal had stated: "A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes."[15]

22. In the light of those provisions and other more recent developments, the Special Rapporteur might amend draft article 3 so that the words "Any individual who commits an offence" would apply to any person acting either individually or as a member of a criminal organization. It was, for example, significant that, in paragraph 5 of resolution 41/103 of 4 December 1986 on the status of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the General Assembly:

> Draws the attention of all States to the opinion expressed by the Group of Three in its report that transnational corporations operating in South Africa and Namibia must be considered accomplices in the crime of *apartheid*, in accordance with article III (*b*) of the Convention;

23. In dealing with the punishment of individuals who committed offences against the peace and security of mankind, account should also be taken of the victims, both individual and collective. In that connection, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[16] provided, as one type of penalty, that fair restitution and compensation must be made to victims and, in paragraph 12, stated: "When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation . . ." It was a well-known fact that the Federal Republic of Germany, for example, had paid more than $10 million in reparations to more than 3 million victims.

24. It should also be noted that there was a relationship between the criminal responsibility referred to in draft article 3 and the rights and duties of alleged offenders. In that connection, the Nürnberg Tribunal had stated in its judgment:

> . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[17]

It therefore had to be asked what duties and obligations individuals now had as a result of threats of the use of nuclear weapons, assuming that such use, which would jeopardize mankind's very survival, would be regarded as an offence against the peace and security of mankind. Persons who were opposed to the manufacture and stockpiling of nuclear weapons, for example, and who were being tried in that connection for offences against national legislation were claiming in their defence that the judgment of the Nürnberg Tribunal confirmed that individuals had international obligations which transcended their national duty of obedience to the State.

[12] See 1993rd meeting, footnote 7.

[13] See 1992nd meeting, footnote 6.

[14] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

[15] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7), pp. 76-77.

[16] General Assembly resolution 40/34 of 20 November 1985, annex.

[17] *The Charter and Judgment of the Nürnberg Tribunal. . . ., op. cit.* (footnote 15 above), p. 42.

25. Draft article 5 was in keeping with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, but it should be noted that such non-applicability was total, not partial, because in view of the universal nature of the offences under consideration it related not only to punishment, but also to the obligation of the offender to make reparation. The Commission and the Special Rapporteur should take account of the need to safeguard the right of victims of offences against the peace and security of mankind to be properly compensated. That right could not and must not be made subject to statutory limitations, as had been done in the United States of America in the case of the claim for damages which had been brought by the Unified Buddhist Congregation of Viet Nam on behalf of the survivors of the My Lai massacre and which had been denied by the Georgia District Court on the grounds, *inter alia*, that the two-year statutory limitation was applicable. That aspect of the non-applicability of statutory limitations should be clearly brought out in draft article 5 and the commentary thereto.

26. In conclusion, he referred to the concerted and systematic crime prevention and criminal justice activities being carried out by the United Nations. The Commission had had the benefit of comments on that question submitted by Governments, specialized agencies and non-governmental organizations, but it did not seem to have benefited from the assistance of the Secretariat staff responsible for organizing United Nations Congresses on the Prevention of Crime and the Treatment of Offenders. It had also apparently not established all the necessary contacts with the members of the United Nations Committee on Crime Prevention and Control. The Chairman of the Commission should, through his good offices, ensure that the Commission benefited from the views that such international criminal law experts might have on the draft code.

27. Mr. SHI said that the Commission had made considerable progress in its work on the draft code since it had resumed its discussion of the topic in 1982 after a lapse of more than 25 years. Much of the credit for that progress was due to the Special Rapporteur, to whom he expressed his appreciation.

28. The topic was both very important and very difficult. The international community of States needed an international régime for the prevention and punishment of such monstrous crimes as armed aggression, genocide and *apartheid*, and the code would meet that need: hence its importance. At the same time, the subject was a complex one because international criminal law was a relatively new and unexplored field of international law. In fact, the very existence of international criminal law as a discipline was not widely accepted in all parts of the world.

29. The preparation of the draft code, as a serious attempt at the progressive development and codification of international law, raised three fundamental issues: the offences to be covered; the nature of criminal responsibility; and the application of the code in space. In view of the realities of contemporary international relations, which were based on the sovereign equality of independent States, the Commission's task would not be an easy one, for a number of doctrinal and practical problems were involved.

30. As to those three issues, he was of the opinion that the code should cover only crimes of a very serious nature that came within the categories of crimes against peace, crimes against humanity and war crimes; that criminal responsibility should be limited to individuals, with the criminal responsibility of States being dealt with under the topic of State responsibility; and that, with regard to the application of the code in space, universal jurisdiction appeared to offer a well-balanced solution that would reconcile other systems of jurisdiction. The establishment of an international criminal court might appear to be an ideal solution, but in practice it would prove counter-productive.

31. As far as the title of the draft code was concerned, he agreed with those members who had urged that the word "offences" should be replaced by "crimes" so that the title in English would be in line with the other languages. In Chinese, the only suitable term to use was the Chinese equivalent of the word "crimes".

32. With regard to draft article 1, he pointed out that a definition was supposed to be a specific and exact explanation of the meaning, nature and limits of the thing defined; but the wording used in article 1 was not specific and also did not provide any general criterion for the definition of crimes against the peace and security of mankind. He was nevertheless prepared to accept that provision for the time being, since he was aware of the great difficulties the Special Rapporteur faced in trying to find general criteria of an objective nature. As to the list of crimes announced in the text of article 1, its exhaustive nature would rule out the possibility of any unwarranted expansion of the scope of the code. If new crimes were to be added to the list at a later stage, that could be done by means of a new agreement.

33. Draft article 2 rightly stated the principle that the characterization of an act as a crime against the peace and security of mankind was within the realm of international law and that, as a logical consequence, such characterization was independent of internal law. That was tantamount to saying that, in the event of conflict between the provisions of the code and those of internal law, the former would prevail. The second sentence could, however, be deleted, since the first already unambiguously affirmed that the characterization was independent of the internal law of any State.

34. In draft article 3, the use of the word "individual" improved the text and gave it the desired precision.

35. Since he had said that he was in favour of the concept of universal jurisdiction, he naturally accepted draft article 4. He noted, however, that there were some differences of opinion on that point: some members of the Commission strongly supported the concept of territoriality, while others, who considered that crimes against the peace and security of mankind were always politically motivated and who were therefore mistrustful of territorial jurisdiction, advocated the establishment of an international criminal jurisdiction. As he saw it, the only solution to that divergence of views would be the adoption of the principle of universal jurisdiction, involving the obligation for States

either to try or to extradite offenders. As already stated, it was important that the provisions of article 4 should make it clear that the crimes defined in the code were extraditable. It must, however, be admitted that universal jurisdiction was no panacea and that there might be cases in which it would fail to work. For example, individuals holding power in a State which practised *apartheid* as a national policy could not be expected to be put on trial by their own courts. Nor were they likely to be extradited. Nevertheless, that might well be the only solution acceptable to the international community as a whole.

36. He could accept paragraph 2 of article 4 because he was neither a defeatist nor an opponent of an international criminal jurisdiction as such. He would even welcome the establishment of such a jurisdiction, if that were ever to happen. He supported the suggestion that the Latin title of the article should be replaced. Apart from the reasons already stated, a title in Latin would create problems in the Chinese text of the code.

37. He accepted draft article 5 without any reservation. Moreover, the non-applicability of statutory limitations to such heinous crimes as war crimes and crimes against humanity was specifically recognized in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, although few States had as yet ratified or acceded to that Convention. It was true that there might be difficulties in gathering documentary evidence, tracing witnesses and investigating facts in some cases. Nevertheless, article 5 upheld the principle that those guilty of such crimes should not go unpunished.

38. The principle of jurisdictional guarantees was common to all legal systems and recognized as an essential element of the protection of human rights in a number of international legal instruments. It should therefore be included in the code. However, he shared the view expressed by other members that draft article 6 need not contain a long and detailed list of guarantees to which a person charged with an offence was entitled. The first sentence of the new text, setting forth the general principle of jurisdictional guarantees, could, with some polishing, serve the purposes of the code.

39. He approved in principle of draft article 7, since the *non bis in idem* rule was universally recognized. However, for the reasons he had given in connection with draft article 4, he would prefer the Latin title of the article to be changed. Moreover, with regard to the situation described by the Special Rapporteur in paragraph (3) of the commentary, it should be noted that the criminal codes of some countries did not preclude the possibility of the trial of a criminal who had already been tried by the courts of another State and had served a sentence in that other State, provided that account was taken of the earlier sentence.

40. Paragraph 1 of draft article 8 stated a universally recognized principle of criminal law, but he was not sure about the propriety of referring, in paragraph 2, to "general principles of law recognized by the community of nations" as sources of international criminal law. There might be a danger of broadening the scope of the draft code, in which case paragraph 2 might not be consistent with article 1.

41. Referring to draft article 9, he said that various legal systems accepted self-defence as an exception, but he doubted whether that was possible with regard to self-defence in the case of aggression, in view of the provisions of Article 51 of the Charter of the United Nations, which referred to "the inherent right of individual or collective self-defence" of Member States. There was also some question as to whether self-defence could be admitted as a defence in respect of crimes against humanity. For the sake of consistency and accuracy, self-defence should be omitted from the list.

42. The concepts of coercion, state of necessity and *force majeure* could be differentiated in a theoretical sense, but they all contained a common factor, namely an irresistible force beyond the will of the perpetrator. In the commentary (para. (9)), the Special Rapporteur noted that the admissibility of defences based on those exceptions depended largely on elements such as the extent to which the perpetrator invoking the exception was at fault and the proportionality between the interest sacrificed and the interest safeguarded. He therefore had no objection to the inclusion of those exceptions in the draft article.

43. With regard to error, the Special Rapporteur's commentary was convincing, and he would have no objection to the inclusion of that exception in the text.

44. In his report, the Special Rapporteur requested the Commission to take a decision on the need to retain a separate provision on superior order, since compliance with such an order was justified by coercion and error. For the reasons given by the Special Rapporteur in the commentary (paras. (20)-(23)), he would suggest that superior order be deleted from article 9. Should the Commission decide to retain that exception, at least the clause on moral choice should be deleted from subparagraph (*d*).

45. Draft articles 10 and 11 did not give rise to any problems.

46. Mr. EIRIKSSON said that the Special Rapporteur's fifth report (A/CN.4/404) and the discussion of it at the current session represented a breakthrough in the consideration of the topic and brought the Commission very close to the adoption of a common position on the issues involved. The Commission might, however, use novel working methods to achieve that end. Accordingly, he proposed that three of the meetings allocated to the consideration of the topic should be set aside for use later in the session and that the Special Rapporteur should be asked to submit a revised set of articles in the mean time, setting out clear choices on four main issues where difficult, but nonetheless possible, decisions must be made. He might also indicate the issues to be addressed in the commentaries to the articles. In his own view, those four issues were: (*a*) whether there should be a substantive definition of the crimes covered by the draft code; (*b*) whether the code should apply to State responsibility or simply to the responsibility of individuals; (*c*) whether the jurisdiction of an international criminal court should be envisaged; (*d*) whether attempt and complicity should be

included among the general provisions or dealt with as specific crimes.

47. In general, he was of the view that the Commission should opt for clear wording in draft articles, rather than couch them in terms which were polemical or more suitable to a commentary. As far as structure was concerned, he agreed that the code should be divided into two parts, one containing general provisions and the second listing specific crimes.

48. With regard to the draft articles themselves, and to draft article 1 in particular, he would recommend the listing of specific crimes, taking account of the comments made by various members of the Commission concerning the exhaustive nature of the list.

49. As to the question of State responsibility versus individual responsibility, he was of the view that the code should apply only to individual responsibility. Both of the above points could be dealt with by deleting draft article 3 and amending draft article 1 to read:

*"Article 1. Scope*

"The present Code applies to the crimes against the peace and security of mankind defined in part II committed by natural persons."

The commentary would then indicate that the reason for an exhaustive listing was the concern for certainty, that the Commission envisaged that other crimes could be added later by means of additional protocols and that the restriction to individual responsibility was without prejudice to State responsibility.

50. With regard to draft article 4 and the question of establishing an international criminal court, he would propose optional international jurisdiction with residual national jurisdiction combined with an option of extradition. That would be dealt with in a comprehensive article drafted on the basis of the wording proposed by Mr. Calero Rodrigues (1994th meeting, para. 10) and the points raised by other members, including Mr. Barsegov (1993rd meeting), and Mr. Graefrath and Mr. Yankov (1995th meeting). The article would read:

*"Article 4. Enforcement*

"1. Every State shall take all the measures necessary to ensure that persons found in its territory who are accused of crimes against the peace and security of mankind are brought before a judicial authority competent for the trial of those crimes under the present Code.

"2. In the case of States which have accepted the jurisdiction of the International Tribunal on Crimes against the Peace and Security of Mankind or an *ad hoc* international tribunal established under the present Code, such persons shall be surrendered to such tribunal.

"3. In the case of any other State, the person shall, unless he is brought before the judicial authorities in its own territory, be extradited to one of the following States, listed in order of priority, following a request for extradition from such State:

"(*a*) the State in the territory of which the crime was committed;

"(*b*) the State against the territory or nationals of which the crime was committed;

"(*c*) the State of which the person is a national."

51. While he was of the view that attempt and complicity should be included in the general provisions of the code, he had doubts about the inclusion of conspiracy or *complot*.

52. Draft article 2 should be deleted. He agreed with other members that the second sentence was unnecessary in any event, but, if the articles were logically structured, the first sentence was also unnecessary. There appeared to be some differences of view as to whether that sentence was designed to establish the primacy of international law or to avoid procedural conflicts. In any case, the term "characterization" was a less recognized term in English than the equivalent term in Spanish or French. If necessary, some explanation on the point should be included in a commentary, perhaps to the revised article 4.

53. In draft article 5, the words "because of their nature" should be deleted. In draft article 6, a general provision would be preferable to the examples given in the new text.

54. Draft article 7 should be amended to read:

"No person shall be tried or punished again for a crime against the peace and security of mankind for which he has already been finally convicted or acquitted."

55. With regard to draft article 8, he endorsed the wording proposed by Mr. Hayes for paragraph 1 (see 1995th meeting, para. 36). Paragraph 2 should be deleted.

56. Draft article 9 raised doctrinal difficulties with regard to the principle of responsibility, on the one hand, and defences, on the other, questions on which the civil-law and common-law systems differed. In his view, the question of intent should be dealt with clearly in the definitions of specific crimes. References to *force majeure*, error of fact and mental incapacity would then be unnecessary.

57. The concept of self-defence was to be ruled out: in the case of aggression, it fell outside the scope of the definition itself and, in other cases, it should not be admitted as an exception. State of necessity, in so far as it was distinct from *force majeure*, was not a valid exception to responsibility. Nor was error of law. The exception of superior order should be admitted only if it fell under coercion, and could thus be deleted. Thus only coercion would remain. He would, however, be in favour of the inclusion of a reference to age.

58. Draft articles 10 and 11 were acceptable, provided that some drafting changes were made to bring them into line with the wording of earlier articles. Article 10, for example, should be linked to the question of complicity.

59. Lastly, the members of the Commission should hold consultations in order to decide whether "crimes" or "offences" should be the term used in the English text of the draft code, so as to dispose of that question once and for all.

### Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

60. The CHAIRMAN invited Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

61. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said that, in the 30 years since the formation of the Asian-African Legal Consultative Committee, its activities had expanded to areas such as economic relations, refugee questions, environmental issues and even political issues such as peace and security. In all those areas, the basic criterion for the Committee's deliberations was that they should have a degree of objectivity and a prodominantly legal orientation; hence the Committee's continued close relationship with the Commission. It had worked closely with the Commission on topics such as the jurisdictional immunities of States and the law of international watercourses. The Committee had also tried to generate wider interest in the work of the Commission among the Governments of its region by preparing notes and comments on the Commission's reports for the use of delegations to the Sixth Committee of the General Assembly.

62. At the time of the Committee's inception, many independent or nearly independent States in Asia and Africa had been facing problems in such areas as the treatment of foreigners, border issues and international watercourses. Consequently, one of the areas selected for co-operation within the context of the Committee had been the codification of law. From 1957 to 1967, the Committee's activities had been confined to that area, to providing advice on problems submitted to it by member Governments and to the consideration of issues of common concern. During that period, the Committee had established very close relations with the Commission.

63. Since 1968, the Committee's activities had expanded considerably. One of its major activities had been the provision of assistance to States participating in the plenipotentiary conferences of the United Nations. Later, it had become concerned with economic questions and finally it had been accorded permanent observer status in the General Assembly, which had adopted a resolution[18] calling for closer co-operation between the United Nations and the Committee. As a result, specific areas of co-operation had been identified over the past five years, including the rationalization of procedures and the promotion of the role of the ICJ. He himself hoped to meet with the United Nations Legal Counsel in the near future to discuss co-operation between the two bodies over the next five years.

64. In the specific area of international watercourses, it had been possible at the Committee's previous session to persuade member Governments to suspend consideration of the question until the 1988 session and to consider the draft articles being prepared by the Commission.

65. Another area of co-operation was the question of the jurisdictional immunities of States, for which the draft articles prepared by the Commission were regarded as a good working basis.

66. The Commission's current session was the last one he would attend as Secretary-General of the Asian-African Legal Consultative Committee. He would nevertheless continue to take a close interest in the Committee's activities. He informed the Commission that the Committee's next session would be held in Singapore in February and March 1988. The Chairman of the Commission would of course be invited to represent the Commission at that session.

67. The CHAIRMAN thanked Mr. Sen for his invitation to attend the Committee's next session and wished him every success in the future.

68. Mr. Sreenivasa RAO expressed his appreciation of Mr. Sen's contribution to the work of the Asian-African Legal Consultative Committee over the past 30 years. His departure marked the end of an era in the existence of the Committee. He wished him every future success.

69. Mr. THIAM thanked Mr. Sen and the Asian-African Legal Consultative Committee for the warm welcome they had extended to him at the Committee's previous session. As Mr. Sen would be stepping down as Secretary-General of the Committee, he paid tribute to his competence and human qualities and wished him every success in his new activities.

70. Mr. YANKOV, speaking also on behalf of Mr. Barsegov and Mr. Graefrath, expressed appreciation of Mr. Sen's contribution to the work of the Asian-African Legal Consultative Committee and wished him every success in his future endeavours.

*The meeting rose at 1.10 p.m.*

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## 1997th MEETING

*Thursday, 14 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. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

[18] General Assembly resolution 36/38 of 18 November 1981.