

Document:-
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Summary record of the 2097th meeting

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

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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(XLI)/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.

definition and an exact indication of what each category covered.

3. With regard to war crimes, the Special Rapporteur proposed two alternatives for draft article 13, the first of which was based on the definitions contained in article 2 common to the 1949 Geneva Conventions and in article 1, paragraph 4, of Additional Protocol I thereto. His own preference was for a solution combining the two alternatives: it would cover both international wars and armed conflicts connected with the liberation of peoples and would mention the violation of the laws or customs of war, in accordance with the approach adopted in paragraph (b) of the second alternative.

4. The formulation of an exhaustive list of war crimes was a very difficult task, but it was necessary to move in that direction. In particular, it would be unacceptable to adopt the technique of enumeration for certain categories of crimes but not for others. War crimes had to be dealt with in the same way as the other crimes. The draft code might be weakened if it referred only to the instruments in force. In article 13, it would be advisable to proceed in the same way as in paragraph 1 of article 14, which spelled out the various aspects of genocide, and as in the second alternative of paragraph 2, which listed the acts constituting *apartheid*.

5. Although draft article 14, on crimes against humanity, took the form he would like article 13 to have, it did not contain a general definition of what a crime against humanity was and such a definition was essential for the continuation of the Commission's work. The expression "crime against humanity" had to be defined before any attempt could be made to specify the content of that category of crimes.

6. In Russian as in English and French, the term "humanity" could mean both "mankind" and the moral concept whose antonym was "inhumanity". That terminological ambiguity clearly showed that there was a conceptual problem. In order to remove the ambiguity, it was necessary to go back to the sources. In his report (A/CN.4/419, para. 35), the Special Rapporteur cited the United Nations War Crimes Commission, which had been established in 1943 and had proposed to term such crimes "crimes against humanity" because they had original characteristics which set them apart, in certain aspects, from war crimes. Actually, it was necessary to go back even further to 1915, when, according to the Encyclopedia of Public International Law published by the Max Planck Institute, the expression "crime against humanity" had been used for the first time to describe what the Turkish Government had done to the Armenian people. What had the expression meant at that time? Wishing to intervene in order to put an end to the massacre of the Armenians, the Governments of Russia, France and Great Britain had published identical statements on 13 May 1915 in which the crimes in question had been characterized as "crimes against humanity" in the sense of "crimes against mankind". Originally, the Russian text had referred to "crimes against Christendom and civilization", thereby adding a religious nuance. France and Great Britain, whose empires included many Muslims, had wanted the definition to be broader and, on 24 May 1915, Russia had agreed to amend its text by replacing the words in question by "crimes against humanity and civilization". The idea of "mankind" had thus been accepted.

7. Thirty years later, when the Charter of the Nürnberg Tribunal⁵ had been drafted, the Russian expression had been changed, apparently as a result of an imperfect translation. The Tribunal's assessment of the crimes had thus been given a "humanitarian" slant.

8. The results of that confusion could still be seen today in Russian texts: usage was not clear, as shown even in official documents. In any event, "humanity" was taken to mean "mankind". The same contradictions were to be found in other languages, although they were perhaps not so glaring. For example, the report under consideration referred both to the concept of "inhuman acts" (*ibid.*, para. 43) and to the concept of harm to mankind as a whole (*ibid.*, paras. 47 *et seq.*).

9. An exchange of views was therefore essential in order to remove any ambiguity and ensure that the same terms were used in all languages. It was not enough to state that crimes such as genocide, *apartheid* and attacks against a cultural heritage or the environment were "inhuman", even if the acts in question were accompanied by atrocities. In fact, such acts might well not involve atrocities: a culture or an element of the environment could be wiped out and a population group could even be destroyed without massacres or violence, by sophisticated means. There had been examples of mass population movements that had taken place simply because of the prospect of a better future. There was also a risk of confusion because all war crimes were also inhuman. Chemical weapons and nuclear weapons were good illustrations: in their case, how could a distinction be made between a war crime and genocide on the basis of the criterion of "inhumanity"? It had been said that "every crime was inhuman" and nothing was more inhuman than a violation of the laws of war.

10. The Special Rapporteur had stated (*ibid.*, para. 40) that war crimes were committed only in time of war, whereas crimes against humanity could be committed either in time of war or in time of peace and could, moreover, be directed not only against a foreign population, but also against the civilian population of the State concerned. If that criterion was to be used, reference would have to be made to "crimes in time of war" and to "crimes in time of war or of peace".

11. In the 1954 draft code, the Commission had drawn a distinction between genocide and the "inhuman acts" such as murder, persecutions or deportation listed in article 2, paragraph (11). It was obvious that those inhuman acts were also present in genocide, which was therefore an "inhuman" act in itself. There was, however, a difference of principle and intention between genocide and war crimes and the Commission had identified that difference as early as 1954.

12. In addition to those terminological considerations, he wished to put forward a more specifically legal analysis. A crime against humanity was intended to bring about the partial or total elimination, as in the case of genocide, of part of mankind and it therefore had to be amenable to prosecution by all States, even if the internal legislation of the State concerned did not condemn it. That principle had precedents in international law: when pirates had been a threat to the interests of the world as a whole, piracy had been regarded as endangering all of human society. All

⁵ See 2096th meeting, footnote 7.

pirates had been declared outlaws in all countries and all vessels had been expected to fight against them. That concept was to be found even in article 14 of the 1958 Convention on the High Seas.⁶

13. It was on the basis of all those elements that the Commission should formulate a definition of crimes against humanity, taken in the sense of crimes against mankind. Since the expression included genocide and *apartheid*, it would have to be indicated that the harm suffered by mankind was the elimination of a population to ensure the supremacy of another group over a given territory. That approach would make it easier to distinguish between the various crimes covered by the topic.

14. The Special Rapporteur proposed to include "any serious and intentional harm to a vital human asset, such as the human environment" as a crime against humanity in paragraph 6 of article 14. In that connection, he pointed out that, under Soviet doctrine, the concept of international security covered ecological security. The inclusion of the proposed provision in the code would undoubtedly help to guarantee that ecological security. It might be advisable to treat such acts as a specific category of ecological crimes, but since they were, at the same time, harmful to the life and health of many population groups and even to mankind as a whole, they might also be regarded as crimes against humanity and be included in the general definition.

15. There were close links between genocide and *apartheid* and the acts referred to in paragraph 4 of article 14, namely 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. History showed that those acts were also present in genocide, of which they were either the means (colonization or deportation) or the end (changes to the demographic composition of a territory). Since, as shown in the Convention on the Prevention and Punishment of the Crime of Genocide, genocide did not necessarily occur on a foreign territory, but could also be committed within national borders, he proposed that paragraph 4 (c) should be amended to read either "changes to the demographic composition of a foreign territory or a territory situated within the borders of the State" or "changes to the demographic composition of the territory of a population group", in order to show clearly that the crime could also be committed within the borders of a State. With regard to deportation, expulsion or forcible transfer of populations from their territory, the judgment of the Nürnberg Tribunal contained clear provisions. It was necessary, however, to think about the distinction to be drawn between transfers of populations carried out under peace settlements and those carried out for the purpose of genocide.

16. Lastly, in the expression "attacks on property", the word "property" appeared to mean both "thing, object of a right of ownership" and "asset". In the case of crimes against humanity, however, the magnitude of the attacks had to be defined. In his report (*ibid.*, para. 48), the Special Rapporteur stated that it could be asked whether such attacks were of a sufficiently serious nature to be treated as crimes against humanity and that the existing instruments did not specifically mention attacks on property. The Special

Rapporteur further indicated (*ibid.*, para. 49) that judicial opinion had tended to favour the treatment of mass attacks on property as criminal, giving the example of the collective fine imposed on German Jews in 1938. The problem had been aptly identified in paragraph 5 of article 14, which provided that the mass destruction of property should be regarded as a crime against humanity. That same paragraph referred to inhuman acts committed against any population or against individuals "on social, political, racial, religious or cultural grounds". He himself was of the opinion that, instead of the term "grounds", which had subjective elements, it would be preferable to use the word "aims" or the word "purposes". Above all, reference had to be made to the links between attacks on property and genocide by taking account of what happened in practice when a people was subjected to genocide or *apartheid*, deprived of its land and dwellings and compelled to emigrate, when changes were made in its demographic composition and when a national group was thus eliminated.

17. He also thought that the destruction of historical monuments embodying the memory of an entire population should be regarded as a crime against humanity, in the same manner as *apartheid* and genocide. That might be a special category of crimes, namely crimes against civilization, but there were, in that case as well, close links between those crimes and the destruction of ethnic and religious groups: they were all crimes against humanity, in other words against all of mankind.

18. Mr. CALERO RODRIGUES noted that draft articles 13 and 14 as submitted by the Special Rapporteur in his seventh report (A/CN.4/419) were not altogether new, since they reproduced, with some changes, articles 13 and 12, respectively, proposed in 1986 in the fourth report.⁷

19. For draft article 13, to which he would confine his remarks, two alternatives were proposed, in both of which the adjective "serious" qualifying the word "violation" appeared between square brackets, although that had not been the case in draft article 13 as submitted in the fourth report. In his view, it was essential to retain that adjective to ensure that minor violations of the rules of armed conflict did not fall within the ambit of the code. In that connection, he would remind members that the Commission had taken a decision of principle on the fact that crimes against the peace and security of mankind should be the most serious offences. Also, the 1949 Geneva Conventions⁸ made a distinction between grave breaches and other acts contrary to their provisions, each category having its own legal consequences. Additional Protocol I⁹ to those Conventions, which repeated that distinction, further provided in article 85, paragraph 5, that "without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes".

20. The Special Rapporteur's examination of the gravity of war crimes and the distinction between war crimes and grave breaches (*ibid.*, paras. 15-27) was interesting, but inconclusive, and sometimes focused on points that did not touch upon the core of the problem. Was it necessary, for instance, to expand the arguments to prove that, while any

⁶ United Nations, *Treaty Series*, vol. 450, p. 11.

⁷ See 2096th meeting, footnote 4.

⁸ *Ibid.*, footnote 10.

⁹ *Ibid.*, footnote 11.

grave breach of humanitarian law constituted a war crime, the converse was not true? The question was rather whether a breach which was not grave could be regarded as a war crime. The Special Rapporteur, without developing the point, seemed to arrive at the right conclusion, since he stated (*ibid.*, para. 22) that it was "hard to imagine how acts which are not highly serious could be considered as crimes against the peace and security of mankind". He agreed with that view and favoured the deletion of the square brackets in article 13, whichever alternative was adopted.

21. While draft article 13 as submitted in 1986 had included an indicative list of acts constituting war crimes, the Special Rapporteur was content in his seventh report with a general definition, an approach he himself approved of. Even those members of the Commission who had expressed themselves at the present session in favour of a list admitted that it could not be exhaustive. A purely indicative list would, however, be of little use and in any event devoid of legal purpose, since it would not make it possible to achieve the degree of precision required in criminal law. He therefore trusted that, instead of embarking on an impossible task, the Commission would be content with a general definition.

22. Leaving aside some questions of drafting that could be settled by the Drafting Committee, he preferred the second of the two alternatives proposed for article 13. The traditional expression "laws or customs of war", which appeared in the first alternative, was no longer satisfactory, since, with developments in international law, the concept of "war" now extended to situations that were not wars in the traditional sense of the term. Consequently, that expression could now be understood only if it was accompanied by an interpretation that relied on a number of international instruments. The expression "armed conflict", on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the "rules of international law applicable in armed conflict" covered both conventional (written) law and customary (unwritten) law, as well as all types of armed conflict, to the extent that international law was applicable to them. If the second alternative were adopted, the need for the distinction referred to by Mr. Roucounas (2096th meeting) between international and non-international armed conflicts, though interesting, would disappear. In that event, if the rules of international law were applicable to an armed conflict, any conduct which seriously violated those rules constituted a war crime whether the conflict was international or not.

23. If the first alternative, under which war crimes were defined as violations of the "laws or customs of war", were adopted, the interpretation to be given to the term "war" would have to be specified. The explanations given in paragraph (b) of the first alternative were insufficient, however, and the references made would have to be extended to Additional Protocol II¹⁰ to the Geneva Conventions and possibly also to article 3 common to the four Conventions, since it was there that the provisions relating to non-international conflicts were to be found. Protocol I related to the protection of victims of international armed conflicts or, in other words, to the situations referred to in article 2

common to the Geneva Conventions, but also to armed conflicts in which peoples were fighting against colonial domination and alien occupation or against racist régimes in the exercise of their right to self-determination (art. 1, para. 4)—conflicts which had been "internationalized" by that Protocol. Protocol II, which related to the protection of victims of non-international armed conflicts, developed and supplemented article 3 common to the Geneva Conventions and applied to armed conflicts that took place in the territory of a contracting party, provided that such conflicts involved the armed forces of that party and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (art. 1, para. 1). It did not, however, apply to situations of internal disturbances, such as riots and acts of violence, which were not considered to be armed conflicts (art. 1, para. 2).

24. If, however, the definition proposed in the second alternative were adopted, there would be no need for an explanation. Even paragraph (b) of that alternative did not seem necessary, since it was self-evident that the "rules of international law applicable in armed conflict" were those that the parties must respect either because they had expressly agreed to them or because those rules were part of general international law.

25. For the reasons he had explained, he was in favour of referring the second alternative of article 13 to the Drafting Committee.

26. Mr. PAWLAK said that, since war and aggression had been outlawed by the Charter of the United Nations, which prohibited the threat or use of force against the territorial integrity or political independence of any State (art. 2, para. 4) except in the case of legitimate individual or collective self-defence (art. 51), it might now seem that the rules governing the conduct of war were out of place and that the Commission's efforts to define war crimes were of purely academic interest. That was certainly not the case, however, for it was an acknowledged fact that the prohibition of force did not suffice to prevent war. Once a war started, therefore, it was important that it should be conducted in conformity with the laws of war, the most important provisions of which were those relating to humanitarian questions. It was also important that those rules should be the same in the case of conflicts between States and in the case of civil war, since the means employed in both cases were identical or almost identical, and that they should apply equally to all the parties to the conflict, in other words to the aggressor and to its victims alike.

27. Furthermore, in defining war crimes, account should be taken of the situation in the contemporary world where wars between States increasingly gave way to local or regional conflicts involving a combination of internal and external military struggles, as in the Indochinese wars or, again, the conflicts in some regions of Africa and Central America. The term "armed conflict", which was broader than the term "war", was therefore preferable to the latter.

28. As one who favoured a general and broad definition of war crimes, covering crimes committed in all armed conflicts within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto, he preferred the second alternative of draft article 13 submitted by the

¹⁰ *Ibid.*, footnote 17.

Special Rapporteur, subject to some drafting improvements which the Drafting Committee could deal with. He would, however, draw the Special Rapporteur's attention to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which the Special Rapporteur had not quoted in his seventh report (A/CN.4/419) and which might usefully be consulted in order to solve certain problems of definition.

29. It was important to bear in mind that the parties to an armed conflict did not have the right to use all means available. Under the famous Martens clause (*ibid.*, para. 5), even in the absence of specific provisions, civilians and combatants remained under the protection and authority of the principles of international law, as stated in article 1, paragraph 2, of Additional Protocol I. Also, the means used in an armed conflict should be confined to the main purpose of the war, which was to defeat the enemy, from which it was evident that the populations of the parties to the conflict should be especially protected and that crimes against civilians were the most serious.

30. In conclusion, he was in favour of using the term "armed conflict", which should be interpreted to include internal conflicts, but not internal terrorism or brigandage. As to the gravity of war crimes, he did not consider it necessary to use the adjective "serious" to qualify violations of the laws or customs of war or the rules applicable in armed conflict: it would be up to the courts to determine the gravity of the crimes committed.

31. Turning to draft article 14, on crimes against humanity, he said that in many respects he shared Mr. Barsegov's views on the meaning of the term "humanity". He also supported the general approach to the subject taken by the Special Rapporteur in his seventh report, as well as the idea expressed in paragraph 32 thereof and further developed in paragraphs 43-46 and 50. For the reasons explained by the Special Rapporteur and in the light of Poland's experience as a country occupied for almost six years by Nazi Germany, he took the view that the concept of inhuman acts could apply to offences against the person and to offences against property. The world must never again witness the humiliations, confiscations and destruction that had been visited upon Poland.

32. Of the two alternatives proposed for paragraph 2, he preferred the second. "Forced labour", as referred to in paragraph 3, could be made the subject of a separate paragraph.

33. He had two comments to make with regard to paragraph 4. First, from the legal point of view, the expression "their territory" was vague: did it mean the "occupied territory" or the "territory of their State or country", or indeed the "land" of those populations? He would be in favour of using the term "occupied territory". Secondly, the example given by Mr. Tomuschat (2096th meeting) in support of the expression "expulsion of populations" was out of place. If he had understood correctly, Mr. Tomuschat had referred to "the mass expulsion of the German population from the territories of the East" as a violation of the 1907 Hague Convention. In fact, however, the Potsdam Agreement signed on 2 August 1945 by Stalin, Truman and Attlee had referred not to "mass expulsion" or to the "territories of the East", but to "the transfer . . . of German populations, or elements thereof, remaining in Poland, Czechoslovakia

and Hungary". In the case of Poland, the population transfer had been part of a peaceful solution to the territorial question arising out of the decisions taken by the Allies with regard to the delimitation of the German-Polish border. Under the Potsdam Agreement and pursuant to the decisions taken by the Allies by agreement with the Polish authorities, the entire German population of Poland had been systematically transferred to the Soviet and British Zones. In 1946, 1,632,000 Germans had left Poland; in 1947, 538,000; and, in 1948, 42,000. That population transfer, though painful, had been carried out under an international agreement and could therefore not be regarded as a crime within the meaning of the draft code.

34. Mr. BOUTROS-GHALI said that, of the two alternatives proposed for paragraph 2 of draft article 14, he preferred the second, which was in keeping with what he had said at the previous meeting with regard to the persuasive function of an illustrative list. He nevertheless thought that the words in square brackets, namely "as practised in southern Africa", should be deleted for two reasons. The first was that *apartheid* might one day disappear from that part of the world. The second was that there was a tribal or customary "third-world *apartheid*", which differed from institutionalized *apartheid* and in which one ethnic group traditionally regarded itself as being superior to another and arrogated to itself rights over the other group on that basis. That form of *apartheid* became institutional *apartheid* when the "inferior" group was prevented from participating in political life or was subjected to a *numerus clausus* for the purpose of enrolment in schools and universities or to restrictions on its economic activity—to say nothing of cases of outright physical elimination. The constitutions of such countries no doubt proclaimed the equality of all citizens and the provisions of their legislation were probably impeccable: the gravity of some of the situations which had occurred in the past year none the less justified the concern he had expressed.

35. Those considerations prompted him to ask two questions. Why was so little importance attached to "customary *apartheid*"? And what suggestion could be made to the Special Rapporteur so that he would take account of that phenomenon?

36. He believed that the answer to the first question might perhaps lie in the justified indignation occasioned by the *apartheid* practised in South Africa, which differentiated between Whites, Blacks and Coloureds (unlike customary *apartheid*, which was based on time-honoured customs and established distinctions between the members of the same race); and in the fear that, if the countries which practised customary *apartheid* and were often the first to denounce South Africa were singled out, the struggle against South African *apartheid* might be weakened.

37. With regard to the second question, he said that, although the second alternative of paragraph 2 proposed by the Special Rapporteur was very explicit, it did not draw attention to *apartheid's* customary substructure. He therefore suggested that the scope of the second alternative should be expanded by including in it a reference to the tribal customs or customary law which lent legitimacy to certain practices. Even if *apartheid* was successfully eliminated in South Africa, there were no grounds for hoping that it would not continue in other forms elsewhere.

38. Mr. MAHIU, referring to draft article 13, said that the choice between a general definition and a list of war crimes posed a tricky problem. A general definition would allow the code to be adapted to future developments and would obviate the need for a discussion of the crimes to be included in a list. He was nevertheless reluctant to endorse that solution. As an argument in its favour, it had been stated that the topic under consideration was subject to change and that new conventions might categorize as war crimes acts which were not currently so regarded. That argument was not decisive. It would in fact be sufficient to formulate article 13 in such a way as to leave the door open to future developments. That was more a problem of drafting than of principle, for, if there was a new convention prohibiting a particular type of conduct, violations of that convention would fall within the scope of the code, since the second alternative proposed by the Special Rapporteur referred to "any violation of the rules of international law applicable in armed conflict". That was thus not a decisive argument against drawing up a list. It might, however, be difficult to agree on a list of war crimes. Would an indicative list be enough in criminal law or must all the crimes be enumerated? It would be best to draw up an exhaustive list, but unfortunately such an exercise did not seem feasible.

39. In those circumstances, why not revert to the method of indicative listing and use the words "in particular"? That had been the Commission's approach in 1950 when it had had the task of codifying the Nürnberg Principles:¹¹ according to Principle VI (b), war crimes were "Violations of the laws or customs of war which include, but are not limited to . . .". The Commission could therefore list the crimes which were not controversial but leave the list open, as it had in paragraph 4 of article 12 (Aggression),¹² provisionally adopted at the previous session, which read: "[In particular] any of the following acts . . . constitutes an act of aggression . . .". The presence of square brackets in that provision no doubt reflected considerations of a different kind: in article 12, the brackets could be explained by the fact that the General Assembly had already adopted the Definition of Aggression,¹³ that it was for other bodies, such as the Security Council, to supplement that Definition and that there was no question of giving the judge the authority to characterize as aggression acts other than those listed in the article. The fact remained that, in that case, the Commission had agreed to entrust the judge with the task of characterizing certain acts or types of conduct in accordance with the conventions in force. Perhaps the Drafting Committee should decide what the best approach would be for article 13, but, in his view, the possibility of a list was not without legal justification.

40. Should account be taken of all violations of the rules governing armed conflicts or only of the most serious ones? He inclined towards the latter proposition, which was based on a distinction between war crimes, grave breaches and serious violations that gave rise both to a problem of terminology and to a problem of substance. In his seventh report (A/CN.4/419, paras. 25-26), when referring to the

links between war crimes and grave breaches, the Special Rapporteur rightly stated that the concept of a war crime was broader and included grave breaches. However, the concepts of violation and breach, which the Special Rapporteur analysed, were not always very clear, even if one referred to the 1949 Geneva Conventions and the Additional Protocols thereto. The two concepts were often used synonymously in those instruments and there might well be only one article in Additional Protocol I¹⁴ in which the two terms could be said to be different: that was article 90, paragraph 2 (c) (i), which related to the International Fact-Finding Commission and stated that that body was competent to "inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol". However, the question was whether the conjunction "or" introduced a distinction or reflected synonymy. The matter was open to discussion and the commentaries did not provide any clarification. They included only one reference to a publicist, Erich Kussbach, the author of a study on the International Fact-Finding Commission, who had drawn the following distinction: a serious violation would entail responsibility on the part of a party to the conflict, but would not entail the international responsibility of the individual, which would arise only as a result of a grave breach.¹⁵ Characterization as a serious violation or as a grave breach would then be decisive.

41. Those were matters to be considered by the Special Rapporteur and by the other members of the Commission, who would be called upon to adopt a clear-cut position. He personally would not be opposed to a general definition of war crimes, followed by a non-exhaustive list of acts and conduct considered to be war crimes, which would be introduced by the words "in particular" or by the formula "which include, but are not limited to", as in the above-mentioned Principle VI (b) of the Nürnberg Principles. It seemed to him that, if the Commission retained the criterion of gravity to determine whether certain acts or types of conduct constituted war crimes and if it wished to set those crimes apart by not taking account of misdemeanours and minor offences, it would, in practical terms, have to take that option to its logical conclusion by drawing up a list of those crimes, even a non-exhaustive one. Moreover, as the Special Rapporteur had pointed out, Additional Protocol I contained a list—which was not very long and which was limitative—of acts or conduct against certain persons or property which were considered to be grave breaches. That did not mean that the code must confine itself to the acts and conduct listed in the 1949 Geneva Conventions and in Additional Protocol I, although such acts and conduct might serve as a basis for a non-exhaustive list of acts and conduct to be characterized as war crimes. A further argument in favour of a list stemming from the concern for harmonization was that article 12, already provisionally adopted by the Commission, contained a non-exhaustive list of acts regarded as acts of aggression and that the text proposed by the Special Rapporteur for article 14 also contained a list—apparently limitative—of acts and conduct regarded as being crimes against humanity.

¹¹ *Ibid.*, footnote 14.

¹² *Yearbook . . . 1988*, vol. II (Part Two), p. 72.

¹³ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁴ See 2096th meeting, footnote 11.

¹⁵ E. Kussbach, "Commission internationale d'établissement des faits en droit international humanitaire", *The Military Law and Law of War Review* (Brussels), vol. XX, Nos. 1-2 (1981), p. 101.

42. Turning to the question of the terms to be used in draft article 13, he noted that the Special Rapporteur was not certain whether the expression “laws or customs of war” was appropriate and that, so far, the members of the Commission were divided on that point. The expression was, of course, commonly used and was to be found in many international conventions and in the internal law of many countries. However, a point to be borne in mind was that most of those texts pre-dated Additional Protocol I of 1977, which used the expression “rules of international law applicable in armed conflict” (art. 2 (b)). That had become the standard formula. It was the one that should be used now, especially since most of the law of armed conflict had been codified in a variety of conventions and it would be advisable to rely on treaty law, Additional Protocol I representing the most recent consensus among States in that field. There seemed little point in reopening the debate on that point.

43. For all those reasons, he believed that the second alternative of draft article 13 should be referred to the Drafting Committee, which should be requested to introduce the following amendments: in paragraph (a), the general definition of war crimes should be followed by a list, possibly a non-exhaustive one, of the main acts and conduct considered to be war crimes, based on the 1949 Geneva Conventions and Additional Protocol I; paragraph (b) should be retained, perhaps with a few drafting changes; and a new paragraph (c) should be added containing a definition of the term “armed conflict”, which would be based in substance on paragraph (b) of the first alternative and could read: “The term ‘armed conflict’ is understood to have the meaning defined in the Geneva Conventions . . .”, so that the two important expressions—“rules of international law applicable in armed conflict” and “armed conflict”—would be clearly defined.

44. With regard to draft article 14, he said that, since he had already made general comments on the substance of that provision at the thirty-eighth session, in 1986, he would refer only to the acts which the Special Rapporteur listed and proposed to characterize as crimes against humanity.

45. He had been persuaded by the Special Rapporteur’s explanations and thus agreed that the crime of genocide should be listed first, its definition being taken from the Convention on the Prevention and Punishment of the Crime of Genocide.

46. As for paragraph 2, he agreed with the point made by Mr. Boutros-Ghali that *apartheid* should not be restricted to the policies and practices prevailing in South Africa, since other forms of *apartheid* might already exist or might exist in the future. Moreover, the second alternative proposed by the Special Rapporteur, which reproduced the definition in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, contained a number of elements that could apply both to *apartheid* as practised in South Africa and to the forms of *apartheid* that existed or might exist in other societies or in other States. The words in square brackets in that alternative should therefore be deleted. There was, of course, a drafting problem, since a definition of *apartheid* already existed in an international instrument; it was for the Commission to decide whether and how it could be improved.

47. He had some doubts about the words “Slavery and all other forms of bondage, including forced labour”, in paragraph 3, because the terms “bondage” and “forced labour” were imprecise and could apply to acts which would not necessarily have a place in the draft code. The wording of that paragraph should therefore be revised with a view to making it more restrictive.

48. In paragraph 4, the Special Rapporteur had rightly taken account of the discussions held in the Commission and in the Sixth Committee of the General Assembly and had attempted to incorporate in the draft code certain extortionate acts that were only too likely to occur. It might be possible to combine in a single provision the acts and conduct listed in subparagraphs (a), (b) and (c); that was a problem that could be referred to the Drafting Committee.

49. With regard to paragraph 5, he noted that the Special Rapporteur had basically reproduced the corresponding provision of the 1954 draft code (art. 2, para. (11)). He welcomed the inclusion of a new element, namely the “mass destruction of their property”.

50. The proposed text of paragraph 6 was an improvement on the corresponding text submitted in 1986¹⁶ because it introduced the crucial idea of intent and it was important that a distinction should be made between accidental and deliberate serious harm to the environment. The provision should, however, be drafted more vigorously and precisely and should be based even more closely on the wording of draft article 19 of part 1 of the draft articles on State responsibility.¹⁷ It should refer expressly only to the human environment as the common heritage of mankind, since that was, after all, the point at issue.

51. In conclusion, he proposed that draft articles 13 and 14 should be referred to the Drafting Committee.

52. Mr. ARANGIO-RUIZ, noting that several members of the Commission who had already spoken on draft article 13 were in favour of the idea of introducing the concept of “gravity”, said that he wished to expand on the brief comments he had made on that point at the previous meeting.

53. The idea was quite commendable and he could appreciate that, in principle, the code, which was meant to deal with crimes against the peace and security of mankind, should cover only the most serious ones. It should, however, be pointed out that the Commission had adopted three categories of crimes (crimes against peace, war crimes and crimes against humanity), as referred to in the 1945 London Agreement¹⁸ which had served as the basis for the war crimes trials held at Nürnberg and elsewhere, and that the concept of gravity was not to be found in the international law which had, for a century or more, governed the punishment of war crimes. Under the rules of international law in force, a belligerent State which had apprehended a member of the enemy’s armed forces for a violation of some rule of the laws of war—whether on land, at sea or in the air—was entitled to try him, even if the violation was a minor one; the punishment would, of course, be proportionate to the violation committed. He was not

¹⁶ Paragraph 4 of draft article 12 as submitted in the fourth report (see 2096th meeting, footnote 4).

¹⁷ See 2096th meeting, footnote 19.

¹⁸ *Ibid.*, footnote 7.

necessarily arguing that minor violations should be included in the code, but he did think that the Commission, and the Drafting Committee in particular, should avoid undermining the effect, if not the existence, of the rules of the law of war, which were part of general international law, especially if the word "war" was taken to apply to all kinds of hostilities.

54. The CHAIRMAN said that, although he understood Mr. Arangio-Ruiz's concern, no one had proposed any change in the usual meaning of the term "war crime" or in the régime applicable to war crimes. The Commission was dealing only with "war crimes" within the meaning of the draft code.

55. Mr. KOROMA said that he agreed with Mr. Arangio-Ruiz. It was, of course, understood that the draft code would generally cover only the most serious acts. In the case of war crimes in particular, however, a régime applicable to them existed and there was no need to know whether a violation of the laws of war was serious to determine whether or not it constituted a war crime. The element of gravity could, if necessary, come into play at the stage of characterization, but certainly not in the definition. Moreover, the inclusion of the concept of gravity in the definition would mean introducing some degree of subjectivity in the application of the code by making the prosecutor—the belligerent State, in the present case—the judge. Although the prosecutor would institute proceedings for a violation of the laws of war, the judge would determine how serious the violation had been.

56. He supported Mr. Barsegov's analysis of the expression "crime against humanity", which was to be understood in the sense of "a crime against the human race", a crime against values that were shared by all of mankind.

57. Lastly, he agreed with the proposal originally made by Mr. Roucouas (2096th meeting) that the definition of war crimes in draft article 13 should be supplemented by an indicative list.

58. Mr. CALERO RODRIGUES drew Mr. Koroma's attention to a case in which a violation of no particular seriousness might be considered a war crime within the meaning of the draft code. Articles 26 and 27 of Additional Protocol I to the 1949 Geneva Conventions contained a definition of the circumstances in which medical aircraft operated and, according to article 28, paragraph 4: "While carrying out the flights referred to in articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked." If the commander of a medical aircraft were to ignore those rules and decide to go in search of the wounded, sick or shipwrecked, would it be said that he had committed a war crime?

59. Mr. ARANGIO-RUIZ said that his concern was not whether the case cited by Mr. Calero Rodrigues should or should not be covered by the draft code—although he was inclined to say that it should—but that, if minor violations were excluded from the code, the Commission might be concealing the fact that such violations were none the less infringements of the laws of war and that they were as such covered by existing international law. It would be for the Drafting Committee to deal with that problem and remove any ambiguity.

The meeting rose at 1 p.m.

2098th MEETING

Tuesday, 9 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, 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(XLI)/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. REUTER, commenting on draft article 13, said he preferred the second alternative and thought that the necessary gravity of the acts to be classified as war crimes must be stated in very clear terms, indeed more clearly perhaps than in either of the alternatives proposed by the Special Rapporteur. He was, however, absolutely opposed to the idea of including in the draft code a list of acts constituting war crimes.

2. The Commission was dealing with very serious issues, which raised the question as to what its role was. Some of the draft articles were still unacceptable and could endanger the entire draft. The Commission's task was not merely to devise some functional mechanism for the prosecution of war crimes, such as an international criminal court. Nor was it to define the circumstances in which States were bound either to try or to extradite offenders. (In that connection, he would point out that the attitude of Governments towards the idea of an international criminal jurisdiction was perhaps more flexible than might appear.) For the majority of Governments, the Commission's task was a broader one, namely to give attention to the substantive rules relating to war crimes and to define new war crimes.

3. Did the Commission intend, in the draft code, to impose on States the obligation to accept Additional Protocols I and II to the 1949 Geneva Conventions? According to

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

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

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

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