Document:-

A/CN.4/SR.2099

Summary record of the 2099th 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**

international community should decide to take more effective joint measures to eradicate such practices there.

33. While he had no objection to the inclusion of slavery (para. 3) as a crime against humanity, it was important to clarify the relevant forms of slavery, in contradistinction to the form that was a crime under the ordinary law of many countries. He, too, agreed that "forced labour" was a very broad term and required clarification in that context.

34. Again, he had no objection to paragraph 4, except that, in his view, its three subparagraphs were couched in unduly general terms and required drafting improvements.

35. As to paragraph 5, "inhuman acts" should indeed comprise offences against the person and offences against property. The Special Rapporteur had been right to include destruction of property as a crime against humanity and had also properly emphasized the need to conserve property deemed to be part of the heritage of mankind. In that connection, it should be borne in mind that the cultural heritage of one people or nation itself formed an integral part of the cultural heritage of mankind as a whole. Accordingly, in addition to the general reference to property, paragraph 5 should also make a specific reference to property as a cultural heritage. Furthermore, as the Special Rapporteur had pointed out, were it not for the element of motivation, the acts referred to in that paragraph might be indistinguishable from ordinary crimes under national criminal codes.

36. Lastly, he agreed that paragraph 6 should be brought more into line with paragraph 3 (*d*) of article 19 of part 1 of the draft articles on State responsibility.[14]

37. The CHAIRMAN proposed that the Commission should adjourn to allow the Drafting Committee to meet.

It was so agreed.

The meeting rose at 11.30 a.m.

[14] *Ibid.*, footnote 19.

2099th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, 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 Mankind[1] (*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. BARBOZA congratulated the Special Rapporteur on the quality of his seventh report (A/CN.4/419) and his introductory statement.

2. Referring to draft article 13, he pointed out that the second alternative of the corresponding article submitted by the Special Rapporteur in 1986[5] had contained the usual definition of war crimes accompanied by a list of acts constituting war crimes, namely: (*a*) all the offences mentioned in the 1949 Geneva Conventions[6] and in Additional Protocol I[7] thereto, in other words "grave breaches"; (*b*) other acts, in particular the use of certain weapons, which were not the aforementioned "grave breaches", but which nevertheless constituted war crimes. In addition to those two categories, there was a third category of war crimes, but they were not serious enough to be included in the draft code, as the Special Rapporteur pointed out (*ibid.*, para. 24).

3. Neither of the two alternatives proposed at the present session contained a list of war crimes and the Special Rapporteur explained why in his report (*ibid.*, para. 4); hence the Martens clause favoured by ICRC (*ibid.*, paras. 5-6), which had the advantage of adapting better to constantly changing realities (*ibid.*, para. 9). Several members of the Commission had, however, already expressed their preference for a list, mainly for the sake of the clarity and precision called for by a liberal conception of criminal law, especially the principle *nullum crimen sine lege, nulla poena sine lege*. It was central to those members' thinking that a code of crimes against the peace and security of mankind should deal only with grave breaches. The other members of the Commission had not rejected that argument, but were prepared to leave it to the judge to determine the seriousness of the act in question. In fact, the two groups of members did not attach the same meaning to the term "grave", and that misunderstanding would have to be resolved.

4. A distinction had to be made between grave breaches and serious violations. The former were serious because the act in itself was inherently so: for example, homicide was a more serious offence than embezzlement because it was a more serious matter to kill someone than to steal his

[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.

[5] See 2096th meeting, footnote 4.

[6] *Ibid.*, footnote 10.

[7] *Ibid.*, footnote 11.

money. That was quite naturally reflected in the applicable penalties: in internal law, the scale of penalties provided for in penal codes gave an idea of the seriousness of offences. However, a *violation* could be considered more or less serious in relation to one and the same criminal *breach* depending on whether the circumstances in which it had taken place were aggravating or mitigating. In such a case, the task of assessing the "seriousness" of the act was essentially a judicial function and the judge had to rely exclusively on the facts of the case. In general, the judge had the power to bring the penalty into line with those facts: the Penal Code of Argentina, for example, punished ordinary homicide with a term of imprisonment ranging from 8 to 25 years, and the judge could adjust the punishment within those limits.

5. It was thus the gravity of the breach and not of the violation that should concern the Commission: if the code was to cover only grave breaches, the Commission, in its legislative capacity, had to rule on the question of the gravity of the breach and could not leave that task to the discretion of the courts without departing considerably from the liberal principles of criminal law. It therefore had to draw a distinction between grave breaches and those which were less grave and, to that end, it had to draw up a list of breaches that were grave enough to be characterized as war crimes. Mr. Arangio-Ruiz's concern (2097th meeting) that leaving out less grave breaches might endanger the existing rules of the law of war could be met by including in the draft code a clause stating that its provisions were without prejudice to the punishment of breaches not referred to therein. That solution was, of course, contrary to the idea of an instrument which would keep pace with developments in the law of war and which was not static, as indicated by the Special Rapporteur (A/CN.4/419, para. 9). But if developments in the law of war did occur and if new reprehensible acts or types of conduct emerged, the solution would be to define new breaches by the usual method of treaty or custom, and those breaches would then be punishable as war crimes not included in the code.

6. The other possibility would obviously be not to take account of the concept of the gravity of breaches and to include war crimes wholesale in the code by adopting the first alternative of draft article 13 without the word "serious", which was now between square brackets. The judge would thus be in a position to punish any of the violations that could constitute a war crime. That was, moreover, the "real" Martens clause, which made no distinction between war crimes that were serious and those that were not.

7. His own preference was for a list, without any general definition. He could not accept a definition such as that proposed in either of the two alternatives, followed by a merely *indicative* list, for that would confer upon the judge a power that did not belong to him to determine the gravity of those breaches that were not listed in the code. In the case of article 12 (Aggression),[8] the Commission had provisionally adopted a text consisting of a definition and an illustrative list of acts and conduct constituting acts of aggression, but that case was different: the definition of the crime of aggression in that text was not simply a *renvoi*; it was a genuine general definition, followed by examples of acts or conduct. In the case of article 13, however, the Special Rapporteur was simply proposing to define a war crime as any violation of the laws or customs of war: that referred to another concept which was not itself defined and the problem of determining the gravity of the breach remained.

8. The present title of draft article 13—"War crimes"—could be retained, but, in the text, the term "war" should be replaced by the expression "armed conflict" in order to cover every type of conflict to which the code was to apply.

9. It must be admitted that, in the context of crimes against the peace and security of mankind, war crimes had their own particular characteristics and, in that connection, it had always been difficult for him to give uniform content to the topic under the title "peace and security", as he had noted at the Commission's thirty-eighth session.[9] One of the particular characteristics of war crimes was that their inclusion in the code could not be justified on the grounds of the defence of peace, since, for a war crime to be committed, there had to be a state of war and not a state of peace. It was even open to question whether the acts and conduct covered by the concept of war crimes really affected the security of mankind.

10. Referring to draft article 14, he said that, in the case of crimes against humanity as in the case of war crimes, the concept of the "peace and security of mankind" as the object of the protection to be ensured by the code was questionable. In that case as well, it had to be determined what was meant by the expression "crimes against humanity" and the first question that arose was whether that expression did not go beyond the limits of the general subject-matter of the code. The term "humanity" appeared to be much broader than the expression "security of mankind", especially if "humanity" was taken in the sense not only of mankind, but also of the "humanitarian" sentiment on which the inclusion of "inhuman acts" in paragraph 5 seemed to have been based. Mr. Barsegov (2097th meeting) seemed to have demonstrated that, historically, the term "humanity" had been interpreted exclusively as a synonym of "mankind". In any event, it was obvious that the term "humanity" had a much broader connotation than the expression "security of mankind", since not everything that affected mankind necessarily endangered its security. It was thus possible to conclude that the title of the present topic did not correspond exactly to the content of the crimes meant to be included in the code. The reason for that lack of consistency, as he had pointed out at the thirty-eighth session, "lay in history, which had handed down to the Commission a form of wording taken from a report addressed by Judge Francis Biddle to President Truman . . . and perhaps more in keeping with the thinking of the time than with logical reasoning".[10] At that time, he had questioned whether the Commission should not try to find another title for the draft code. Now, however, he thought that efforts should be made to work out a formal definition of the expression "peace and security of mankind". That definition, formulated on a sound legal basis, would be included in draft article 10, entitled "Categories of offences against the peace and security of mankind", submitted by

[8] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

[9] *Yearbook . . . 1986*, vol. I, p. 163, 1967th meeting, para. 64.

[10] *Ibid.*

the Special Rapporteur in his fourth report, in 1986,[11] and would in fact justify the existence of that article.

11. Analysing the acts and conduct which the Special Rapporteur proposed to characterize as crimes against humanity in article 14, he said that he had no comments so far as genocide (para. 1) was concerned. With regard to *apartheid* (para. 2), he expressed his preference for the second alternative, with the deletion of words between square brackets, namely "as practised in southern Africa", so as to give the crime a universal character. As to forced labour (para. 3), he considered that account should be taken of the remarks made by Mr. Tomuschat (2096th meeting), Mr. Mahiou (2097th meeting) and Mr. Sepúlveda Gutiérrez (2098th meeting), as well as of the rules established by ILO in the matter.

12. With regard to paragraph 4, he commended the Special Rapporteur for having followed the suggestions of certain members of the Commission, including himself, by incorporating provisions of that kind in the draft code. The world was still witnessing the consequences and suffering caused—sometimes for centuries—by the expulsion of populations, the establishment of settlers in occupied territories and changes to the demographic composition of a particular territory. Of all the acts and conduct of that kind, he would cite only one example, but one that wounded the sentiments of his country, namely that involving the Falkland Islands (Malvinas), where an Argentine population had been expelled under threat from a British gunboat and replaced by British settlers, still protected now by a powerful military force.

13. While the inclusion of inhuman acts in the draft code could no doubt be justified on many grounds, it would be called into question if the concept of humanity was not defined. If "humanity" denoted solely mankind, and not humanitarian sentiment, there might be doubt as to whether acts of the kind referred to in paragraph 5 really affected the security of mankind. That was an additional argument in favour of the Commission re-examining either the title of the draft or its precise scope.

14. Lastly, he agreed with the inclusion of the provision in paragraph 6, although, in his view, it was too vague. It was necessary to know precisely what the Commission wanted to protect thereby. In the case of the human environment, the position was clear, but to determine what constituted a "vital human asset" was not part of the judicial function. It was therefore for the Commission to indicate those vital human assets harm to which would constitute a crime.

15. Mr. OGISO, congratulating the Special Rapporteur on his seventh report (A/CN.4/419), said that he would confine his comments to draft article 13, but reserved the right to speak later on draft article 14.

16. In his view, the definition of war crimes should contain three elements: the rules of humanitarian law, as defined in the 1949 Geneva Conventions and the Additional Protocols thereto—which would enable both wars and armed conflicts to be covered; the customs of war—a term of art used in a number of conventions and military codes; and the rules set forth in other international agreements prohibiting the use of certain weapons, in particular weapons of mass destruction. He noted, however, that the first alternative of article 13 proposed by the Special Rapporteur made no specific mention of the international instruments prohibiting the use of certain weapons and that, in the second alternative, the customs of war were only implied in the expression "principles and rules of international law". He therefore considered that the two alternatives should be reformulated in the manner he had indicated.

17. As to the question of the seriousness of the violations that constituted a war crime, he recognized the need to qualify the acts referred to on that basis. The Commission had already discussed the question and had apparently wished to limit the characterization of crimes against the peace and security of mankind to the most serious violations, other violations of the rules of international law or of the customs of war and particularly violations of a technical nature being punishable by national military courts. If, however, the Special Rapporteur considered the word "grave" inappropriate because of the connotations it had in Additional Protocol I[12] to the Geneva Conventions, the word "serious" could be used.

18. He nevertheless had a reservation to make. If it was for the judge to determine the seriousness of the violation, the judgment would differ substantially depending on whether the court was a national or an international one. An international court, being less influenced by emotional elements, would certainly be in a better position to arrive at an objective decision. That question should be discussed at a future session.

19. As to a possible list of war crimes, he concurred with the Special Rapporteur: it would be inadvisable to draw up such a list, even one of a non-exhaustive nature, if only for practical reasons. In the first place, it was difficult to see how the code could refer to all the important principles of the Geneva Conventions and the Additional Protocols thereto. Secondly, to enumerate the "customs of war" would require special expertise. Lastly, irrespective of whether the Geneva Conventions or other international instruments were concerned, it must be remembered that a considerable number of States parties had made reservations or interpretative declarations when signing. In the circumstances, there was no certainty that the rules of those conventions could be transposed to the draft code in simple and clear-cut terms. If the majority of members of the Commission were in favour of the list, however, he trusted that the Special Rapporteur would submit a concrete enumeration, perhaps of a non-exhaustive nature, on the basis of which the Commission could consider what acts should constitute crimes. He reserved the right to speak again on the list itself.

20. Mr. FRANCIS, referring to draft article 13, said that he preferred the second alternative submitted by the Special Rapporteur. In the first place, paragraph (*a*) of that alternative specified that the violation had to be "serious" to constitute a war crime, and that was consistent with the decision already taken by the Commission and approved by the General Assembly. Secondly, paragraph (*b*) was broader in scope than the corresponding paragraph of the first alternative, since it covered not only the international agreements by which the parties to the conflict were bound,

[11] *Yearbook . . . 1986*, vol. II (Part One), p. 83, document A/CN.4/398.

[12] See 2096th meeting, footnote 11.

but also the generally recognized principles and rules of international law applicable to armed conflicts. That wording had the advantage of referring to the important body of law which existed in the matter and, in particular—without mentioning them expressly—to the 1949 Geneva Conventions, and that would allow for more latitude in the application of the code.

21. Although the second alternative was therefore preferable, paragraph (*b*) would more appropriately be placed in another part of the draft code. Its content could, for instance, be transferred to the traditional article on definitions. Also, as Mr. Mahiou (2097th meeting) had recommended, the last phrase could be divided and a separate definition given of what was to be understood by the expression "armed conflict".

22. The second alternative would, however, still be incomplete if it were not accompanied by a non-exhaustive list of war crimes, as several speakers had already said. In his seventh report (A/CN.4/419, paras. 4-10), the Special Rapporteur, relying on instruments, doctrine and publicists, had stated the reasons which, in his view, tended to discourage any attempt at such an undertaking. Yet at least two factors militated in favour of such a solution. In the first place, it was possible that the application of the code would be a matter not simply for an international body, but also, and above all, for universal jurisdiction. It was unlikely, however, that national courts would have many specialists in international law and, if a war crime was not defined in very specific terms, the application of the code would not proceed smoothly. Also, as history showed, violations of the law of war were not committed only by armies: it sufficed to call to mind current events in the Middle East, Latin America and Asia, where not only soldiers, but also civilians and even children were involved. A list would therefore have the advantage of making everyone realize, and in an explicit manner, what was and was not criminal. For those reasons, he considered that, in so far as possible, article 13 should contain a non-exhaustive list of war crimes.

23. Turning to the crucial question of the "gravity" of the violations that constituted war crimes, he noted that such crimes were always "serious" ones, at any rate in subjective terms. If the code was to have real meaning, however, it would have to recognize several degrees of gravity, as the Special Rapporteur advised. A distinction had to be made between a soldier withholding a meal from a prisoner and a soldier subjecting a prisoner to torture. Many other examples could be cited to illustrate the possible range of violations: the need to characterize war crimes by reference to their gravity was dictated by their very number.

24. Commenting on draft article 14, and in particular on the question of *apartheid*, he said that, in defining that crime, the phrase in the first alternative of paragraph 2 reading "the institution of any system of government based on racial, ethnic or religious discrimination" could be used as a *chapeau* to introduce a detailed enumeration of the policies and practices constituting *apartheid*. One remark was called for: for the time being, such policies and practices provided the only instance in which every aspect of the future code was already being contravened. Bearing in mind that, in addition, the phenomenon had already endured for 40 years, notwithstanding the intervention of the United Nations, it was obvious that *apartheid* must be included in the code.

25. With regard to slavery, the words "Slavery and all other forms of bondage, including forced labour" in paragraph 3 seemed to lack clarity. There were, for instance, relations between bondage and slavery that were not reciprocal. To avoid any confusion, it would be better to refer to slavery alone, if necessary placing bondage and forced labour elsewhere in the draft.

26. The Special Rapporteur's comments on the proposed articles were excellent, particularly the paragraphs dealing with attacks on property (*ibid.*, paras. 47-58). Valid reasons were given in support of those considerations and it was quite right that attacks on property should be covered by the code. The views expressed in relation to the historic phenomenon of slavery in Africa (*ibid.*, para. 52) were very relevant. The Special Rapporteur also gave a convincing analysis with regard to the mass or systematic nature of crimes against humanity and one could conclude, as he did (*ibid.*, para. 67), that an individual act could constitute a crime against humanity if, though lacking any mass element, it constituted a link in a chain and was part of a system or plan.

27. He suggested that draft articles 13 and 14 should be referred to the Drafting Committee.

28. Mr. KOROMA said that, in connection with draft article 13, the Special Rapporteur was asking the Commission to concentrate on three questions: the definition of war crimes, terminology and the criterion of gravity.

29. With regard to the first question, some members of the Commission considered it preferable to have only a general definition of war crimes, while others were in favour of adding a list of criminal acts to the definition. The two positions were not fundamentally opposed, since it went without saying that such a list would in any case be merely indicative. If the Commission decided to draw up such a list, it could take as its basis the Charter of the Nürnberg Tribunal,[13] which, as Mr. Yankov (2098th meeting) had pointed out, defined war crimes as being "violations of the laws or customs of war" and went on to provide a non-exhaustive list of those crimes: murder, ill-treatment, deportation of civilian populations, etc. (art. 6 (*b*)). He did not, however, see any serious drawback in relying on a sufficiently broad general definition, if that was the wish of the majority of members of the Commission. But it was at that point that terminological problems arose.

30. Although the laws of war nowadays derived primarily from conventions, the importance of custom should not be overlooked. Not only were the Hague Conventions of 1899 and 1907 on the laws and customs of war on land[14] still in force, but they contained provisions which related to the protection of civilians, and the 1949 Geneva Convention on the subject was even regarded as supplementary to sections II and III of the Regulations annexed to the 1907 Hague Convention. The preamble to the 1907 Hague Convention stated:

> Until a more complete code of the laws of war has been issued . . . in cases not included in the Regulations . . . the inhabitants and the

[13] *Ibid.*, footnote 7.

[14] See J. B. Scott, *op. cit.* (2096th meeting, footnote 5), p. 100.

belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

It was on the basis of those principles that, as the Special Rapporteur recalled in his seventh report (A/CN.4/419, para. 9), the Nürnberg Tribunal had maintained that the laws of war were not to be found solely in treaties, but also emerged from the customs and practices that had been gradually and universally recognized by doctrine and in the jurisprudence of military courts. It was also true that that law was not static and that, by continual adaptation, it followed the needs of a changing world.

31. He therefore shared Mr. Ogiso's point of view and considered that the definition adopted by the Commission should take account both of customary law and of the conventions on the laws of war, as well as of the conventions and general principles of law concerning armed conflict. Accordingly, he preferred the second alternative proposed for draft article 13. He also considered it important to refer to "armed conflict" rather than to "war", so that there would be no legal *lacuna* in the definition of war crimes. In carrying out its task of progressive development of the law, the Commission had to adopt the new terminology accepted by the international community as a whole.

32. With regard to the criterion of gravity, he considered that, strictly speaking, the issue was one of penalties rather than of definition. In fact, any violation of the laws of war constituted a war crime, the perpetrator of which was liable under civil and criminal law, regardless of the seriousness of the act. As the Special Rapporteur had pointed out, the concept of "grave breaches" had first been used in the 1949 Geneva Conventions, such breaches being war crimes if they were committed in isolation or on a limited scale and crimes against humanity if they were committed on a large scale, regardless of their gravity. Gravity was thus linked not to the nature of the act, but to the circumstances in which it was committed. That point was also borne out by the Geneva Conventions, which established universal jurisdiction for all such crimes. He was therefore in favour of the deletion of the term "serious" appearing between square brackets in draft article 13.

33. Referring to draft article 14, he said that, while he welcomed the fact that the Special Rapporteur had again dealt with the concept of crimes against humanity, he thought that it would be useful to give a definition of such crimes. All the necessary elements for such a definition were, moreover, to be found in the seventh report. In his view, the most important one was that such crimes should have been committed against mankind as a whole, against the human race itself. If the Commission decided to adopt a definition, it could draw inspiration from article 6 (*c*) of the Charter of the Nürnberg Tribunal, which defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds . . . ".

34. He thought that no one would object to the inclusion of genocide and *apartheid* in the category of crimes against humanity. Moreover, many States had ratified the Convention on the Prevention and Punishment of the Crime of Genocide. *Apartheid* had long since been universally condemned by the international community as a flagrant violation of international law and as a crime against humanity. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[15] for example, had added "eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid* . . . even if such acts do not constitute a violation of the domestic law of the country in which they were committed" (art. I (*b*)) to the crimes against humanity defined in the Charter of the Nürnberg Tribunal. Similarly, article 85, paragraph 4 (*c*), of Additional Protocol I[16] to the 1949 Geneva Conventions had regarded "practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" as grave breaches.

35. Of the two alternatives proposed for paragraph 2 of article 14, on *apartheid*, he preferred the second. Although it reproduced virtually word for word article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which had, it should be remembered, been adopted by the overwhelming majority of States throughout the world, it did not specifically mention that Convention, and that might enable a larger number of States to accept it. For the same reasons, he was also of the opinion that the reference to southern Africa in the second alternative should be retained, although he would, of course, have no objection in principle to its deletion. While it was true that the acts referred to were also committed in other parts of the world, it was only in southern Africa that *apartheid* had been made an official policy: in the other countries in which the problem existed, efforts were being made to overcome it. If the definition were broadened, it might be more difficult for States to accept.

36. He was also in favour of including among crimes against humanity slavery and the slave trade, as well as the expulsion or forcible transfer of populations from their territory and changes to the demographic composition of a territory. In various parts of the world, it still happened that, in the name of development, indigenous populations were expelled from their territories or forcibly transferred or that a foreign population was settled on a territory at the cost of enormous suffering for all. Condemnation of that phenomenon by the Commission could have a salutary effect and could help to end such cruel practices.

37. Finally, he said that he agreed with the inclusion in the draft code of attacks on property having cultural value.

38. Mr. CALERO RODRIGUES said that he would focus on crimes against humanity. Before dealing with the provisions proposed by the Special Rapporteur, however, he wished to make some general comments which could also apply to other parts of the draft code.

39. The division of the draft into three parts—crimes against peace, war crimes and crimes against humanity—was useful, but solely for reasons of convenience: such a categorization of crimes could not otherwise be justified, since one and the same act could very well be characterized as a crime under more than one heading. It would therefore be preferable if the expressions "crimes against peace", "war

[15] United Nations, *Treaty Series*, vol. 754, p. 73.

[16] See 2096th meeting, footnote 11.

crimes" and "crimes against humanity" constituted no more than section headings within the various parts of the draft code and if the code itself, like most criminal codes, began with a part devoted to general principles, followed by a part dealing with each act constituting a crime. The Commission should keep to the idea of devoting a separate article to each crime—particularly those listed in draft article 14—which could be combined under the heading "Crimes against humanity".

40. The wording of the draft articles also called for an effort to achieve uniformity. Each draft article in the second part should describe the acts which fell within the scope of the code, rather than concepts or situations of a general nature. That drafting work would be facilitated by the presence of a preliminary article that might read: "The acts described in the present part constitute crimes against the peace and security of mankind", or "The acts described in the present part are crimes punishable under the present Code", or "The acts described in the present part constitute crimes against the peace and security of mankind which are subject to the penalties indicated in each article" (assuming that the Commission would include provisions concerning the applicable penalties in the draft code). The work done so far on the question was lacking precisely because the Commission had not yet decided whether penalties would be included in the draft, whether it would leave it to national courts to determine penalties or whether the code would refer in that regard to the legislation of States. In his view, a legal instrument could not be described as a code if it did not make provision for penalties.

41. Like Mr. Mahiou (2097th meeting), he considered that draft article 14 did not raise any particular problems of substance. The list of six crimes did not give rise to any objections, and it had not been suggested that others should be added. The only problem related to the way in which the crimes were to be defined; it should not be difficult to arrive at a text that was acceptable to the majority of the members of the Commission. The main task in connection with crimes against humanity thus had to be carried out by the Drafting Committee.

42. In defining the first two crimes, genocide and *apartheid*, the Commission could look for inspiration to various treaties. Indeed, for the purpose of defining the crimes covered by the code, it should, in general, depart as little as possible from the existing international instruments. The Special Rapporteur had therefore been right to follow closely the text of the Convention on the Prevention and Punishment of the Crime of Genocide, which was particularly useful since its article II listed five acts that constituted genocide. He wondered, however, what meaning should be attached to the word "including" in draft paragraph 1 of draft article 14, since the list which followed was apparently, despite that word, an exhaustive one. The list contained in article II of the Genocide Convention had in fact been devised in that sense.

43. In the case of *apartheid* (para. 2), the International Convention on the Suppression and Punishment of the Crime of *Apartheid* was rather less useful because the crime of *apartheid* included a number of "policies" and that term required some clarification. The Commission could attempt to define the acts listed in article II of the Convention by making its wording clearer and perhaps by referring expressly to acts committed in the context of *apartheid*.

44. There were also conventions relating to slavery (para. 3), but they referred to institutions and the text would need adaptation in order to specify exactly which acts came under the heading of slavery. Like other members of the Commission, he felt that caution was called for where "forced labour" was concerned. Article 5 of the Slavery Convention[17] did refer to forced labour, but it said no more than that States parties were obliged to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery. Hence the Convention referred not so much to forced labour as to the risk that forced labour might become slavery. Indeed, the Convention—which, of course, dated from 1926—tolerated compulsory or forced labour for public purposes. Two institutions, debt servitude and serfdom, had subsequently been declared unlawful. Forced labour itself had been abolished by ILO Convention No. 105[18] in 1957. Those instruments might serve as a basis for the Commission's work, so long as they were adapted to give a clear definition of the acts prohibited by the code.

45. In his view, paragraph 4 of draft article 14 lacked rigour, first because it was not clear what was meant by the words "their territory" in subparagraph (*a*) and it would be better to refer to "occupied territory"; and, secondly, because "changes to the demographic composition of a foreign territory" (subpara. (*c*)) could only be the result of the expulsion or forcible transfer of a population, of the establishment of settlers, or of a combination of both. For that paragraph as well, the Commission could look to an international instrument, namely Additional Protocol I[19] to the 1949 Geneva Conventions, article 85, paragraph 4 (*a*), of which referred to the following as acts constituting grave breaches: "The transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the Fourth Convention."

46. Paragraph 5 of draft article 14 was a good starting-point, but all of the acts listed in it, particularly the mass destruction of property, would have to be carefully considered to see whether they belonged in that provision, and the reasons why would have to be clearly explained.

47. Lastly, like other members of the Commission, he thought that the concept of a "vital human asset" (para. 6) was too vague. If the Commission decided to retain that expression, it would have to define it more precisely. In any event, serious and intentional harm to cultural property would be better included in paragraph 5 or in a separate article than in the provision dealing with serious and intentional harm to the environment. There again, useful guidance was to be found in Additional Protocol I, article 55, paragraph 1, of which stated: "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. . . . " The Commission would also do well to refer to article 19 of part 1 of the draft articles on State responsibility.[20]

[17] League of Nations, *Treaty Series*, vol. LX, p. 253.

[18] See 2096th meeting, footnote 24.

[19] *Ibid.*, footnote 11.

[20] *Ibid.*, footnote 19.

48. In reply to Mr. Koroma, who had argued that any breach of the Geneva Conventions would constitute a war crime, he pointed out that that was not what was said in article 85, paragraph 5, of Additional Protocol I, on the repression of breaches: "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes." For a crime to exist, according to that paragraph, the breach must therefore be a "grave" one. He agreed, however, with Mr. Barboza's view of the matter, which corresponded to the concept of a grave breach as referred to in the Conventions and the Additional Protocols thereto, particularly article 147 of the Fourth Convention,[21] which read:

> Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

49. It was thus apparent that the Geneva Conventions and the Additional Protocols thereto did not refer only to breaches and grave breaches; they specified which acts constituted grave breaches. The Commission could make use of them, for example, to draw up a list of crimes, although he personally had doubts about the advisability of a list, since it was impossible to compile a complete list and an indicative list would not serve much purpose in legal terms. If the Commission wanted to refer to grave breaches, it could at least follow the example set in those instruments and state which acts constituted grave breaches.

50. Mr. BARSEGOV said he thought that the Commission's work on the present topic, as on other topics, would benefit if the members of the Commission were better informed about the work of other United Nations bodies. For example, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had been dealing with questions of genocide for a very long time and it had carried out studies with a view to strengthening the effectiveness of the Convention on the Prevention and Punishment of the Crime of Genocide. Personally, he was not very optimistic about the action taken by States to combat genocide: there had been many acts of genocide since the Convention had been adopted and it had never been implemented. That was, however, the very reason why the Sub-Commission was concentrating on the problem. He asked whether the Secretariat could circulate to the members of the Commission the 1978 study on the question of the prevention and punishment of the crime of genocide[22] and the revised and updated version of that study prepared by B. Whitaker in 1985,[23] or at least the latter document.

51. The CHAIRMAN said that, although the Planning Group had discussed that point at the previous session, it might be advisable to revert to it, since it could well be useful to have certain documents available for reference purposes, including the studies mentioned by Mr. Barsegov, but also the draft international penal code of the International Association for Penal Law, with which all members of the Commission might not be familiar. He suggested that, in future, the special rapporteurs should be invited to give the Secretariat a list of the documents which members of the Commission might need when studying their reports.

52. Mr. CALERO RODRIGUES recalled that, in 1983, the Secretariat had prepared a compendium of international instruments relevant to the draft code.[24] If the Secretariat could not circulate all the instruments mentioned therein, perhaps it could update the compendium itself.

53. The CHAIRMAN pointed out that the compendium had also been circulated at the previous session in its original form.

54. Mr. KOROMA said that he was surprised to read in the penultimate paragraph of document ILC(XLI)/Conf.Room Doc.2 that the Commission would apply its work programme "without undue wastage of Secretariat resources". The Commission was not in the habit of wasting the resources at its disposal. The phrase implied a criticism of the Commission and should be deleted.

The meeting rose at 1 p.m.

[21] Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (United Nations, *Treaty Series*, vol. 75, p. 287).

[22] E/CN.4/Sub.2/416.

[23] E/CN.4/Sub.2/1985/6 and Corr.1.

[24] Document A/CN.4/368 and Add.1 (mimeographed).

2100th MEETING

Thursday, 11 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, 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 Mankind[1] (*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*)

[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).