Document:-

A/CN.4/SR.2101

Summary record of the 2101st 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

68. Lastly, the Agreement of 7 December 1970 had been the second Polish/German treaty on border issues, the first having been signed on 6 July 1950 between Poland and the German Democratic Republic. Both treaties referred to the existing border between Poland and Germany as having been established by the Potsdam Agreement.

The meeting rose at 1.05 p.m.

2101st MEETING

Friday, 12 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. 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 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. JACOVIDES said that, with the conclusion of the draft code, the Commission would have provided the international community with an instrument of deterrence and punishment.

2. With regard to draft article 13, the Special Rapporteur had indicated that the problems which arose related to the definition of war crimes, to terminology and to the concept of gravity. He agreed that a general definition of war crimes should be laid down and that it should be left to judges to decide on its application in each particular case in the light of the evolution and progressive development of the law. The law of war derived from certain customs and practices which had gradually gained recognition, as well as from the general principles of justice as recognized by jurists and endorsed by the practice of military courts. Hence, it was not a static law, but a law which, through a process of continual adaptation, followed the needs of a changing world; treaties, for the most part, were no more than an expression and definition of the principles of law that already existed.

3. With regard to terminology, he considered that the choice between "war" and "armed conflict" was less clear. Since war had, in theory, been outlawed with the adoption of the rules of *jus cogens* enshrined in the Charter of the United Nations and various other international instruments, the expression "armed conflict" would be more in keeping with present-day terminology. None the less, the expression "laws or customs of war", which was found in many international conventions in force, as well as in national laws, should not be discarded, on the understanding that its use did not sanction war.

4. He commended the Special Rapporteur for having adopted the concept of gravity in the definition of war crimes. He considered that, like the 1949 Geneva Conventions and Additional Protocol I thereto, the draft code should make a distinction between grave breaches and other breaches and that, if the code was to be effective, it should cover only the former. That was one of the reasons why many members had insisted that, in the English title of the topic, the word "crimes" should be used instead of "offences". In his view, therefore, the square brackets in paragraph (*a*) of the first alternative of article 13 should be removed.

5. In general, however, the second alternative of article 13 seemed preferable to him, because it used terminology that was more modern and closer to humanitarian law as codified.

6. Crimes against humanity, dealt with in draft article 14, had initially been linked to a state of belligerency but were now separate from war crimes. No doubt the same act could be both a war crime and a crime against humanity, but the concept of a crime against humanity was broader, since war crimes were committed only in time of war and as between belligerents.

7. With regard to inhuman acts, the Special Rapporteur had, in his seventh report (A/CN.4/419, paras. 43 *et seq.*), rightly drawn attention to the many criteria at issue—moral, ideological, methodological and nationalistic, for instance—in the case of attacks against persons and attacks against property and, in particular, against monuments of historical, architectural or artistic significance, such as those classified by UNESCO as belonging to the heritage of mankind. Indeed, there were already conventions on the protection in wartime and peacetime of artistic and scientific institutions and historical monuments. Cyprus had none the less had experience, as a result of foreign occupation, of the systematic destruction of its cultural heritage, when priceless antiques and objects of religious significance had been plundered and sold on the black market.

8. He was in general agreement with the list of crimes against humanity set out in article 14, but reserved the right to revert to the matter in more detail. Genocide was such a crime, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, which could be

---

[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.

regarded as declaratory of customary law. Similarly, *apartheid* and, in general, any system of government based on racial, ethnic or religious discrimination, clearly fell into that category of crimes. He trusted that there would be a change in the system of *apartheid* as practised in South Africa, and recent developments in Namibia were certainly welcome. Since it was to be feared that similar systems of government would be established in other parts of the world, however, he felt that the first alternative of paragraph 2, which was short and drafted in general terms, was more suitable for a code of general application.

9. Slavery and other forms of bondage were, of course, crimes *jure gentium* and, in many cases, were covered by ordinary law; but where a State was involved, slavery could be included as a crime against humanity. The same applied to the crimes dealt with in paragraph 4, which had no place in international life or international law, but of which the Cypriots, like certain peoples in the Middle East and southern Africa, had had bitter experience. Lastly, it was perhaps necessary to be more specific with regard to the acts referred to in paragraphs 5 and 6.

10. The Commission was nearing the end of its undertaking. He was grateful to the Special Rapporteur for the efforts he had made in that regard and trusted that the Commission's collective endeavour would be crowned with success. He welcomed such signs of improvement in the international climate as the revitalization of the United Nations, the recognition of the worth of the United Nations peace-keeping forces, the extension of the jurisdiction of the ICJ and the increased co-operation between the super-Powers in combating terrorism, drug trafficking and pollution, all of which could have a positive effect on the Commission's contribution to building a more effective international legal order.

11. Mr. EIRIKSSON said that work on the draft code was sufficiently advanced to allow two intermediate conclusions to be drawn. First, the final result would not be a code of the kind found in national jurisdictions: there would be imperfections and approximations and some degree of universality and scope would have to be sacrificed for the sake of acceptability. Paragraph 1 of article 4 (Obligation to try or extradite),[5] for example, presupposed the agreement of States: some mechanism might therefore have to be provided to ensure that minor points did not prevent such agreement. In that connection, the model of the human rights conventions might be borne in mind.

12. The second conclusion was that the drafting of the articles would be better if the consequences of the crimes included were specified in the text itself. In other words, there was no need for the characterization of crimes to be polemic, declaratory or condemnatory, whatever the moral and political gains perceived.

13. Referring to the question of the list of war crimes which might or might not be included in draft article 13, he said that he had never been in favour of that solution. Moreover, he had earlier proposed that aggression should continue to be defined in the terms now employed in paragraph 2 of article 12 (Aggression).[6]

14. With regard to the characterization of crimes, the text did not clearly indicate the consequences resulting from the distinction between a crime against peace, a crime against humanity and a war crime. For reasons relating to the drafting technique used in the code, that differentiation could be retained for headings of sub-chapters, but it should not appear in the definitions.

15. As to the definitions and in general terms, he said that he shared the views of those who believed that the Commission should be wary in its work of prejudicing the body of law already existing outside the code.

16. On another general point, he said that a distinction could be drawn between crimes which had names—and when they did, they should be used—and the others. Accordingly, on the one hand, there were genocide, slavery and aggression and, on the other, the crimes referred to in draft article 14, paragraphs 4, 5 and 6. The debate had shown that the expression "war crimes" fell between those categories. As for *apartheid*, it might perhaps be necessary to avoid using the word itself as the generic term for the crime it represented. In fact, the policy of *apartheid* would soon be eradicated, no doubt forever. A more general term should therefore be found.

17. For all those reasons, he proposed that article 13 should appear in a sub-chapter entitled "War crimes" and read:

> "The present Code applies to any serious violation of the rules of international law applicable in armed conflict."

That text was based on the wording of paragraph (*a*) of the second alternative proposed by the Special Rapporteur. He was not sure whether paragraph (*b*) of the second alternative was necessary and its content could be reflected in the commentary.

18. Draft article 14 could be divided into eight separate articles in a sub-chapter entitled "Crimes against humanity". The first would read:

> "The present Code applies to genocide. For the purposes of the present Code, 'genocide' means any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such."

The second would read:

> "The present Code applies to the institution of any system of government based on racial, ethnic or religious discrimination."

The third would read:

> "The present Code applies to slavery and all other institutions and practices similar to slavery."

The expression "practices similar to slavery" might have to be re-examined, but in any case the term "forced labour" was inappropriate.

19. The three crimes referred to in paragraph 4 of article 14 would then follow, divided into three separate articles, each introduced by the words: "The present Code applies to . . . ". The following article, the seventh, would read:

---

[5] *Yearbook . . . 1988*, vol. II (Part Two), p. 67.

[6] *Ibid.*, p. 71.

"The present Code applies to all other inhuman acts against any population or against individuals on social, political, racial, religious or cultural grounds."

The eighth and last article would read:

"The present Code applies to any serious and intentional harm to the human environment."

20. To complete the new arrangement of the text, article 12 (Aggression), provisionally adopted at the previous session, would appear in a sub-chapter headed "Crimes against peace" and be worded as follows:

"The present Code applies to aggression. For the purposes of the present Code, 'aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."

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

22. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's seventh report (A/CN.4/419), which took into consideration many suggestions made in the Commission and in the Sixth Committee of the General Assembly, would undoubtedly expedite work on the draft code.

23. The code was being understood more and more as an essential element of the United Nations security system, which was built on the prohibition of the threat or use of force and the co-operation of States in the prevention and settlement of disputes and situations which might threaten international peace and security. The development of international criminal law in order to co-ordinate the policy of States in their fight against serious international crimes was part of that co-operation, particularly in an increasingly interdependent world where States had become vulnerable to acts of foreign interference and large-scale international crime and where the enforcement of the international rules essential for the survival of mankind had become a vital necessity. The code could help to strengthen the common basic values of the international community and to establish an international legal order based on the rule of law.

24. After expressing the view that it would be best to have a separate article for each crime, he said that he too preferred the second alternative of draft article 13, which referred to the rules of international law applicable in armed conflict. That formula had several advantages. It avoided the term "war", which often gave rise to problems. It did not introduce the concept of "international or non-international conflict", which was open to controversial interpretations and might raise the question of the extent to which a crime committed during an internal armed conflict could be categorized as a war crime. It simply stated the essential point, presupposing in paragraph (*a*) a decision by the parties or a judge that certain rules of international law were applicable to the armed conflict in question. For that reason, it would be better not to add a paragraph defining armed conflict. That was also why he would prefer not to use the term "grave breaches", which bore the imprint of the 1949 Geneva Conventions and did not cover all war crimes or even all serious war crimes. On the other hand, by referring to "serious violations" of the rules of international law applicable in armed conflicts, namely the rules contained in conventions, rules of customary law or rules agreed upon by the parties to the conflict, all war crimes could be covered and, at the same time, be restricted to the most serious violations within the meaning of the code.

25. The first part of the second alternative would be sufficient to determine the scope of the article and there was no reason for paragraph (*a*) to be clarified by paragraph (*b*). In fact, the rules of international law applicable in an armed conflict might derive from different sources and depend on the nature of the armed conflict in question. Some rules, like the Martens clause (*ibid.*, para. 5), might even have been accepted in the form of generally recognized principles. But in any case, rules, and not merely principles, must serve as the basis for penal law. The term "rules" thus also applied to those "principles".

26. The criterion of gravity was essential. To avoid any risk of confusion with established national and international standards concerning war crimes, the Commission must clearly define which kinds of war crimes fell within the ambit of the code.

27. Article 13 should begin with a general definition containing three elements, namely the applicable rules of international law, armed conflict and the gravity of violations, and should be accompanied by a list of crimes. In that connection, it would be useful if Mr. Yankov's suggestion (2098th meeting, para. 16) could be made available to the Commission in writing. He also agreed with all the arguments which had been put forward in favour of such a list. Since the Commission was dealing with penal law, it could not be content with a very general definition, with cross-references to other legal documents or to customary law or with a set of examples. It had to be specific in describing the nature or type of the violations it had in mind. Whether cases were ultimately to be decided by national courts or by an international tribunal, there could be no question of leaving everything to the discretion of judges. The list therefore had to be exhaustive as far as the types of violation were concerned, but of course it could not be exhaustive with regard to the acts which might be committed. For that purpose, the Commission could follow the model of the Charter of the Nürnberg Tribunal, the 1949 Geneva Conventions or Additional Protocol I thereto, without specifically referring to those instruments.

28. He suggested adding to paragraph (*a*) of the second alternative a new paragraph consisting of three subparagraphs: the first dealing with crimes against protected persons (the wounded, the sick, civilians, prisoners of war, *parlementaires*, soldiers *hors de combat*); the second dealing with the destruction of protected goods, the term "goods" being preferable to "property" because it was much broader; and the third dealing with the unlawful use of certain weapons and methods of warfare. Each of those subparagraphs would be accompanied by an indicative list of the acts concerned. He had formulated a text along those lines and would give it to the Special Rapporteur.

29. He thought it was also necessary to include an article making it clear that the use of weapons of mass destruction, in particular nuclear weapons, constituted a serious war crime or, more correctly, a crime against humanity. That, of course, was a controversial question. In 1981, however,

the General Assembly had adopted the Declaration on the Prevention of Nuclear Catastrophe,[7] proclaiming that States and statesmen that resorted first to the use of nuclear weapons would be committing the gravest crime against humanity, and that there would never be any justification or pardon for statesmen who took the decision to be the first to use nuclear weapons. The Commission should support that position by drafting a special article for that type of crime; it should approach that important question mindful of its responsibility to contribute to the progressive development and codification of international law. That responsibility, so often referred to when the Commission was dealing with international liability for acts not prohibited by international law, with watercourses or with the environment, must not be forgotten when it was faced with a problem which was no less vital for the survival of mankind than the protection of the environment.

30. There appeared to be a fairly general consensus on the question of crimes against humanity. Genocide and *apartheid*, in particular, must be included in the draft code. In both cases, the Commission should not refer to the earlier conventions, but should reproduce their substance in describing the crimes concerned. It must also be careful not to intrude upon the scope of application of those instruments. The provision dealing with the crime of *apartheid* should not be restricted to South Africa, since the institution of *apartheid* might appear in other parts of the world. He therefore preferred the second alternative of paragraph 2 of draft article 14.

31. Paragraph 3 could be improved by a stricter form of wording. In the International Covenant on Civil and Political Rights,[8] slavery and servitude were not dealt with on the same footing as forced labour. Article 8, paragraph 3, of the Covenant showed that the expression "forced labour" could not be used without a more specific determination. In the case of slavery and servitude, as with war crimes and other crimes against humanity, the criminal act could consist of ordering the act to be committed or actually committing it; but it could also have a broader connotation and, like the crime of *apartheid*, it could originate in legislation. It might therefore be necessary to extend the provision to refer to any measures, including legislative measures, which were designed to legalize or to justify such practices.

32. He agreed with the approach adopted by the Special Rapporteur in paragraph 4, but thought it would be useful to combine subparagraph (*b*), whose wording might be too broad, with subparagraph (*c*). Moreover, the scope of the provision should be confined to occupied territories and care should be taken to formulate it in such a way that it could not be invoked to shield a population which had acted as a fifth column in planning a war of aggression from the consequences deriving from the responsibility of the aggressor State.

33. He supported the idea that the concept of a "vital human asset" should include objects deemed to belong to the cultural heritage of mankind. Since the aim was not so much to protect specific cultural goods as to protect mankind from the loss of its heritage, however, paragraph 6 should be worded more precisely. In that connection, he agreed with Mr. Barsegov's comments (2097th meeting) on the term "humanity". The same was true of the environment. It had been suggested that the wording of paragraph 6 should be brought into line with that of article 19 of part 1 of the draft articles on State responsibility.[9] Account should also be taken of article 55 of Additional Protocol I[10] to the Geneva Conventions, which sought to protect the natural environment against widespread, long-term and severe damage liable to prejudice the health or survival of the population. The wording should focus on persons in posts of political, military or economic responsibility, who, by ordering, committing or bringing about the commission of a serious violation of an obligation incumbent on the State, caused widespread, long-term and severe damage to the human environment.

34. Turning to the difficult question of the implementation of the code, he said that the Commission should look for solutions which were manageable, likely to be accepted by States and could be successfully applied. Those who believed that the code would be a useful instrument were necessarily interested in its effective implementation. It would be useless to look for ideal solutions which had no chance of being achieved in the near future: that would prevent the code from ever coming into force. What was needed was a realistic approach based on existing international law and State practice.

35. At its previous session, the Commission had provisionally adopted article 4 (Obligation to try or extradite),[11] on the assumption that the code would be applied by national courts. That had been the most feasible approach at that stage. In its commentary to the article, however, the Commission had also made it clear that it did not wish to rule out other approaches. It had stated, in connection with paragraph 3 of article 4, that "the jurisdictional solution adopted in article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court".[12] The General Assembly had taken note of that approach and it was clear from its discussions that the international community was in fact prepared to consider the practical implementation of an international code of crimes against the peace and security of mankind. For the first time in the past six years, the Commission had received at least a partial answer to the question it had repeatedly asked on the implementation of the code. In resolution 43/164 of 9 December 1988, the General Assembly had encouraged it "to explore further all possible alternatives on the question [of the judicial authority to be assigned for the implementation of the provisions of the code]" (para. 2).

36. Unfortunately, many people seemed to believe that the Commission had only two alternatives: the universal jurisdiction of national courts or the exclusive jurisdiction of an international tribunal. Sometimes there was mention of the idea of special or *ad hoc* tribunals, which might, of course, raise other problems. Few States had realized that, in its commentary to article 4, the Commission had also

[7] General Assembly resolution 36/100 of 9 December 1981.

[8] United Nations, *Treaty Series*, vol. 999, p. 171.

[9] See 2096th meeting, footnote 19.

[10] *Ibid.*, footnote 11.

[11] *Yearbook . . . 1988*, vol. II (Part Two), p. 67.

[12] *Ibid.*, p. 68, para. (5) of the commentary.

referred to another possibility, namely "to have an international court coexist with national courts".[13]

37. In his view, it was reasonable to start with universal jurisdiction, since that was the assumption underlying article 4. However, that solution—itself not a new one—left some problems unresolved. Intensive co-operation would be needed among the States concerned in order to ensure that criminals would not go unpunished and in order to harmonize the decisions of national courts. At a later stage in its work, the Commission might therefore have to add to the draft some more specific provisions on the implementation of the code, for example by considering the possibility of a combination of the universal jurisdiction of national courts and the jurisdiction of an international criminal court.

38. Some elements of such an approach already existed in the form of the revised draft statute for an international criminal court prepared by the 1953 Committee on International Criminal Jurisdiction[14] and the Statute for an International Criminal Court adopted by ILA in 1984.[15] Those texts explicitly provided not for the exclusive jurisdiction of an international court, but for the concurrent jurisdiction of national courts and an international court, and did not treat the two as mutually exclusive alternatives. Under article 23 of the ILA text, for example, a State would be at liberty to decide whether to try a suspect in its national court or to refer him to the international criminal court.

39. While solving some of the problems of universal jurisdiction, the latter proposal unfortunately introduced an element of insecurity by giving the State concerned a choice in the matter. Moreover, it did not solve the problems connected with an international court of first instance. It might therefore be wiser to combine the positive aspects of universal jurisdiction with those of an international criminal tribunal by considering the establishment of an international criminal court as a court of review. The existence of an international court having the power to review final judgments of national courts would in any event solve most of the problems to which he had just referred. Access to such a court should be limited to the State whose national had been tried by a foreign court, and the State on whose territory or against which the offence had been committed when the offender had been tried by another State. Whenever one of those two States considered that the trial abroad had not been in conformity with the code, it could appeal to the international court, whose decision would be final. A national court seized of a case that came under the code might also be allowed to request a binding opinion from the international court on a question of international criminal law.

40. Such a solution, which he submitted for the Commission's consideration, would have the advantage of relying on existing machinery at the national level. It would make it much easier for States to accept the establishment of an international criminal court; it would avoid any unnecessary extradition of offenders; and it would not require a public prosecutor or prosecution chamber or the establishment of an international prison and the training of international law enforcement staff. At the same time, an international criminal court with powers of review would substantially strengthen objectivity and impartiality in the administration of justice and would harmonize the case-law of national courts. It would become an effective remedy for the States concerned against the improper administration or misuse of justice by national courts. Lastly, it would represent a feasible move towards the establishment of an international criminal court proper.

41. Such a flexible approach would allow for the effective implementation of the code, promote mutual co-operation by States in combating international crime and ensure the enforcement of the basic rules of international law. It would thus strengthen the international legal order and the rule of law in international relations.

42. In conclusion, he stressed once again that there was more than one possible solution, not just the single alternative of universal jurisdiction: there were many other approaches which could be combined with universal jurisdiction so as to ensure the objective, fair and equitable application of the code.

43. Mr. KOROMA, referring to paragraph 23 of the Special Rapporteur's seventh report (A/CN.4/419), said that it was inappropriate to give grievous bodily harm as an example of a correctional offence because, in common law at least, it was a very serious offence punishable by a harsh penalty. Perhaps that was only a translation problem, but it should be looked into in any case.

44. Mr. Graefrath's comments on the question of jurisdiction offered much food for thought, but for the time being he would ask only one question: assuming that the international criminal court was to be a court of review, could it be seized by an individual who had been tried by a court of the State of which he was a national and who had exhausted all local remedies?

45. With regard to the inclusion of the concept of gravity in the definition of war crimes and to the types of offences to be characterized as such, it would be better to wait until the Special Rapporteur had summed up the discussion before coming back to that question.

46. Mr. FRANCIS said that he basically agreed with Mr. Díaz González's proposal (2100th meeting) that drug trafficking should be included in the draft code as a crime against humanity. In his own earlier statement (2099th meeting), he had intended to raise the question of drug trafficking, which was of crucial importance not only for third world countries, but for all countries of the world. He had, however, decided to wait to hold consultations, particularly with the members of the Commission from Latin America, but also with Mr. McCaffrey, who was due to arrive shortly, and with Mr. Reuter. Would the Commission revert to that question?

47. The CHAIRMAN assured Mr. Francis that it would do so.

48. Mr. REUTER noted that Mr. Graefrath had seemed to rule out the idea that the Commission should take a stand on the question of countermeasures or reprisals. In that connection, he himself had stated that, if the Commission did not discuss that question, it would have to say so unambiguously and indicate that it did not want to, or could

[13] *Ibid*, p. 67, para (1) of the commentary.

[14] "Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953" (*Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645)), annex.

[15] ILA, *Report of the Sixty-first Conference, Paris, 1984* (London, 1985), p. 257.

not, solve that problem. One of the reasons why he could not agree to the attribution of responsibility for the crime of the use of nuclear weapons or of weapons of mass destruction to the first user was that that would be tantamount to deciding indirectly on the question of reprisals.

49. Noting that Mr. Barsegov (2100th meeting) and other members had raised the question of motive and intent, he warned the Commission against the danger of getting lost in a theoretical discussion on that question. The problem in that regard stemmed from the fact that the terms used in the various national legal languages were almost untranslatable into other languages, because they corresponded to specific concepts in a particular legal system. The Commission nevertheless had to decide, in respect of each crime to be included in the draft code, whether psychological factors should or should not form part of the definition of the crime. It could not formulate any general rules on that point. There had, for example, been cases of genocide caused by unintentional bacteriological contamination: in such cases, it was possible to envisage ordinary civil liability, but certainly not criminal responsibility. In the case of war crimes, there were also problems, such as that of military necessity, which the Commission had no right to ignore.

50. Mr. OGISO said it was his understanding that the Special Rapporteur was not particularly keen to submit a list of crimes to supplement draft article 13. If he nevertheless did so in order to comply with the wish of several members of the Commission, it would be better not to have the text go directly to the Drafting Committee, but to have the Commission consider it in plenary so that members could at least make some general comments on it.

51. The CHAIRMAN said that, if the list was submitted directly in plenary, the discussion on the agenda item under consideration would have to be reopened. He therefore suggested that the text to be drafted should simply be distributed to all members of the Commission, who would thus be able to make their comments to the Drafting Committee.

52. Mr. THIAM (Special Rapporteur) said that he had no firm position on the question of the list. He had himself made a number of proposals and had even put forward a draft list in connection with which the use of nuclear weapons had given rise to differences of opinion. If there was to be a list, he would therefore amend it until a consensus had been reached. In order not to upset the timetable and programme of work, that list could be referred to the Drafting Committee, which would prepare a provisional text and transmit it to the Commission for its comments.

53. Mr. TOMUSCHAT said he, too, thought that the preparation of the list would be a very delicate task and that it was only in plenary that each member of the Commission would be able to state his views. It might be advisable for the Special Rapporteur to prepare an addendum to his report to deal with that particular point.

54. The CHAIRMAN said that, in the light of the discussion, he would ask the Special Rapporteur to submit a draft indicative list of war crimes and that time would be found for every member who wished to do so to express his opinion on it the following week in plenary.

It was so agreed.

55. After an exchange of views on the dates of distribution of the summary records of the Commission's meetings, the CHAIRMAN said he would take it that the Commission agreed to request Mr. Fleischhauer, Under-Secretary-General, the Legal Counsel, to ask the technical services of the United Nations Office at Geneva to speed up the publication of those documents and, in particular, at Mr. Barsegov's request, that of the Russian version of the summary records of the meetings at which Mr. Barsegov had spoken.

It was so agreed.

56. 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.

2102nd MEETING

Tuesday, 16 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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)[4] (*continued*)

ARTICLE 14 (Crimes against humanity)[5] (*concluded*)

1. Mr. THIAM (Special Rapporteur), summing up the discussion, thanked members for their valuable contributions to a rich debate. Commenting first on a minor point

[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 text, see 2096th meeting, para. 2.

[5] For the text, *ibid.*