Document:-

A/CN.4/SR.2000

Summary record of the 2000th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1987, vol. I

45. In nearly all the prosecutions of individuals accused of war crimes since the Second World War and, more generally, at international conferences and in codification work, consideration had been given to exoneration from responsibility by reason of superior orders. In the 1954 draft code (art. 4), the Commission had reproduced the provisions of article 8 of the Charter of the Nürnberg Tribunal,[23] adding one phrase based on the findings of that tribunal and relating to the moral choice of the author of the incriminated act. Having regard to the principle and not to the exception, a superior order was not a justifying circumstance. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held at Geneva from 1974 to 1977, some participants had tried to find a solution to that very important question, and the Conference had had before it a text whose object was to specify the right of refusal to obey, the principle of non-exoneration of the accused from criminal responsibility and the exception to non-exoneration. After the rejection of that text, which covered the whole problem—the rule itself and the conditions for admissibility of the exception—two interpretations had been advanced: some participants had held that the law in force remained applicable; others, whose opinion he did not share, had maintained that the way was open to oppose non-exoneration from responsibility by positive law. In those circumstances, it might be asked whether it was sufficient to consider the exceptions, as the Special Rapporteur had done, without examining the problem as a whole; and it might be thought that the Commission should devote a separate article to superior orders, since the code envisaged regulation going beyond humanitarian law and covering a whole range of situations.

46. On the actual substance of the question, he thought there were some cases in which the wrongful order had no bearing on the legal situation of the subordinate; others in which it was contrary to the internal law of the State of which he was a national; and yet others in which it was contrary to international law but not covered by internal law—not to mention the unlikely case in which the internationally wrongful order was lawful at the national level. Mr. Tomuschat (1993rd meeting) had raised the problem—both legal and practical—of the relationship between error and knowledge of the law. No doubt there might be borderline cases which should be discussed: the criminality of military personnel, for example, depended on the notion of proportionality, which was gradually finding a place in the law of war. But where offences against the peace and security of mankind were concerned, it did not seem that the problem of knowledge of the law arose in such an acute form, since the particularly odious nature of the crimes in question could not escape any reasonable person. Legal doctrine and some judicial decisions even spoke of "manifest wrongfulness"; and one writer went so far as to propose the notion of "manifest criminality" as being more flagrant than "manifest wrongfulness".

47. The problem had a second facet: the case in which the order was wrongful and the subordinate, although knowing it to be wrongful, had to obey. It might happen that the author of the incriminated act invoked either ignorance of its wrongfulness and the obligation to obey, or the latter obligation only. True, it was not easy to find national legislation providing only for absolute obedience, and laws generally had more nuances; but that was a further reason why the Commission should consider the exception to the rule of responsibility. On that point, the Special Rapporteur had introduced, in draft article 9, subparagraph (*d*), the reservation of moral choice, a concept used by the Nürnberg Tribunal and reproduced in the 1954 draft code (see para. 45 above). That concept raised serious problems, however. As orders constituted a kind of coercion, the moral choice was not linked to the impossibility of disobeying an order that was in conformity with internal law but contrary to international law, nor to the possibility of deciding to die for not having carried out a wrongful order or to carry out a wrongful order in order not to die. For the subordinate, moral choice meant knowing that he was participating in an international crime when it was possible for him to refuse to obey the order given.

The meeting rose at 1.05 p.m.

2000th MEETING

Wednesday, 20 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Two thousandth meeting of the International Law Commission

1. The CHAIRMAN, declaring open the Commission's 2000th meeting, recalled that its first meeting had been held at United Nations Headquarters, Lake Success, New York, on 12 April 1949 under the chairmanship of Mr. Manley O. Hudson, the members then present being: Mr. Alfaro, Mr. Amado, Mr. Brierly, Mr. Córdova, Mr. François, Mr. Hsu, Mr. Koretsky, Sir Benegal Rau, Mr. Sandström, Mr. Scelle, Mr. Spiropoulos and Mr. Yepes.

2. The Commission's 1000th meeting had been held at the Palais des Nations, Geneva, on 16 June 1969 under the chairmanship of Mr. Nikolai A. Ushakov, the members then present being Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Rosenne, Mr. Ruda,

[23] *Ibid.*, footnote 6.

Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor and Mr. Yasseen.

3. He could not let the occasion of the 2000th meeting pass without noting that the Commission had endured over the years. He need not dwell on its accomplishments, which were widely known and recognized.

4. Lastly, he noted that 1987 also marked the fortieth anniversary of the adoption by the General Assembly on 21 November 1947 of resolution 174 (II), establishing the Commission.

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*)

5. Mr. ARANGIO-RUIZ, continuing the comments he had made at the 1996th meeting on the provisions of draft articles 2 and 3, stressed that it was not enough to affirm the autonomy or supremacy of international law or to introduce a provision expressly imposing upon States the general obligation to take all the legislative, administrative and judicial measures necessary for the implementation of the code. For one thing, the very constitution of a State might be affected, as would be likely in the case of Italy; and, for another, it would be inadequate, for the purposes of the draft code, merely to enjoin States to take such measures, for that would do little more than impose upon States an obligation to achieve a result (*obligation de résultat*). That was probably the most common type of obligation in international law. In the case of the vital and important rules embodied in the draft code, however, it would not be enough to enjoin States to adopt the necessary internal measures.

6. If the code was to become a living piece of law, and if courts were to be able to apply it directly to individuals, the rules it embodied must, through an explicit provision of the international instrument containing the code, become an integral part of the internal law of each of the States parties to that instrument. Such a provision was absolutely essential.

7. Those considerations applied whether or not an international criminal court was established. The need to make the code part of the legal systems of States existed in both cases. Once the code had become an integral part of the internal criminal law of States, a decisive step would have been taken in the uniform application of its provisions both with regard to the characterization of offences and with regard to the general principles of substantive and procedural criminal law.

8. He agreed with the comments made at the previous meeting by Mr. Barsegov and Mr. Roucounas on the important issue of the subjective and objective elements of certain crimes; that issue would have to be dealt with in greater depth. In that connection as well, the only way to ensure that the code would be implemented was to make it part and parcel of the internal law of States. In the area covered by the draft code, there could be nothing less than a uniform criminal law that was internationally agreed on and imposed as such. The substantive and procedural rules embodied in the principles set forth in the code would thus automatically become rules and principles of the criminal law of States and national authorities would then be automatically and directly involved in the implementation of those rules. To claim that such a goal was too ambitious would be tantamount to saying that the very idea of the draft code was too ambitious.

9. Mr. ILLUECA, noting that, with a few changes, draft article 1 reproduced the text of article 1 of the 1954 draft code, said that the formulation of that provision was a basic requirement if the Commission was, as it had been invited to do by the General Assembly in its resolution 41/75 of 3 December 1986, "to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences" (para. 1).

10. According to some jurists, international criminal law was a hybrid discipline that borrowed both from international law and from criminal law, and it was quite true that, as a result of that duality, the development of international criminal law as a separate branch from international law had given rise to drafting and conceptual problems. It must, however, be recognized that, since the formulation of the Nürnberg Principles,[6] new rules of international criminal law had developed prohibiting certain types of conduct which were contrary to the fundamental interests of the international community and which were, as the Special Rapporteur stated in paragraph (1) of the commentary to draft article 1, "crimes which affect the very foundations of human society".

11. From the technical point of view, the draft code thus had to be based on international criminal law and he was therefore of the opinion that, in draft article 1, the words "crimes under international law" should be replaced by "international crimes". In support of that proposal, he recalled that the term "international crimes", as used in the 1949 memorandum by the Secretary-General on the Charter and Judgment of the Nürnberg Tribunal,[7] had been favourably welcomed and that section 3 of part III of that memorandum, relating to "international crimes in general", stated:

[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. I (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] See 1992nd meeting, footnote 12.

[7] See 1996th meeting, footnote 15.

When laying down that individuals are liable to be punished for crimes against international law, the Court did not give any precise definition of international crimes. . . .

He also recalled that, in his memorandum, the Secretary-General had analysed the international crimes listed in article 6 of the Charter of the Tribunal by dealing successively with the first group of international crimes (crimes against peace), the second group (war crimes) and the third group (crimes against humanity). The term "international crimes" had not been used only in that memorandum: it was also to be found in the writings of eminent jurists.

12. The text of draft article 1 might therefore be amended to read:

"*Article 1. Definition*

"The international crimes defined in the present Code constitute offences against the peace and security of mankind."

13. The way in which the Special Rapporteur had stated Principle II of the Nürnberg Principles in draft article 2 gave rise to some problems which had nothing to do with the dispute between those who advocated the monist doctrine and those who advocated the dualist doctrine of international law in referring to the relationship between internal law and international law. Some of those problems involving form and substance might be avoided if the word "act" were deleted. The first sentence of article 2 could then read: "The characterization of the international crimes defined in article 1 is independent of internal law."

14. As to draft article 3, he would not go into any further detail on the point of view he had expressed in his earlier statement (1996th meeting) but he would draw attention to the importance of the comments made by Mr. Boutros-Ghali (1998th meeting) concerning the criminal nature of organizations as subjects of international criminal law. It must not be forgotten that the Charter and Judgment of the Nürnberg Tribunal, as well as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, all referred to the criminal nature of non-State groups, organizations and institutions. That point would have to be given further consideration by the Special Rapporteur and the Commission.

15. Draft article 4, which highlighted the need for the establishment of an international criminal jurisdiction, could be endorsed without reservation: only a few changes would have to be made in paragraph 1 to take account of the comments made during the discussion. With regard to the question of extradition, Mr. Roucounas (1999th meeting) had provided further clarifications on some important and complex problems. He himself would add that, when a State holding the perpetrator of an international crime decided not to try him, the obligation to extradite also stemmed from the 1967 Declaration on Territorial Asylum,[8] which provided that States should not grant asylum to "any person with respect to whom there are serious reasons for considering that he has committed . . . a war crime or a crime against humanity" (art. 1, para. 2), and from the 1951 Convention relating to the Status of Refugees,[9] which expressly stated that its provisions did not apply to persons accused of international crimes (art. 1, sect. F).

16. Draft article 7 provided for the application of the rule *non bis in idem*, whereas the Charter of the Nürnberg Tribunal[10] rejected that rule, stating in article 29:

. . . If the Control Council for Germany, after any defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under article 14 hereof [Committee for the Investigation and Prosecution of Major War Criminals] for such action as they may consider proper, having regard to the interests of justice.

That point would require further discussion, because it was open to question whether or not it was justified to provide for the possibility, in the case where new evidence was discovered that would constitute a fresh charge, of reopening a case that had already been tried in order to prevent an international crime from going unpunished.

17. Mr. AL-KHASAWNEH said that the Special Rapporteur had skilfully reformulated the draft articles in order to take account of the reactions to the previous texts in the Commission and in the Sixth Committee of the General Assembly. The inclusion in the draft of so many alternatives and options and the frequent use of safeguard clauses nevertheless showed that political considerations had a great impact on major issues such as the criminal responsibility of States and the establishment of an international criminal jurisdiction, as had been pointed out by the Special Rapporteur as early as 1985 when, in introducing his third report at the thirty-seventh session, he referred to "the difficulties of the topic, which lay at the meeting-point of law and politics and therefore touched everyone's sensibilities and deepest convictions".[11]

18. There was, however, a risk of being over-sensitive to political considerations. It was, of course, essential that the final text should command wide acceptance and Mr. Jacovides (1995th meeting) had rightly recalled that, like politics, international law-making was the art of the possible. Yet the possible was not necessarily what appeared at first glance to be politically less controversial or more in conformity with the opinions expressed in the Sixth Committee.

19. There was, for example, no reason to assume that a State would be more willing to have one of its nationals—let alone one of its agents—tried by a foreign court than by an international criminal court. Yet it was precisely that assumption that had had the effect of relegating the idea of international criminal jurisdiction to a residual place in favour of the concept of universal jurisdiction, which, on closer inspection, might not prove easier to implement.

20. Similarly, shifting the emphasis away from the criminal responsibility of States to that of individuals

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

[9] United Nations, *Treaty Series*, vol. 189, p. 137.

[10] See 1992nd meeting, footnote 6.

[11] *Yearbook . . . 1985*, vol. I, p. 6, 1879th meeting, para. 5.

would not necessarily commend the code to wider acceptance by States. The Commission's experience showed that the only verifiable acceptance, namely the number of signatures and ratifications by States, would depend on a number of extraneous factors, of which the debates and documents of the Sixth Committee could not give any satisfactory indication.

21. The draft code, which thus reflected some hesitations about questions involving political considerations, nevertheless tended to attach only marginal importance to the fact that the exercise of progressive development and codification now being carried out was also an exercise in penal legislation. In that connection, it was true that the work in progress did raise important questions of justice and morality, for the difficulties involved in reconciling law and justice took on particular significance when the subject-matter was criminal law.

22. Before discussing those difficulties, he wished to refer to some aspects of the way in which the penal nature of the present task facilitated or hampered the Commission's work. For example, the requirement of precision in penal drafting provided a satisfactory yardstick against which texts could be examined. Moreover, the jurisdictional guarantees set out in draft article 6 as submitted by the Special Rapporteur in his fifth report (A/CN.4/404) were common to all schools of law and legal systems, so that it should be relatively easy to define responsibility and exceptions thereto. It was also fortunate that questions such as the presumption of innocence, the requirement of intent and the individuality of penalties were part of what was sometimes described as "settled law".

23. Other more fundamental questions relating to the concept of criminal responsibility were, however, far from settled. It was, for example, doubtful whether a broad interpretation of the term *lex* in the maxim *nullum crimen sine lege* would do away with the inherent tensions between justice and law or, in other words, between natural law and positive law. It was open to question whether statutory limitations were the result of the technical problems involved in obtaining evidence or of the divine blessing of forgetfulness and forgiveness. He also had doubts about paragraph (2) of the commentary to draft article 1, which stated that "the reaction to an act by the international community at a given time and the depth of the reprobation elicited by it are what makes it an offence against the peace and security of mankind". To give but one example, only a few decades previously the erection of military fortifications in breach of treaty obligations would have been regarded an an offence suitable for inclusion in the code, whereas, at present, such an action would be regarded as an offence suitable for inclusion in the present topic lay not only at the meeting-point of law and politics, but also at the meeting-point of law and justice.

24. Turning to the principle *aut dedere aut punire*, in connection with which he agreed that the word *punire* should be replaced by *judicare*, he said that he had no objection to the use of Latin. The problem, as he saw it, was that a procedural formula was being elevated to the rank of a principle of substance. Accordingly, the wording of draft article 4 should be amended in the following ways. First, provision should be made for a system of priorities to avoid conflicts of jurisdiction and competing applications for extradition. Secondly, as just stressed by Mr. Arangio-Ruiz, it should be specified that States were under an obligation to incorporate the provisions of the code into their internal legal systems and that, in so far as possible, penalties should be uniform. Thirdly, with regard to the question of asylum, he suggested the adoption of the compromise formula embodied in a number of recent conventions, such as those dealing with so-called "aerial offences", the taking of hostages and crimes against internationally protected persons. Fourthly, with regard to jurisdictional guarantees, he suggested that the Commission should follow the 1979 International Convention against the Taking of Hostages,[12] which differed in that respect from earlier conventions. Fifthly, the effect of the rule *aut dedere aut judicare* on the existing web of extradition treaties should be carefully considered, particularly with a view to ensuring that States which had a stronger jurisdictional claim than others, but which did not have an extradition treaty with the State in whose territory the alleged offender had been found, were not discriminated against simply by virtue of the absence of such a treaty.

25. If a system of universal jurisdiction was to operate properly, the international community as a whole had to consider that persons accused of certain acts had excluded themselves from society by committing those acts. Thus a group of States which shared the same ideals and interests might quite easily decide that piracy, for example, was a threat to their shared ideals and interests and that it warranted the exercise of universal jurisdiction. However, no such easy decision could be made by an international community which was both universal and heterogeneous; hence the admittedly disappointing conclusion that drug traffickers were perhaps the only group which might be the subject of undisputed universal jurisdiction. He therefore urged the Commission to give draft article 4 further consideration before adopting it.

26. He agreed with the speakers who had said that, for the sake of logic and clarity, the wording of paragraph 1 of draft article 4 should be brought into line with that of the corresponding provisions of the conventions to which he had referred earlier.

27. He also agreed with the proposal to delete the words "because of their nature" at the end of draft article 5, but hoped that the principle underlying those words would be explained in the commentary.

28. With regard to draft article 6, he noted that the term "judicial guarantees" was used in at least one place, namely the third sentence of paragraph (6) of the commentary, to describe what was meant by "jurisdictional guarantees" in the title and text of the article. In other instruments, however, the terms used were "minimum guarantees" or "fundamental guarantees". The Special Rapporteur might wish to consider whether all those terms were synonymous, in which case the choice between them would be a matter of legal taste.

[12] See 1995th meeting, footnote 10.

29. As for the title of the draft code, he noted that the problem with regard to the use of the term "offences" existed only in English. It did not, for example, affect the Arabic text.

30. Mr. PAWLAK recalled that, during the Second World War, his country had suffered enormously as a result of the policies and crimes of the leaders of Nazi Germany. He was therefore firmly convinced of the need for a universal instrument such as the draft code on which the Commission was now working.

31. As to the title, he agreed that the term "offences" should be replaced by "crimes", which better reflected the nature and content of the draft code.

32. He also agreed with the new text of draft article 3, in which the word "person" had been replaced by "individual". That amendment removed any ambiguity as to the scope of the code *ratione personae*. It would, however, require some changes in the other articles, and particularly in draft articles 6 and 8, where the word "person" would also have to be replaced by "individual".

33. Draft article 4 was one of the most crucial provisions of the entire draft, since it dealt with the problem of the implementation of the code. The new text provided a practical solution to that problem, but that approach might give rise to difficulties, as the Special Rapporteur had recognized in the commentary. In that connection, he drew attention to the principles embodied in the 1945 London Agreement,[13] to which was annexed the Charter of the Nürnberg Tribunal, and in the Charter of the Tokyo Tribunal.[14] Those principles fully took account of the provisions of the 1943 Moscow Declaration[15] concerning the return of war criminals to the countries where they had committed their crimes. He therefore suggested that the general rule to be embodied in article 4 should be formulated along the following lines:

> "Perpetrators of crimes against the peace and security of mankind shall be tried and punished in the country in which their crimes were committed, according to the laws of that country."

34. Such a provision would not only give effect to the principle of territoriality, which was fully recognized by the criminal laws of many countries, including his own, which had embodied it in article 3 of its Penal Code, but would also be in keeping with General Assembly resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, paragraph 5 of which stated:

> 5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

Perpetrators whose crimes had not been committed in a particular country or had been committed in several countries could be prosecuted by a group of countries setting up a joint jurisdiction, as had been done at Nürnberg and at Tokyo at the end of the Second World War.

35. In draft article 4, paragraph 2, he would prefer the negative wording proposed by the Special Rapporteur to be replaced by a positive formulation, such as: "Interested States may also establish an international criminal jurisdiction."

36. Neither the application of the principle of territoriality nor collective trials could, however, solve all the problems involved in prosecuting the perpetrators of crimes against the peace and security of mankind. It was therefore also necessary to apply the principle of universal repression, which was recognized in the legal systems of many countries. In Poland, it was enshrined in article 115, paragraph 2, of the 1969 Penal Code, which stated that Polish courts would apply Polish penal law if the perpetrator had committed an offence outside Polish territory that was punishable under an international agreement to which Poland was a party. That general principle of universal repression, which was also embodied in a number of international instruments, such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, might be stated in the following terms:

> "Every State has the duty to try any perpetrator of a crime against the peace and security of mankind committed in its territory or elsewhere or to extradite him to the State where he has committed the crime."

He was also not convinced that draft article 4 had to include a reference to the question of arrest. Perhaps the term "detention" might be used, as in the Charter of the Nürnberg Tribunal.

37. As he had already stressed, the implementation of the code was the most important issue at stake. In that connection, he drew attention to the principle of good faith. As early as 1966, when listing the principles of treaty interpretation, the Commission had pointed out that: "The first—interpretation in good faith—flows directly from the rule *pacta sunt servanda*."[16] He stressed that point because he was aware of the difficulties involved in matters such as extradition, means of obtaining evidence, contradictory judgments and a uniform scale of penalties. He nevertheless believed that, once the draft code became a binding international treaty, it would be implemented in good faith according to international legal practice.

38. Turning to the list of offences, he drew attention to the need to avoid including almost every conceivable violation of international law. It was necessary to concentrate on the fundamental issues and use a general definition of the specific characteristics of international crimes as a criterion for inclusion in the list. The code should not only reflect the present state of the conscience of the international community, but also point

[13] See 1992nd meeting, footnote 6.

[14] *Ibid.*, footnote 11.

[15] Declaration on German Atrocities, signed at Moscow on 30 October 1943 by the United Kingdom, the United States of America and the Soviet Union; for the text, see United Nations, *The Charter and Judgment of the Nürnberg Tribunal. . . .* (see 1996th meeting, footnote 15), p. 87, appendix I.

[16] Paragraph (12) of the commentary to article 27 of the final draft articles on the law of treaties adopted by the Commission at its eighteenth session, *Yearbook . . . 1966*, vol. II, p. 221, document A/6309/Rev.1, part. II.

the way for the development of international law. Crimes against the peace and security of mankind might therefore be characterized as acts which seriously jeopardized the most vital interests of mankind, violated the fundamental principles of *jus cogens* and threatened individual nations, ethnic groups, civilization and the right to life. Perhaps the Special Rapporteur could also consider the relationship between the provisions of the draft code and those of article 19 of part 1 of the draft articles on State responsibility.[17] He would also not object if the list of international crimes included "ecocide", as a reflection of the need to safeguard and preserve the environment, as well as the first use of nuclear weapons, colonialism, *apartheid*, economic aggression and mercenarism.

39. In conclusion, he recalled that, in the last preambular paragraph of resolution 41/75 of 3 December 1986, the General Assembly had stressed the urgent need for the elaboration of the draft code. He therefore requested the Special Rapporteur to indicate, in summing up the present discussion, whether he would consider the possibility of preparing draft articles on crimes against peace, crimes against humanity, war crimes and related offences for the Commission's next session.

40. Mr. DÍAZ GONZÁLEZ commended the Special Rapporteur for his remarkably consolidated fifth report (A/CN.4/404), which took account of the comments made not only by members of the Commission at its previous session, but also by representatives in the Sixth Committee at the forty-first session of the General Assembly.

41. He could agree to draft article 1, but, for the reasons just stated by Mr. Illueca, he thought that the words "crimes under international law" should be replaced by "international crimes".

42. Although draft article 2 rightly embodied the sacrosanct rule *nullum crimen, nulla poena sine lege*, the Commission still had to find the best way of drafting a provision on the characterization of acts as offences against the peace and security of mankind.

43. He preferred the former text of draft article 3, which would make it possible to establish the criminal responsibility of States, particularly since the Commission had adopted on first reading article 19 of part 1 of the draft articles on State responsibility,[18] and of criminal organizations.

44. Draft article 4 was the corner-stone of the entire draft, for a code of offences against the peace and security of mankind would be pointless if it did not provide for machinery for the enforcement of penalties or, in other words, for the establishment of an international criminal jurisdiction. All the proposals concerning the form which such a jurisdiction might take were acceptable, but by far the best solution would be to set up an international criminal court or, as a last resort, a criminal division of the ICJ. He found the title of article 4 inappropriate, not because it was in Latin, which was the language of the law *par excellence*, but because it did not take account of practical realities: the point was not to punish or extradite, but rather to try or extradite. That was why the text of paragraph 1 was unsatisfactory. A State must not merely arrest the alleged perpetrator of an offence against the peace and security of mankind found in its territory: it also had an obligation to mount a search for him in order to arrest him and then try or extradite him. It would, however, be more accurate to replace the word "perpetrator" by "alleged perpetrator", since the situation to which reference was being made had taken place prior to trial.

45. He had no problem accepting draft article 5, but thought that the words "because of their nature" were unnecessary.

46. With regard to the Spanish title of draft article 6, the words *Garantías jurisdiccionales* should be replaced by *Garantías procesales* or by *Garantías judiciales*.

47. Draft article 7 seemed to establish the supremacy of internal law and therefore contradicted draft article 2, which established the supremacy of international law over internal law, a rule that was already recognized in international law and in internal law. In the text itself, it would be preferable to use the words "alleged offence" and to replace the words "penal procedure of a State" by "penal procedure provided for in the present Code".

48. In draft article 8, paragraph 2, he proposed that the words "and punishment" should be deleted, for the person in question might be acquitted. He also suggested that the words "the community of nations" should be replaced by "the international community".

49. Draft article 9 appeared to refer to extenuating or absolving circumstances, rather than to exceptions to the principle of responsibility. In that connection, he agreed with the comments on intent and motive made by Mr. Barsegov (1999th meeting), which had shed light on the various objective and subjective factors that entered into the definition of offences against the peace and security of mankind.

50. Of all the exceptions listed in draft article 9, he might be able to agree to self-defence in the case, for example, of an act of aggression, but there could be no question of self-defence if the intent had been to commit aggression. Similarly, error of fact or of law could not be invoked if intent to commit genocide had been established. The Commission should take great care on such points and carefully study extenuating or absolving circumstances, many of which would have to be ruled out in the case of the offences covered by the code. Could a State justify a policy of *apartheid* by exercising its right to self-defence against a community living in its territory? Could it claim that responsibility in that regard lay only with the head of State? Could a State's police force be unaware that, in implementing such a policy, it was committing a crime against humanity?

51. He had a few drafting comments to make with regard to the Spanish text of the draft articles, and, in co-operation with the other Spanish-speaking members of the Commission, he would make available to the secretariat a document containing the corrections to be made.

52. Mr. BEESLEY commended the Special Rapporteur for the way in which he had taken account of

[17] See 1993rd meeting, footnote 7.

[18] *Ibid.*

the comments made on the present topic in the Sixth Committee of the General Assembly.

53. The proposal he had put forward at the 1994th meeting had drawn upon the procedures of the ICJ and had been made on the assumption that it might be unrealistic to base the Commission's work on the expectation that an international tribunal would be established. The proposal had been that the possibility should be considered of enforcing the code through national courts to which would be added a judge from the jurisdiction of the accused, as well as one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question. Such a procedure would not only internationalize the proceedings in a way that might be acceptable to the international community, but also provide some guarantee of impartiality and ensure the necessary interaction of the different legal systems. It would serve to ensure that the rights of the accused, as well as the interests of the international community as a whole, were protected. It might also provide a meeting-ground for those who advocated the establishment of an international criminal tribunal and those who thought it very unlikely that such a tribunal would be established. It would also make for certainty and uniformity in the application of the law.

54. His proposal had been prompted by differences in the jurisprudence of national jurisdictions in the field of criminal law. Matters such as the presumption of innocence had been settled by the draft code, but other matters had not. He had in mind, for example, the obligation to inform the accused of his rights at the time of arrest, the rules applicable to the questioning of the accused, trial by jury, the rules of evidence and of extradition, the right to bail and the writ of *habeas corpus*. Furthermore, while there was common ground in the Commission with regard to the rule on non-retroactivity, there was no such common ground with regard to an exhaustive or non-exhaustive list of offences. In that connection, the worst thing, in his view, would be to agree on a rule of non-retroactivity coupled with an open-ended list of offences, the effect of which might be to cause some national jurisdictions to add to the list, thereby making it retroactive in effect.

55. The questions of superior orders and *mens rea* showed that jurists from different jurisdictions invariably reflected their own legal system. With regard to superior orders, it was clear from the cases cited by Leslie Green in his 1976 study[19] that countries such as Belgium, Canada, France, the Federal Republic of Germany, Ghana, Israel, the Netherlands, Norway, Poland, the United Kingdom and the United States had all rejected the defence of superior orders. On that issue, therefore, the Commission was on sure ground and could be reasonably certain of the results that would be achieved. *Mens rea*, on the other hand, was regarded by some as equivalent to motivation, whereas, in English law at least, it was something different. To illustrate that point he read out certain excerpts from *Halsbury's Laws of England*, drawing particular attention to paragraphs 3, 4, 6 and 7 of part I, section I. Those passages underlined the relevance of the concept of *mens rea* in many countries whose jurisprudence, like Canada's, had its origins in that of the courts of what had formerly been the British Empire, with its attendant safeguards such as trial by jury and *habeas corpus*. They also underlined the need to take account of the fact that jurisprudence was not uniform in all parts of the world. For all those reasons, he considered it essential to draft an instrument that could be implemented universally and in the utmost good faith.

56. Turning to the title of the topic, he said that he would prefer the word "crime" to the word "offence", since the latter was often used to denote relatively minor offences. A possible alternative might be the term "capital crime".

57. He agreed that the code should provide that States must take the necessary steps to incorporate its rules into their own internal law. Canada, whose law did not provide for the automatic application of international instruments, had had to legislate to that effect in almost all such cases. The 1947 United Nations Act, for example, had been passed to take account of the Charter of the United Nations and to enable Canada to implement the decisions of the Security Council. As Canada was not the only country in that position, the code should impose a similar obligation on all States so that none could later plead its constitution as a defence.

58. On the question whether the list of offences should be exhaustive or non-exhaustive, he said that Canadian criminal law, for its part, had never been concerned with the establishment of such a list: depending on the case and as society had changed, certain acts had been made punishable by law, while the punishable nature of other acts had been abolished. In the case of the draft code, the answer might lie in an annex which could later be amended.

59. As to whether the code could be applied to crimes committed both by individuals and by States, it would be difficult to envisage a workable procedure whereby one State could find another State guilty in the absence either of an international tribunal or at least of some mixed tribunal that would include judges from other jurisdictions. He therefore considered that the Special Rapporteur was right to confine the scope of the code for the time being to the individual.

60. With regard to draft article 1, although he understood the Special Rapporteur's point of view concerning the idea of seriousness (para. (2) of the commentary), he would like that idea to be mentioned in the code at some point.

61. As to draft article 2, it was important to note that the code would be meaningless if it was not based on the assumption of the supremacy of international criminal law; hence the need for a provision inviting States to legislate to that effect. He agreed with the Special Rapporteur (para. (7) of the commentary) that to use the *non bis in idem* rule to oppose international prosecution would be a negation of international criminal law and, in practice, would completely paralyse the punitive system based on the code. That point therefore required serious consideration.

[19] L. C. Green, *Superior Orders in National and International Law* (Leyden, Sijthoff, 1976).

62. He also agreed that draft article 4 was the essence of the entire draft code, but he did not agree with the use of the word "perpetrator", which seemed to imply a presumption of guilt. It would be better to refer to the "accused" or to the "individual charged with the offence".

63. There was an apparent omission in draft article 6 on jurisdictional guarantees, for it made no reference to legal capacity; but, in the modern-day world, children were in fact taking part in fighting. And what of insanity, which constituted a defence in many jurisdictions?

64. Mr. KOROMA said that, without in any way wishing to criticize the Secretariat, he regretted that only one summary record had been made available so far. The task of members would be facilitated if they could refer to the summary records as the Commission's discussions progressed.

65. He continued to believe that the title of the draft code should be retained as it stood. *Black's Law Dictionary* showed that "offence" was a generic term embracing both felonies and misdemeanours. It was possible that the title could be amended at a later stage to refer to "crimes", but, until it had been agreed which offences constituted offences against the peace and security of mankind, the title should stand.

66. He did not agree that draft article 5 was superfluous. It was true that certain jurisdictions imposed a statutory limitation for criminal offences. However, in the case of extremely serious offences, such as genocide, war crimes and crimes against humanity, it should not be possible to invoke statutory limitations in order to prevent prosecution, no matter how long the period of time involved.

67. He did not understand why an argument had arisen regarding the primacy of internal law or international law and the adoption of the code under internal law. Different States obviously had different ways of incorporating international law into their internal law. The main point was to agree on what was acceptable to all States and, then and only then, for States to decide how to translate the code into their legislation.

68. The thesis argued by Mr. Barsegov (1999th meeting) regarding *mens rea*, which he endorsed, had its justification in the outcome of the Nürnberg Trial, when the defences of superior orders and duress had been rejected because of the magnitude of the crimes involved. Genocide and crimes against humanity could also not be excused on the ground that there had been no intent to commit the offence. Nor, in his view, could lack of capacity or insanity constitute a defence in the case of offences against the peace and security of mankind. Children, to whom reference had been made, might be capable of murder, but they could not commit genocide without the support of the State. That was why such defences had been rejected whenever they had been invoked.

69. Mr. BEESLEY said that, in his earlier statement, he had not been arguing for or against any particular point, but had merely wished to draw attention to the fact that systems of jurisprudence differed on such issues as *mens rea* and an exhaustive list of offences. The Commission would ignore that fact at its peril.

70. Mr. Sreenivasa RAO said he did not think that there was any wide divergence of views in the Commission on the question of *mens rea,* given the nature of the crimes involved. Crimes such as *apartheid*, genocide and the use of nuclear weapons placed the whole of mankind in jeopardy and there was therefore no justification for extrapolating from ordinary internal law concepts. The Commission could be guided by the principles of ordinary criminal law, but it should be very careful about applying them to international situations.

71. It had rightly been said that there was no need for the Commission to become involved in the implementation of the code. As he had already pointed out (1994th meeting), the Commission's first aim should be the formulation of rules that would command the broadest possible agreement. It should then be left to individual States to decide how best to implement the code. Mr. Beesley's suggestion, which looked to the practical realities, was an innovation that merited consideration. The Commission had made good progress and neither *mens rea* nor the implementation of the code should detain it any longer.

72. Mr. CALERO RODRIGUES said he agreed with Mr. Koroma that the word "offence" in the title of the draft code was correct. It was, however, also imprecise, for it was a general term which covered not only crimes, but also minor offences, whereas the draft code dealt solely with the category of offences known as crimes.

73. Mr. BARSEGOV said that the comments he had made at the previous meeting on the question of intent and motive had nothing to do with the particular characteristics of his own country's legal system. The subjective element of intent, whether or not it could be invoked under internal law in the case of ordinary crimes, could not be invoked in the case of offences against the peace and security of mankind. Contrary to what some people might think, international law was not merely a transposition of internal law to external relations.

The meeting rose at 1.05 p.m.

2001st MEETING

Thursday, 21 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.
