Document:-

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Summary record of the 1997th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-

1987, vol. I

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.

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.

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. Prince AJIBOLA, referring to the English title of the topic, said that the word "crimes" would be more appropriate than "offences". The general understanding of the term "offence" was that it was of lesser gravity than a crime, which was a *malum in se* or conduct in herently criminal. Crimes were very serious offences, heinous in nature, atrocious, cruel and, in the language of common law, felonies as opposed to misdemeanours. He therefore proposed that the Commission should consider recommending to the General Assembly that the title of the topic be changed to "Draft Code of Crimes against the Peace and Security of Mankind".

2. There was still much to be done to improve the definition in draft article 1, which could be amplified to give a clearer idea of the three major categories of crimes: crimes against humanity, crimes against peace and war crimes. That should be done before tackling the list of offences, which, as other members of the Commission had already said, it might well not be possible to make exhaustive. Article 1 could be made to provide for that situation by the addition of the words "as well as any other such crime as may be adopted by the General Assembly from time to time as constituting a crime against the peace and security of mankind". That wording would give the draft the necessary flexibility and open-endedness.

3. Draft article 2 could be deleted: the autonomy of international law was so patently obvious as to require no restatement. If the Commission wished to confirm it, however, the text of article 2 could be amended to reflect more adequately the idea expressed in paragraph (4) of the commentary that "the present draft code would itself become meaningless if it did not rest on the assumption of the supremacy of international criminal law".

4. With regard to draft article 3, the question was whether the use of the word "individual" solved the problem of the content of the code *ratione personae*. He shared the view that, if the word "individual" was used in article 3, it should also be used in the rest of the draft. The fact remained, however, that replacement of the word "person" by "individual" did not solve the whole problem, for there were acts of individuals that were also acts of the State, so that in such cases prosecution of the individual was inevitably equivalent to prosecution of the State. In other words, it might be difficult to separate some acts of individuals from acts of the State. In the 1954 draft code (art. 2, para. (1)), aggression was specifically referred to as an offence against the peace and security of mankind, while in the Definition of Agression[6] (art. 1) it was defined without reference to individuals. That problem clearly needed to be considered in connection with draft article 9 (*d*), in which superior order was made an exception to criminal responsibility, provided that no moral choice was possible for the perpetrator. The Special Rapporteur himself raised the problem in the commentary to article 9.

5. Draft article 11 also had some bearing on the question. Despite article 7 of the Charter of the Nürnberg Tribunal[7] and article 6 of the Charter of the Tokyo Tribunal,[8] the question remained whether it was the State or the individual that was liable to prosecution in such circumstances. It was also important to relate the topic of State responsibility to the present topic, otherwise the General Assembly might defer further work on the draft code until the last report on State responsibility had been submitted.

6. Another important question was that of jurisdiction, referred to in draft article 4, from which it appeared that national jurisdiction was envisaged. At the same time, paragraph 2 left the way open for the establishment of an international criminal court. It might accordingly be well to redraft paragraph 1 to read:

> "1. Every State has the duty to try or extradite any alleged or suspected perpetrator of a crime against the peace and security of mankind found within its jurisdiction."

7. The establishment of an international criminal jurisdiction was not a new idea. As long ago as 1948, the General Assembly had invited the Commission to study that question.[9] After considering the reports of the special rapporteurs appointed to deal with the question, the Commission had decided, at its second session in 1950, that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and possible.[10] Subsequently, a number of special committees had been appointed to look into the same question, but decisions had been deferred pending agreement on a definition of aggression and the completion of work on a draft code of offences against the peace and security of mankind. He was confident that an international criminal jurisdiction would eventually be established, although perhaps not in the near future. In the mean time, he could agree to an article providing for State jurisdiction, with suitable machinery for extradition. As States might sometimes be unwilling to extradite, however, further consideration of that aspect of international law might

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

[4] *Ibid.*

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

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

[7] See 1992nd meeting, footnote 6.

[8] *Ibid.*, footnote 11.

[9] See General Assembly resolution 260 B (III) of 9 December 1948.

[10] See *Yearbook . . . 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145.

be necessary. The only other possible solution was the setting up of *ad hoc* international criminal tribunals, and draft article 4 could be made even more flexible so as not to exclude that possibility. The 1954 draft code should be carefully studied, in particular article 2, which boldly attempted to define offences against the peace and security of mankind.

8. He could accept the content and purport of draft article 5 in general, although the words "because of their nature" seemed unnecessary and could be deleted.

9. With the exception of the words "person" and "offence" in the introductory clause, draft article 6 was commendable. But, as other members had suggested, the idea of the right of appeal in appropriate cases could be introduced. He used the words "in appropriate cases" advisedly to allow for the possible establishment of an *ad hoc*, or even a permanent, international criminal tribunal.

10. Draft article 7 should either be amended substantially to reflect the international nature of the draft code, or be deleted. If draft article 2 was accepted as it stood, emphasizing the autonomy of international law *vis-à-vis* internal law, it was only logical and legally right for international law not to take cognizance of a trial under internal law. The *non bis in idem* rule would be applicable only if an individual had to be tried under international law.

11. Since, in criminal law, all retroactive laws, whether internal or international, were unjust, the aim of draft article 8 was welcome. The provisions of paragraph 1 might, however, be regarded as being negated by the provisions of paragraph 2, for reference to the general principles of international law might cause serious difficulties. Paragraph 1 could be amended to read:

> "No individual shall be prosecuted for any alleged crime which, at the time of the commission of such alleged crime, did not constitute a crime against the peace and security of mankind."

Paragraph 2 could then be deleted.

12. With regard to draft article 9, whether the crimes in question were triable by a national or an international court, some of the defences provided for might be viewed by lawyers of the common-law countries as involving issues of *mens rea* and *actus reus*. Self-defence was already recognized by international law and by the Charter of the United Nations (Art. 51). While error of fact might, in appropriate circumstances, be a defence, error of law should not be accepted, because the perpetrator, by the very nature of the crime, must appreciate its gravity.

13. As to draft article 10, he thought that complicity and intent should be dealt with in separate articles. Draft article 11 was quite acceptable.

14. Mr. SEPÚLVEDA GUTIÉRREZ said that he was impressed by the erudition and zeal of the Special Rapporteur and hoped that the Commission would be able to complete its task as soon as possible.

15. In connection with draft article 1, he thought that examination of the whole code would be facilitated if the Commission had even a provisional list of the crimes to be covered, since the enumeration of the different categories of crimes would affect various provisions of the code. However difficult it might be to draw up that list, a start should be made as soon as possible. As to the wording of article 1, the expression "under international law" seemed to be unnecessary and to weaken the provision to some extent, by unnecessarily opening the way for controversies.

16. Draft article 2 seemed vague, at least in the Spanish version, which did not correspond exactly to the original text. First, the word *calificación*, in the title, should be replaced by *tipificación*, and in the first sentence the word *hecho* should be replaced by *acción u omisión*. The second sentence seemed unnecessary. Lastly, the article seemed incomplete: it did not say who was to characterize an act as an offence against the peace and security of mankind. True, it hinted at the establishment of an international criminal court, but was that really the object in view? As other members of the Commission had already observed, States would still play the principal part in applying the future instrument; for some time yet, it would be States that were responsible for prosecution and punishment under their national laws. Hence it was important to avoid all ambiguity until an international court was set up. There had been some talk of a transitional régime, but he would need further particulars before forming an opinion. His own view was that it should be provided that the crimes covered by the code were punishable, or should be punished, in accordance with its provisions.

17. Draft article 3, with its reference to the "individual", lacked clarity, and it would be desirable to specify that the author of an offence against the peace and security of mankind could only be a person having official functions, that was to say an agent of the State, since a private person acting on his own account would not possess the means to commit such a crime. On the other hand, the text should also mention organizations, associations and other legal persons that might be responsible for crimes against humanity. That question deserved consideration.

18. Draft article 4 should be given a title that could be used in all the official languages of the United Nations, especially as the Latin expression proposed appeared to admit of several variants. Since the rule stated in the article had already been examined at length, he would confine himself to emphasizing that extradition raised innumerable problems.

19. Draft article 5 would be improved by the deletion of the words "because of their nature".

20. The Spanish title of draft article 6, which was ambiguous, should be replaced by *Garantías procesales*. Moreover, a detailed recital of the jurisdictional guarantees accorded to the accused might offer means of evasion that would make it possible either to delay the trial *sine die* or to prevent the punishment of some criminals. There was no reason why the article should not be simplified. It would be sufficient to say that the accused was entitled to the guarantees generally provided in legal systems and that the court trying him must ensure that those guarantees were applied.

21. In draft article 8, he had reservations about paragraph 2, which was too vague and might lead to injustice. Indeed, he doubted whether there was any general principle of international law which determined, or could in future determine, the criminal character of an act or omission. The last part of the paragraph required amendment.

22. He found draft article 9 difficult to accept in its present form. The title "Exceptions to the principle of responsibility" did not correspond to the content, which listed extenuating circumstances rather than exceptions. Furthermore, some of those circumstances might prove decisive, so that crimes would remain unpunished. He therefore endorsed the criticisms made of that provision and thought it would be preferable to leave it to courts to evaluate the circumstances which extenuated or nullified responsibility. Perhaps it would suffice to indicate, if that seemed necessary, that the competent court was to examine the extenuating or absolving circumstances.

23. Draft article 10 did not raise any problems; nor did draft article 11, except that it should perhaps be placed among the initial articles, since it stated a general principle.

24. Mr. OGISO, referring to draft article 1, said he agreed with a number of previous speakers that the word "offences" should be replaced by "crimes".

25. Draft article 2 should be placed in part II, containing general principles, since it dealt with the autonomy of international law and its primacy over municipal law. With regard to the drafting of the article, the first sentence should be replaced by wording such as that of Principle II of the Nürnberg Principles.[11] He noted that, in paragraph (1) of the commentary to article 2, the Special Rapporteur referred to that principle as confirming the principle of the autonomy of international criminal law.

26. As indicated in paragraph (7) of the commentary to article 2, the question of dual prosecution could arise when a national court characterized an act as a punishable crime under its municipal law and the same act was so characterized under the code. In such cases, he would support the view of the Special Rapporteur that the judgment of the national court did not preclude international criminal proceedings from being instituted. Because of the autonomy of international criminal law, the *non bis in idem* rule could not be invoked against an international criminal court. As the Special Rapporteur himself indicated in paragraph (9) of the commentary, however, it was only before an international criminal court that the rule could not be invoked.

27. He approved of the Special Rapporteur's decision to replace the word "person", in draft article 3, by "individual", which removed all ambiguity concerning the content of the draft code *ratione personae*. The question of the responsibility of States should not be taken up in the code, but should be thoroughly examined during the discussions on the topic of State responsibility itself.

28. The first principle to be clarified with regard to draft article 4 was that the offences against the peace and security of mankind defined in the code should be tried and punished by an international criminal court. Logically, therefore, it was only pending the establishment of such an institution that the internal jurisdiction of States could be exercised: the Special Rapporteur confirmed that in paragaph (6) of the commentary, where he stated: "The option envisaged in paragraph 2 would obviously be more consistent with the overall philosophy of the draft." Would it therefore not be preferable to deal with international jurisdiction in paragraph 1 and national jurisdiction in paragraph 2? Moreover, as it stood, paragraph 1 appeared to suggest that arrest was a pre-condition for the State's duty to try or extradite. It might be preferable to replace the word "arrested" by "found" or "present", which were used in a number of international conventions, such as the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.[12] However, if the Special Rapporteur had used the word "arrested" deliberately, because of the seriousness of the offences, he would not oppose its retention.

29. As to the duty to extradite, he shared the view expressed by other members that the offences covered by the code must not be treated as non-extraditable political offences, and suggested that that rule should be expressly stated. He accordingly proposed that the title of draft article 4 be changed to "Universal offence" and that the text be redrafted to read:

> "1. An offence against the peace and security of mankind is a universal offence. Any perpetrator of such an offence found in the territory of any State shall be extradited to an international criminal court for punishment.
>
> "2. Pending the establishment of an international criminal court, every State had the duty to try or to extradite such a perpetrator found in its territory.
>
> "3. None of the offences contemplated in the present Code shall be regarded as being a political offence."

30. With regard to draft article 5, he shared the view that statutory limitations should not apply to offences against the peace and security of mankind, in view of their seriousness. Besides, the international community had already embodied that idea in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which had entered into force in 1970. It should be remembered, however, that, during the deliberations in the General Assembly on that Convention, a number of States had stressed that the essential prerequisite for the abolition of statutory limitations was a clear definition of the crimes to which that abolition would apply, and that unfortunately the Convention did not contain such a definition. It should also be remembered that statutory limitations had existed for a very long time in most legal systems, because of the need to protect human rights and the difficulty of obtaining evidence and calling witnesses so long after an act had been committed. For those reasons, he maintained that non-applicability of

[11] See 1992nd meeting, footnote 12.

[12] United Nations, *Treaty Series*, vol. 860, p. 105.

statutory limitations should be authorized only after the nature and scope of the crimes concerned had been precisely defined. Provisions such as draft article 8, paragraph 2, which referred to the "general principles of law recognized by the community of nations", did not satisfy that condition.

31. The text of draft article 6 could be improved. First, if the Special Rapporteur's intention in using the words "In particular" in the introductory clause was to show that the safeguards set out were "minimum guarantees", as understood in article 14, paragraph 3, of the International Covenant on Civil and Political Rights, he would suggest that the introductory clause be amended to read:

> "Any individual charged with an offence against the peace and security of mankind shall be entitled to the following minimum guarantees extended to all human beings:"

Those mimimum guarantees should then be enumerated as precisely and completely as possible, and to that end he suggested adding two further guarantees in paragraph 3 (*g*) of draft article 6, which provided for the right to avoid self-incrimination. The first would be that a confession made under compulsion, torture or threats, or after prolonged arrest or detention, should not be admitted in evidence; the second would be that no one should be convicted or punished if the only evidence produced against him was his own confession. Those two guarantees were recognized, for instance, in the Japanese Code of Criminal Procedure, and he believed that similar provisions were in force in many other States. As to the question of *jus cogens*, he stressed that, in view of its importance and its place in international law, that question must not be dealt with casually; for his part, he would prefer it to be left aside at the present stage.

32. In draft article 7, he proposed the addition of a second sentence reflecting the content of paragraph (9) of the commentary to draft article 2, in order to emphasize that, because of the autonomy of international criminal law, the *non bis in idem* rule could not be invoked against an international criminal court. In view of its importance, that idea should be expressed in the text of the code and not in the commentary. He accordingly suggested the addition of the following sentence to article 7:

> "This *non bis in idem* rule shall apply only as between States pending the establishment of an international criminal jurisdiction."

33. In draft article 8, paragraph 2, following the criticisms made, the earlier formula "the general principles of international law" had been replaced by "the general principles of law recognized by the community of nations". The new wording remained ambiguous, however, since it was not clear what those principles were. The Special Rapporteur had explained that those general principles should be construed in the common-law sense. The intention would thus appear to be to include judicial precedents. He was not necessarily opposed to that, in so far as judicial precedents were evidence of the state of positive law. It remained to be decided, however, whether international criminal responsibility should be laid on an individual by virtue of anything other than written positive law. If the Special Rapporteur's intention in using the words "general principles of law recognized by the community of nations" was to introduce a concept of justice going beyond written positive law, which would necessarily be vague and ambiguous, he would have to reconsider his position; for that would introduce concepts that were not precisely legal into such a fundamental rule of criminal law as *nullum crimen sine lege*. It would be better to delete paragraph 2.

34. With regard to the separate rule *nulla poena sine lege*, which was not included in draft article 8, the Special Rapporteur had recognized in his fourth report that "the Commission has not yet decided clearly whether the draft under consideration should also deal with the penal consequences of an offence" (A/CN.4/398, para. 181). For his part, while recognizing the difficulties involved in laying down specific rules on the subject, he believed that the draft code should at least provide some guidelines on the rules of punishment. Alternatively, as he had mentioned at the previous session,[13] such guidelines could be written into the statute of the international criminal court, if it was set up.

35. The new text of draft article 9 was clearer than the former text. But it was precisely because of its succinct character that the new text required as detailed and precise a commentary as possible, which in the fifth report (A/CN.4/404) was not always the case. For example, paragraph (2) of the commentary stated that "self-defence precludes both international responsibility on the part of the State invoking self-defence and individual criminal responsibility on the part of the leaders of that State". But nothing was said about the case in which an individual other than a leader invoked self-defence. In his fourth report, the Special Rapporteur had said: "When hostilities have broken out . . . one cannot speak of self-defence between the combatants, because the attack unfortunately becomes as legitimate as the defence . . ." (A/CN.4/398, para. 252.) That was true enough, but was it certain that non-leaders could not invoke self-defence with regard to war crimes? One example might be soldiers of an occupation force who killed innocent civilians in the face of an imminent peril to their lives. The commentary to draft article 9 did not provide an answer to that question.

36. The question of extenuating circumstances, referred to by the Special Rapporteur in paragraphs (2) and (6) of the commentary to draft article 11, related to the application of penalties, a matter which would be examined at a later stage.

37. Lastly, on the question of criminal intent, there were, as he had said at the previous session,[14] two essential elements of crimes against humanity: one was the mass element and the other the element of intent. The first element meant that the offence must have been committed against a group or a number of people within a group, and that it must have been organized and executed systematically. The second element, which was

[13] *Yearbook . . . 1986*, vol. I, pp. 112-113, 1961st meeting, para. 23.

[14] *Ibid.*, p. 113, para. 24.

even more important, meant that the offence, even if characterized by massiveness, could not be regarded as a crime against humanity unless it had been committed with intent to destroy a national, ethnic, racial or religious group. But, although the expression "with intent" had been used in paragraph 1 of draft article 12 as submitted by the Special Rapporteur in his fourth report (*ibid.*, part V), it was only in regard to genocide. He therefore suggested that the draft code should include a general provision specifying the requirement of intent for all crimes against humanity.

38. Similarly, it had been proposed at the previous session that serious damage to the environment should be included in the draft code. There again, the decisive consideration was whether there had been criminal intent to destroy the environment. Without criminal intent there was no criminal responsibility. For example, there might be an accident in a nuclear power plant which caused widespread and serious damage to the environment in neighbouring States. The question of the liability of the author State towards the injured States would certainly arise under international law, but not that of individual criminal responsibility, unless there had been criminal intent on the part of those concerned.

39. Personally, he would prefer the two elements of massiveness and intent to be mentioned under the heading "General principles", since they were essential elements of crimes against humanity. But if the Special Rapporteur would prefer to take up that question later, in connection with the definition of a crime against humanity, he could agree to that course.

40. As to methods of work, he agreed with Mr. Eiriksson (1996th meeting) that the best way to make progress would be to ask the Special Rapporteur to redraft the articles, taking into account the views expressed by members and, in particular, to submit new texts fot the controversial articles as soon as possible, so that the Commission could examine them carefully and refer them to the Drafting Committee.

41. Mr. REUTER said that, having listened with attention and interest to the statements made by other members of the Commission, he wished to explain his views on two points, although he must do so with certain reservations, since at the present stage in the discussion he did not know the feeling of the Special Rapporteur.

42. Referring first to the question of the balance of the future code, he observed that the present draft contained, on the one hand, provisions defining a certain number of crimes, and on the other hand, provisions concerning criminal procedure: he wondered what importance the Commission attached to those two aspects of the draft. As to procedure—which was of considerable importance since it concerned nothing less than the legal consequences of the crimes in practice—the ideal solution would certainly be to set up an international criminal court. In view of the need to prepare a draft that would be acceptable to the greatest possible number of States, however, many members of the Commission, including himself, were prepared to abandon that option in favour of universal jurisdiction. But to establish universal jurisdiction might not be as easy as it appeared; the Commission should study the question thoroughly and be as precise as possible, injecting international law into the internal legal systems called upon to apply the code. On the other hand, the Commission might be in danger of overloading the draft and causing opposition to it, although it had always tried to find compromise solutions.

43. For example, it might be asked who was under an obligation, in what respect, and towards whom. Was the duty of States to deliver persons accused of offences against the peace and security of mankind to be understood as a duty to extradite? As had been shown by the expulsion of Klaus Barbie from Bolivia, States sometimes resorted to means other than extradition to deliver an accused to the judicial authorities of another State. Hence, if the Commission preferred to leave the matter indefinite, it would no doubt use a term such as "deliver", or an even more neutral word. But it might wish to be more precise, in which case two comments were called for. First, the reason why States had so far hesitated to accept such heavy obligations as the duty to try or to deliver an alleged offender was that the choice given them was often merely theoretical, since they must have sufficient information to be able to institute legal proceedings. Furthermore, did the Commission wish to impose obligations on States that would bind them to one another, or was it prepared to take the step that separated it from the sphere of human rights?

44. On another question of procedure, article 7 was drafted in such a way that it could be applied even in the absence of relations between two States. If a criminal sentenced to imprisonment escaped to another country, where he was again brought to trial, convicted of a capital offence and executed, that would be a violation of the code if article 7 created rights in favour of individuals; but if it did not, there would be no violation of the code, since there would be no injury to another State, the two States having simply exercised their competence in turn. Draft article 6 raised the same problem: did it create rights for the individual to be tried or rights for States? Could a State refrain from trying a person on the pretext that it had insufficient evidence, but refuse to deliver him to another State? An example would be the situation of a State party to the European Convention on Human Rights[15] which expelled terrorists in order to deliver them to the courts of another country, without observing the normal jurisdictional procedures: the persons concerned would have suffered a wrong and, after exhausting local remedies, would apply to the European Court of Human Rights, which might then condemn the State in question. Consequently, the clearer or the less clear the draft code, the more or the less acceptable it would be to States. For instance, one member of the Commission had observed that the draft should contain a provision making it an obligation for States to co-operate with one another: such a clause was indeed necessary, but how far could the Commission go without being imprudent? Again, it had been suggested that priority should be given to the principle *ratione loci*; but did the Commission wish to say so clearly? Was the object to draft an international

[15] See 1992nd meeting, footnote 9.

code of procedure to regulate problems arising from the obligation to try or to deliver?

45. Secondly, he feared that the question whether or not the application of the code should be limited to the responsibility of individuals might give rise to misunderstanding. While he shared the view of those members of the Commission who believed that State crimes should not be left out of account, he would remind them that article 19 of part 1 of the draft articles on State responsibility[16] was in the nature of a blank cheque, in that it established the concept of a State crime without stating the general rules by which that type of crime would be governed. He recognized that the Commission could not do otherwise, and even accepted the idea of having no statutory limitations for crimes of that type or of providing for different periods of limitation applicable to less serious breaches of international law. He also recognized that a crime was of concern to a wider circle of States than an ordinary delict; but the idea of inflicting a penalty on a legal person—in the present case, a State—was very serious and caused him some difficulties. He therefore reserved his position on that point.

46. The position taken by the Special Rapporteur on self-defence seemed to him to be perfectly normal. If a head of State was tried for aggression and if the State of which he was head could invoke self-defence—which was more than a justifying circumstance, since it nullified the crime—it was obvious that he could not be punished for the crime of aggression. For instance, supposing that two States, after having fought a war and suffered heavy losses, ended by making peace; that the individuals who had been the leaders of those States during hostilities took refuge abroad; that neither the Security Council nor the General Assembly, nor even another State, had spoken of aggression; and that each of the former belligerent States nevertheless claimed to have been the victim of aggression and asked that the former commander-in-chief of the other State be delivered to it to be tried for aggression: was it conceivable that an individual could have committed the crime of aggression if it was not established that the State to which he belonged had in fact committed the same crime? In such a case what authority would attach to a decision of the Security Council, a resolution of the General Assembly or a judgment of the ICJ establishing aggression? Would national courts be automatically bound by such a decision?

47. From those considerations he concluded that, if the Commission were to deal only with the crimes of individuals in the draft code, it must still not overlook the fact that most, if not all, of the crimes covered were State crimes in the first place. Those comments might make it easier to understand the question of self-defence, but he recognized that they, in turn, raised new problems. Thus he was not sure that the suggestion he had made at the 1993rd meeting, to the effect that it should be stated that draft article 3 was without prejudice to any decisions the Commission might take on the question of the criminal responsibility of the State, would meet all the concerns he had mentioned.

[16] See 1993rd meeting, footnote 7.

48. Mr. FRANCIS supported Mr. Ogiso's proposal (para. 29 above) to add a new paragraph to draft article 4, specifying that the concept of a political offence could not be invoked as a defence for the crimes included in the draft code. That was a point which he himself had stressed at the previous session,[17] but had omitted to mention in his statement at the present session.

The meeting rose at 1 p.m.

[17] *Yearbook . . . 1986*, vol. I, p. 148, 1965th meeting, para. 44.

1998th MEETING

Friday, 15 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

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

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

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. BOUTROS-GHALI said that, instead of reviewing the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) and the comments made by members of the Commission, he would simply make a few general remarks.

2. In the conclusion to his fourth report (A/CN.4/398, para. 259), the Special Rapporteur had stated: "It will undoubtedly be noted that the texts and judicial decisions analysed are . . . too closely linked to

[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.