

Document:-
A/CN.4/SR.2096

Summary record of the 2096th 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:-
1989, vol. I

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Mr. Sreenivasa Rao was elected First Vice-Chairman by acclamation.

Mr. Roucounas was elected Second Vice-Chairman by acclamation.

Mr. Calero Rodrigues was elected Chairman of the Drafting Committee by acclamation.

Mr. Bennouna was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/418)

17. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/418), on the understanding that its adoption would be without prejudice to the order of consideration of the topics, which would be decided later.

The provisional agenda (A/CN.4/418) was adopted.

18. The CHAIRMAN, drawing attention to General Assembly resolution 43/169 of 9 December 1988, suggested that the request in paragraph 5 of that resolution should be taken up under agenda item 9 (Programme, procedures and working methods of the Commission, and its documentation), which was to be referred to the Planning Group.

It was so agreed.

Organization of work of the session

[Agenda item 1]

19. The CHAIRMAN said that, in addition to the officers of the current session, the Enlarged Bureau would be composed of the special rapporteurs and members who had formerly been Chairman of the Commission, namely Mr. Arangio-Ruiz, Mr. Barboza, Mr. Díaz González, Mr. McCaffrey, Mr. Ogiso, Mr. Thiam, Mr. Yankov, Mr. Francis and Mr. Reuter.

20. Mr. KOROMA said that, in future, the Commission should have before it at the beginning of the session a summary table showing the stage reached in the preparation of each of the reports to be discussed.

The meeting was suspended at 5.15 p.m. and resumed at 5.55 p.m.

21. The CHAIRMAN, referring to the reports to be discussed by the Commission, said that four had still not been issued and would be distributed between 17 May and 1 June. The Commission would also have before it the second report by Mr. Ogiso on jurisdictional immunities of States and their property and would consider it together with his preliminary report, which it had been unable to discuss at the previous session. Because the reports would be available at different times, the Enlarged Bureau recommended that the Commission should consider the items on the agenda in the following provisional order:

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| 1. Draft Code of Crimes against the Peace and Security of Mankind (item 5) | 7 meetings |
| 2. State responsibility (item 2) | 7 meetings, plus a further two meetings later |
| 3. International liability for injurious consequences arising out of acts not prohibited by international law (item 7) | 5 meetings, plus one further meeting later |

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|---|------------|
| 4. Jurisdictional immunities of States and their property (item 3) | 7 meetings |
| 5. The law of the non-navigational uses of international watercourses (item 6) | 6 meetings |
| 6. Relations between States and international organizations (second part of the topic) (item 8) | 2 meetings |

The Commission would set aside four meetings for consideration of the reports of the Drafting Committee and would also make time available for receiving the representatives of the legal bodies with which it co-operated.

22. If there were no objections, he would take it that the Commission agreed to adopt that provisional plan of work.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

23. The CHAIRMAN said that the Enlarged Bureau proposed that the Planning Group should be composed as follows: Mr. Sreenivasa Rao (Chairman), Prince Ajibola, Mr. Al-Qaysi, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Roucounas, Mr. Thiam, Mr. Tomuschat and Mr. Yankov. The Group was not restricted and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

24. The CHAIRMAN recalled that, at its previous session,⁶ the Commission had decided to establish a Working Group which would suggest topics for inclusion in the Commission's long-term programme of work. The Enlarged Bureau proposed that the members of the Commission from the five regional groups should meet to appoint one representative from each as a member of the Working Group, which would elect its own chairman.

The meeting rose at 6.30 p.m.

⁶ See *Yearbook . . . 1988*, vol. II (Part Two), p. 110, para. 557.

2096th MEETING

Wednesday, 3 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley,

Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Drafting Committee

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, following consultations, he proposed the following membership for the Drafting Committee: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Díaz González, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi and Mr. Solari Tudela. Mr. Bennouna would be an *ex officio* member in his capacity as Rapporteur of the Commission.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind¹ (A/CN.4/411,² A/CN.4/419,³ A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPOURTEUR

ARTICLE 13 (War crimes) and

ARTICLE 14 (Crimes against humanity)

2. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the topic (A/CN.4/419), as well as draft articles 13 and 14⁴ contained therein, which read:

CHAPTER II ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

...

Article 13. War crimes

FIRST ALTERNATIVE

(a) Any [serious] violation of the laws or customs of war constitutes a war crime.

(b) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and

in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(a) Within the meaning of the present Code, any [serious] violation of the rules of international law applicable in armed conflict constitutes a war crime.

(b) The expression "rules of international law applicable in armed conflict" means the rules laid down in the international agreements to which the parties to the conflict have subscribed and the generally recognized principles and rules of international law applicable to armed conflicts.

Article 14. Crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) killing members of the group;
- (ii) causing serious bodily or mental harm to members of the group;
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children from one group to another group.

2. FIRST ALTERNATIVE

Apartheid, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2. SECOND ALTERNATIVE

Apartheid, which shall include policies and practices of racial segregation and discrimination [as practised in southern Africa] and shall apply to the following inhuman acts committed for the purpose of establishing or maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) denial to a member or members of a racial group or groups of the right to life and liberty of person:

- (i) by murder of members of a racial group or groups;
- (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
- (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

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* . . . 1988, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

⁴ Revised texts of draft articles 13 and 12, respectively, submitted by the Special Rapporteur in 1986 in his fourth report (*Yearbook* . . . 1986, vol. II (Part One), pp. 85-86, document A/CN.4/398).

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

3. Slavery and all other forms of bondage, including forced labour.

4. (a) Expulsion or forcible transfer of populations from their territory;

(b) Establishment of settlers in an occupied territory;

(c) Changes to the demographic composition of a foreign territory.

5. All other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of their property.

6. Any serious and intentional harm to a vital human asset, such as the human environment.

3. Mr. THIAM (Special Rapporteur) said that his seventh report (A/CN.4/419) dealt with war crimes and crimes against humanity, questions which the Commission had already discussed at length. The purpose of the report was essentially to propose specific texts for draft article 13, on war crimes, and draft article 14, on crimes against humanity. The report also gave a brief account of the doctrinal discussions on the subject and of earlier debates, largely intended for the more recently elected members of the Commission who had not been able to follow all of the Commission's discussions on the present topic. They could, of course, raise issues of principle in connection with the discussion of draft articles 13 and 14, but there would be no need to reopen the general debate.

4. Draft article 13 raised three problems relating to definition, terminology and the question whether a certain degree of gravity was necessary for an offence to constitute a war crime.

5. With regard to the first issue, the choice lay between an exhaustive enumeration of war crimes and a general definition. A really exhaustive list, however, was virtually impossible. The Hague Convention (IV) of 1907⁵ had had recourse to the famous Martens clause (*ibid.*, para. 5) whereby acts not specifically enumerated in the Convention could be treated as violations of the laws of war if they violated the principles of the law of nations. In the 1954 draft code, the Commission had avoided the enumerative approach and had adopted a general definition of war crimes as "acts in violation of the laws or customs of war" (art. 2, para. (12)), following the advice of the then Special Rapporteur, the late Jean Spiropoulos, who had urged that it should be left to the judge to determine whether the case in question was one involving a war crime (*ibid.*, para. 7).

6. A general definition would be consistent with the judgment of the Nürnberg International Military Tribunal,⁶ according to which the law of war was to be found in customs and practices which had gradually obtained universal recognition, and in the general principles of justice applied by jurists and practised by military courts. Leading

jurists who had examined the problem also agreed that an exhaustive list of war crimes was impossible. For all those reasons, he proposed the general definitions of war crimes appearing in the two alternatives of paragraph (a) of article 13.

7. The second problem was that of terminology. It had been suggested that the expression "war crime" was outmoded and that the word "war" should be replaced by "armed conflict". However, a very large number of conventions and other international instruments used the traditional expression "laws or customs of war", which was to be found more particularly in the 1907 Hague Convention, in the Charter of the Nürnberg Tribunal⁷ (art. 6 (b)) and in the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)⁸ (art. 5 (b)). In the first alternative proposed for article 13, the traditional term "war" was used. In the second, he had introduced the concept of "armed conflict" to replace that of "war". It would be for the Commission to choose between those alternatives.

8. The third problem arising out of article 13 was whether a certain degree of gravity was necessary for an offence to be considered as a war crime. There had been no reference to the question of the gravity of the offence either in the 1907 Hague Convention or in the Charters of the Nürnberg and Tokyo Tribunals. Nor was any such reference made in either Law No. 10 of the Control Council for Germany⁹ or the 1954 draft code. The criterion of gravity appeared in the 1949 Geneva Conventions¹⁰ and in Additional Protocol I¹¹ thereto, article 85, paragraph 5, of the latter instrument specifying that "grave" breaches of humanitarian law constituted war crimes (*ibid.*, paras. 18-19). During its own discussions prior to the adoption of the 1954 draft code, the Commission had examined a proposal by one of its members, the late Manley O. Hudson, to introduce the element of gravity in the definition of war crimes.¹² The Special Rapporteur at the time, Jean Spiropoulos, had objected that he considered "every violation of the laws of war as a crime".¹³

9. His own view was that the matter had to be reconsidered carefully. Some judicial decisions rendered immediately after the Second World War had treated offences of a somewhat minor character as war crimes, but they could be explained by the feelings prevailing at the time and the desire of the courts to punish as many as possible of the persons responsible for committing abuses during the war. The position was now different and the subject should be approached in a different frame of mind. The term "crime" could no longer be used with the broad meaning attached

⁵ Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

⁶ *Documents on American Foreign Relations*, vol. VIII (July 1945-December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*

⁷ Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

⁸ Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

⁹ Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, p. 3).

¹⁰ See *Yearbook . . . 1950*, vol. I, pp. 148-149, 60th meeting, paras. 12 and 21.

¹¹ *Ibid.*, p. 149, para. 15.

⁵ Convention respecting the Laws and Customs of War on Land, of 18 October 1907 (see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100).

⁶ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

to it in the instruments drawn up during the Second World War. As far as the present draft code was concerned, the purpose was to sanction particularly serious and odious crimes. Offences of lesser gravity should be excluded from the scope of the definition of "war crimes", which did not mean, of course, that they should go unpunished. The term "serious" appeared in square brackets in the two alternatives of paragraph (a) of article 13. The Commission would have to decide whether it wished to retain that adjective, and consequently the criterion of gravity, in the definition of war crimes.

10. As to draft article 14, the 1954 draft code contained neither the expression "crimes against humanity" nor the word "genocide", although the former expression was included in the Charters of the Nürnberg and Tokyo Tribunals, as well as in Law No. 10 of the Allied Control Council (*ibid.*, para. 37). The Nürnberg Judgment also used the expression "crimes against humanity", as did Principle VI (c) of the Nürnberg Principles¹⁴ formulated by the Commission in 1950. The gap should therefore be filled and the expression "crimes against humanity" used in the draft code. Crimes against humanity differed materially from war crimes, which presupposed a state of armed conflict and were directed against belligerent enemies. Crimes against humanity could be committed at any time, against any persons, and in particular against one's fellow citizens.

11. The various subparagraphs of paragraph 1 of draft article 14 set forth specific acts constituting genocide. It should not be assumed that "crimes against humanity" meant solely acts of barbarity and physical ill-treatment. The expression also covered humiliating or degrading acts. In that connection, it was interesting to note a decision of the Supreme Court of the British Zone in Germany (*ibid.*, para. 45).

12. Attacks on property had been regarded by the courts as crimes against humanity when they occurred on a massive scale. As for crimes against persons, the International Military Tribunals had dealt with both mass crimes and crimes against individuals. The question remained open as to whether the criterion of "mass nature" was the only necessary condition for an offence against property to be treated as a crime against humanity.

13. *Apartheid* was included in draft article 14, for notwithstanding certain reservations of principle the Commission as a whole was in full agreement that it should be regarded as a crime against humanity. To meet the requests of certain members, he had also included, in separate provisions, slavery and the mass expulsion of populations from their territories.

14. Lastly, he trusted that, rather than revert to a general debate, the Commission would concentrate its discussion on the draft articles he had introduced.

15. Mr. TOMUSCHAT commended the Special Rapporteur for his succinct and lucid seventh report (A/CN.4/419) and for the clarity of his oral introduction.

16. He agreed entirely on the need for a general definition of war crimes in draft article 13. An enumeration could

never be exhaustive, particularly since humanitarian law was developing rapidly.

17. Of the two alternatives proposed for article 13, he preferred the second. To begin with, war was not the only phenomenon to which humanitarian law applied. The notion of armed conflict which had rightly been introduced into all recent instruments would help to avoid any misunderstanding. It would be preferable to follow that modern terminology and for the draft code to speak of armed conflict, despite the Special Rapporteur's explanation that the term "war" encompassed all forms of armed conflict. A further reason for preferring the second alternative was that, since humanitarian law was now widely codified, it would be advisable to dispense with the reference to "customs of war" and to speak solely of the rules "applicable in armed conflict". That was particularly true in the delicate area of penal law, where it was better to have written norms.

18. Should the Commission favour the first alternative, however, the wording of paragraph (b) should be re-examined in the light of article 3 common to the 1949 Geneva Conventions¹⁵ and of article 1, paragraph 4, of Additional Protocol I thereto,¹⁶ which, on his reading, assimilated armed conflicts with inter-State conflicts in the traditional sense. It would also be advisable, in connection with non-international conflicts, to refer to Additional Protocol II,¹⁷ although that could lead to controversy because Protocol II had not been ratified by many States.

19. He agreed about the need to introduce the criterion of gravity in draft article 13, but would note in that connection that the French expression *violation grave* had been rendered in English as "serious violation", whereas the Additional Protocols spoke of a "grave breach". If the French text of the draft code was to follow the wording of the Additional Protocols, the English text should do likewise.

20. A further question of co-ordination between the Additional Protocols and the draft code arose. Turning any grave breach of the rules applicable in armed conflict into a war crime might be going beyond the terms of the Additional Protocols, which defined grave breaches very narrowly. The Commission would therefore have to decide whether the draft code should be brought into line with the two Additional Protocols or whether a more general formula was desirable.

21. It was right that the wording of draft article 14, paragraph 1, dealing with the crime of genocide, should not depart from that of the Convention on the Prevention and Punishment of the Crime of Genocide, which had acquired virtually the force of customary law.

22. The position with respect to *apartheid*, dealt with in paragraph 2, was more difficult, as the International Convention on the Suppression and Punishment of the Crime of *Apartheid* had still not been accepted by all States. Basically, he was in agreement with the phrase in the first alternative of paragraph 2, reading: "the institution of any

¹⁵ See footnote 10 above.

¹⁶ See footnote 11 above.

¹⁷ Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 609).

¹⁴ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

system of government based on racial, ethnic or religious discrimination". *Apartheid* was a phenomenon that was in the course of disappearing: Namibia was shortly to attain independence as a member of the United Nations, and *apartheid* in South Africa was also expected to disappear. In the circumstances, therefore, a wider form of wording seemed desirable. The Drafting Committee might, however, wish to give close consideration to the matter and reflect on tangible examples of what would be covered by such a broad form of words.

23. Despite the Special Rapporteur's laudable intention to prohibit slavery under paragraph 3, the problem was that, under the law of most nations, slavery was an ordinary crime and punishable as such. It ranked as a crime against humanity only when practised by a State. The Commission would therefore have to decide whether the draft code should cover merely crimes under ordinary law or also crimes in the commission of which the State was involved in some form or other. The prohibition on forced labour was, of course, of long standing in the context of ILO, but the expression "forced labour" had received an extremely broad interpretation in the jurisprudence of that organization that it would be impossible, in his view, to adopt in the context of the draft code.

24. Paragraph 4 introduced three crimes the criminal nature of which had long been acknowledged, and implicitly so under the terms of articles 43 *et seq.* of the Regulations annexed to the 1907 Hague Convention,¹⁸ whereby the occupying Power was obliged to respect the rights of the population. According to modern thinking, the expulsion or forcible transfer of populations from their territory (para. 4 (a)) amounted to a breach of the right of a people to self-determination inasmuch as it annihilated the very basis of that right, namely to reside in the land that had always been theirs. He noted in that connection that, while the mass expulsion of the German population from the territories of the East in 1945 was a reaction to the war crimes committed by Hitler's Germany, such a transfer was hard to justify in that better world where disputes were settled peacefully and in accordance with the Charter of the United Nations, particularly Article 33 thereof. The General Assembly had, moreover, constantly condemned all such acts, whether in the Near East, Cyprus, South Africa, Cambodia or elsewhere, and had never been swayed by political considerations. Accordingly, paragraph 4 of draft article 14 commanded his full support.

25. Paragraph 5 raised two questions, the first being who could commit the "inhuman acts" in question. Article 2, para. (11), of the 1954 draft code stated that they could be committed "by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities". That element was lacking in the present draft, which might therefore be construed as extending to any private act. Presumably that was not the Special Rapporteur's intention, and the point should therefore be clarified in the text.

26. The second question concerned the need for the criterion of "mass nature". He endorsed the statement in the Special Rapporteur's report that "where the mass element is absent, an individual act should constitute a link in a

chain and be part of a system or plan" (A/CN.4/419, para. 67). That was an important point and should be reflected in the text of the article as well.

27. He further agreed about the need to protect cultural property and historical monuments, but there, too, the Special Rapporteur's purpose did not seem to be clearly expressed in the text, which should be amplified to provide special protection for the cultural, architectural and other heritage.

28. Paragraph 6 involved matters of penal law and must be as specific as possible. It would suffice to refer solely to the "human environment", dispensing with the very general expression "vital human asset", thus establishing a clear parallel between that provision and article 19 of part 1 of the draft articles on State responsibility.¹⁹

29. Mr. ROUCOUNAS said that he welcomed the Special Rapporteur's seventh report (A/CN.4/419) and the renewed opportunity it provided to discuss the question of war crimes and crimes against humanity. He would confine his comments for the time being to war crimes, an area in which he broadly approved of the Special Rapporteur's approach, while reaffirming the view that the draft code should contain a general definition followed by a list of the crimes concerned. The balance of the draft must be maintained, although he recognized the legitimacy of the Special Rapporteur's arguments in favour of the alternative texts proposed. Accordingly, in the case of war crimes it was desirable to preserve a parallel with crimes against humanity, which were enumerated, and also to emphasize the deterrent aspect of the instrument, even if there was some risk of overlapping, as had already been pointed out.

30. It was not appropriate to use the definition contained in paragraph (b) of the first alternative of draft article 13, since the specific references to the 1949 Geneva Conventions and Additional Protocol I would have the effect of limiting the objective of the Commission's work. Moreover, article 1, paragraph 4, of Protocol I had given rise to difficulties of interpretation and widely divergent views were held regarding the definition of an "international armed conflict". It would therefore be preferable to avoid direct references to those instruments.

31. The concept of war crimes involved a further consideration. Admittedly, there was some overlapping between the notion of war crimes and that of grave breaches of humanitarian law, but it should be borne in mind that the concept of a "grave breach" had formed part of international legislation ever since the adoption of the 1949 Conventions. It had been reaffirmed by the 1977 Protocol and it was thus necessary in order to ensure continuity. Moreover, there was reason to think that not all "grave breaches" were covered by the category of crimes known as war crimes.

32. With regard to the laws or customs of war, as referred to in paragraph (a) of the first alternative of article 13, one could cite by way of example the specific instance of "superior orders". Surely it would be difficult to assert that that concept, although absent from Additional Protocol I, was not governed by customary law. Plainly the lack of specific texts did not mean that the rules of customary law did not apply.

¹⁸ See footnote 5 above.

¹⁹ *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

33. He could not fail to agree that the seriousness of the offences should be emphasized. The best course would be to use a form of language which reflected the concept of a war crime, yet retain the word "serious" and the expression "armed conflict". In most cases, war crimes involved serious crimes under humanitarian law. The draft code was concerned with crimes against the peace and security of mankind, and the text should make it clear that such crimes were of the most serious nature. That approach would be consistent with the trend of opinion in the international community in recent years.

34. Lastly, the Commission should discuss the question of including the expression "armed conflict", which covered not only international conflicts as referred to in the 1949 Geneva Conventions and in Additional Protocol I—even though the expression was broader in scope as used in the Protocol—but also non-international conflicts, such as civil war. The concept of armed conflicts would need careful consideration if paragraph (b) of the second alternative of article 13 were retained, although he himself would favour that version.

35. Mr. ARANGIO-RUIZ said that he preferred the definition of war crimes in the second alternative of draft article 13, which contained a clear reference to international law. Since some countries had, in the past, codified their laws of war, there was a certain ambiguity in the form of language employed in the first alternative. It would be best, however, to specify that the applicable rules of international law included both treaty and custom, and he would suggest adding a qualifier such as "written and unwritten".

36. He agreed that it would be difficult to draw up an exhaustive list of acts constituting war crimes, because of the rapid development of new technologies. Any such list would have to refer to the role of customary law in supplementing written law. As to the degree of gravity of war crimes, both the procedural and the substantive elements must be left intact: a belligerent State which was the victim of such crimes must retain the right to prosecute the offenders. He understood that the Special Rapporteur's purpose in placing the word "serious" in square brackets was to ensure that all violations of the laws of war could be brought into the category of war crimes, as under the existing régime.

37. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on the clarity of his seventh report (A/CN.4/419) and on the evident mastery with which the subject-matter had been treated.

38. In draft article 14, the Special Rapporteur had included a list of acts constituting crimes against humanity, but there was no comparable list of war crimes in draft article 13. Certainly, an exhaustive list would be impossible, but an indicative list would none the less restore the balance between the two articles.

39. As for draft article 14, there was little difficulty in defining crimes against humanity, which had already been discussed at the Commission's thirty-eighth session, in 1986.²⁰ Moreover, some such crimes were already proscribed in separate treaties which listed them in detail. It would therefore suffice to reproduce those lists within the

corresponding articles of the draft code, as had already been done in the case of article 12 (Aggression),²¹ provisionally adopted at the previous session.

40. In 1986, in his fourth report,²² the Special Rapporteur had commented that the list of acts enumerated in article 2, paragraph (10), of the 1954 draft code, on genocide, was exhaustive, whereas the list in article 2, paragraph (11), on inhuman acts, was merely illustrative. Thus slavery, for example, had not been referred to separately in the 1986 draft, but was now included in draft article 14 (para. 3), together with three new crimes: expulsion or forcible transfer of populations from their territory; establishment of settlers in an occupied territory; and changes to the demographic composition of a foreign territory (para. 4). The new crimes reflected contemporary developments in international law, and the dividing line between crimes against peace and crimes against humanity had to be further discussed. As to the concept of inhuman acts, he agreed that it could be applied both to offences against the person and to offences against property.

41. Turning to the text of draft article 13, it was indeed necessary to specify the meaning of the term "war", used in the first alternative. The phrase "any international or non-international armed conflict" had the advantage that it was defined both in the 1949 Geneva Conventions and in article 1, paragraph 4, of Additional Protocol I, which also referred to national liberation struggles. The second alternative was more explicit than the first, but did not make it sufficiently clear that non-international conflicts, such as armed struggles by national liberation movements against colonial domination, were also included. Moreover, the words "the international agreements to which the parties to the conflict have subscribed" (para. (b)) seemed to exclude non-State entities.

42. As for the gravity of war crimes, he agreed with the Special Rapporteur that the only acts proscribed under internal penal law to be covered by article 13 should be those relating to war crimes. The prohibition of certain methods of waging war, such as the use of nuclear weapons, was already found in international agreements and in customary international law, as well as in General Assembly resolutions. Accordingly, such methods need not be mentioned in the definition of war crimes.

43. Comparing draft article 14 with the non-exhaustive list of crimes against humanity in draft article 12 as submitted in the fourth report,²³ he suggested that the new additions should be emphasized. The enumeration of acts of genocide in paragraph 1, however, largely reproduced the wording of article 2, paragraph (10), of the 1954 draft code in a non-exhaustive manner, which seemed to be an appropriate solution. The same list appeared in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

44. The definition of acts of *apartheid* contained in the second alternative of paragraph 2 was preferable, for it reproduced the corresponding provisions of article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Adoption of that

²⁰ See *Yearbook . . . 1986*, vol. II (Part Two), pp. 43 *et seq.*, paras. 81-102.

²¹ *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

²² *Yearbook . . . 1986*, vol. II (Part One), p. 53, document A/CN.4/398.

²³ See footnote 4 above.

alternative would make for consistency in the draft code, since article 12 (Aggression) had been elaborated by the same method. Such lists helped to make the code self-contained, although there had been some opposition to including the crime of *apartheid*.

45. With regard to paragraph 3, he shared the reservations expressed about incorporating forced labour, a very broad concept that was already dealt with in two ILO Conventions.²⁴ As for paragraph 4, the crimes enumerated therein should be brought together under a single *chapeau* by the Drafting Committee.

46. The "inhuman acts" referred to in paragraph 5 had been taken from article 2, paragraph (11), of the 1954 draft code, with the addition of mass destruction of a population's property. The concept of attacks on property was not new; cultural property was already protected by the normative activities of UNESCO and by article 85, paragraph 4 (d), of Additional Protocol I²⁵ to the 1949 Geneva Conventions. There had been many recent cases of mass destruction of homes for political, racial or religious reasons, and he therefore supported the proposed wording of paragraph 5.

47. He also supported the reference in paragraph 6 to "any serious and intentional harm to a vital human asset, such as the human environment".

48. Finally, he believed that draft articles 13 and 14 should be referred to the Drafting Committee.

49. Mr. BOUTROS-GHALI said that he agreed with those members who favoured a list of war crimes in draft article 13. The chief reason was a non-judicial one: there was a need to educate public opinion, which would be responsive to such a list. Clearly, the list would have to be illustrative, not exhaustive.

50. Mr. ROUCOUNAS said there was no doubt that both the alternative definitions of war crimes in draft article 13 covered acts committed in armed conflicts involving national liberation movements. Indeed, several such movements were parties to instruments of international humanitarian law.

51. Mr. ARANGIO-RUIZ said that Mr. Tomuschat had perhaps been unduly sanguine in his view that the liberation of Namibia would lead South Africa to abandon its policy of *apartheid*. The definition of *apartheid* as a crime against humanity must cover possible cases in the future. Indeed, *apartheid* was already a combination of crimes and offences, and the definition must be comprehensive.

52. Mr. THIAM (Special Rapporteur) said that the words "as practised in southern Africa" had been placed in square brackets in the second alternative of paragraph 2 of draft article 14 for that very reason.

The meeting rose at 1 p.m.

²⁴ Convention No. 29 concerning Forced or Compulsory Labour, and Convention No. 105 concerning the Abolition of Forced Labour, adopted by the General Conference of ILO on 28 June 1930 and 25 June 1957, respectively (International Labour Office, *Conventions and Recommendations, 1919-1966* (Geneva, 1966), pp. 155 and 891).

²⁵ See footnote 11 above.

2097th MEETING

Friday, 5 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, 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 Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/411,² A/CN.4/419,³ A/CN.4/L.431, sect. D, ILC(XL)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes) *and*

ARTICLE 14 (Crimes against humanity)⁴ (*continued*)

1. Mr. BARSEGOV said that the reports of the Special Rapporteur had the distinction of offering a number of alternatives with regard to the substance of the problems under consideration. Whether one agreed with his conclusions or not, it had to be recognized that the Special Rapporteur had laid the foundations for a fruitful exchange of views.

2. One of the most vital questions the Special Rapporteur had raised in his seventh report (A/CN.4/419) was that of the definition of war crimes and crimes against humanity and their constituent elements. He himself had already stated his preference for the formulation of precise definitions and lists that were as complete as possible. On that point, he shared the opinion of Mr. Roucounas, Mr. Razafindralambo and Mr. Boutros-Ghali (2096th meeting). Those lists could play a very important role in mobilizing opinion and even in prevention. A list could, however, be drawn up only on the basis of specific characteristics and firm and stable classification criteria. Under each heading (crimes against peace, war crimes, crimes against humanity), it would have to be indicated exactly which acts were covered, thus making the code more specific and more effective in political and legal terms. There was no point in having three categories of crimes or trying to classify a particular act under a particular heading unless there was a precise

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 . . . 1988*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

⁴ For the texts, see 2096th meeting, para. 2.