Document:-

A/CN.4/SR.2106

Summary record of the 2106th 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**

normally considered as merely a preliminary to the assessment of monetary compensation. Hence, in his view, the Special Rapporteur had, on the whole, struck the right balance in draft article 7.

54. Finally, in a document such as the report under consideration, in which the notes were sometimes richer in information than the text itself, they should be placed at the bottom of the pages to which they related rather than at the end of the document.

55. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked members for their comments. It would be preferable if he summed up the discussion and replied to the questions that had been raised within the framework of his forthcoming second report, which would deal, in particular, with the other forms of reparation, their modalities and their relationship with cessation and *restitutio in integrum*. It was a fact that judges did not always draw a distinction between cessation and restitution, restitution and compensation, compensation and satisfaction, and satisfaction and guarantees of non-repetition. Obviously, all those remedies telescoped at some point or another and, in his second report, he would analyse the judicial decisions which illustrated that state of affairs.

56. In reply to a question by Mr. AL-KHASAWNEH and Mr. DÍAZ GONZÁLEZ, the CHAIRMAN said that, time permitting, the members of the Commission who had not yet done so would be able to speak on the topic before the end of the present session.

The meeting rose at 1.15 p.m.

2106th MEETING

Tuesday, 23 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, 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 and Add.1,[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*)

1. The CHAIRMAN said that the Special Rapporteur had now prepared an indicative list of war crimes for inclusion in draft article 13. Most of the members of the Commission who had spoken on the topic had expressed a preference for the second alternative of the article, and it had been suggested that the addition of a list of crimes would provide useful guidance for the Drafting Committee.

2. He invited the Special Rapporteur to introduce paragraph (*c*) of the second alternative of article 13 (A/CN.4/419/Add.1), which read:

> **(*c*) The following acts, in particular, constitute war crimes:**
>
> **(i) serious attacks on persons and property, including intentional homicide, torture, the taking of hostages, the deportation or transfer of civilian populations from an occupied territory, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;**
>
> **(ii) the unlawful use of weapons and methods of combat, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction.**

3. Mr. THIAM (Special Rapporteur) said that, in preparing the list of war crimes in paragraph (*c*), he had been faced with several options. He could have reproduced in its entirety article 85 of Additional Protocol I[5] to the 1949 Geneva Conventions; that article contained a list of all "grave breaches" and could have provided the substance for a first subparagraph, listing acts against protected persons and property. A second subparagraph would then have dealt with the unlawful use of weapons. However, he had been reluctant to use article 85 as a whole, because of the reservations expressed by certain States. Moreover, some States had not accepted Additional Protocols I and II. The proposed list was therefore based on a number of sources, including Additional Protocol I, Law No. 10 of the Allied Control Council,[6] the Charter of the Nürnberg Tribunal,[7] the 1954 draft code and suggestions made by members of the Commission. The list was purely indicative, and was intended as a working document. Crimes could, of course, be added or deleted.

4. Paragraph (*c*) (i) listed attacks on persons and property afforded protection under the laws of war, even if they were not mentioned in article 85 of Additional Protocol I. The qualifier "protected" might be added before the words "persons and property", and a reference could well be made to the improper use of protective emblems.

5. Paragraph (*c*) (ii) dealt with the unlawful use of weapons and methods of combat, a time-honoured notion

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* Resumed from the 2102nd meeting.

[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] See 2096th meeting, footnote 11.

[6] *Ibid.*, footnote 9.

[7] *Ibid.*, footnote 7.

found in the Geneva and Hague Conventions. He had not attempted to include specific types of weapons because of the difficulty of definition. It would be for the Commission to decide whether particular categories of weapons should be expressly prohibited.

6. Mr. BARBOZA observed that the list proposed by the Special Rapporteur was basically the same as that submitted in his fourth report in 1986 (art. 13, second alternative).[8] It would follow on from paragraphs (*a*) and (*b*) of the present second alternative, and be introduced by the clause: "The following acts, in particular, constitute war crimes". In other words, the text of paragraph (*a*) would not be changed, but the square brackets would be removed from the word "serious" qualifying the word "violation". The article would thus have a general part and then give specific examples in a non-exhaustive list. Other breaches not included in the list would consequently be covered by the code, provided they were "serious". And the seriousness of such breaches—in order for them to merit inclusion in the code—would be a matter for appraisal by judges.

7. In discussing the two alternatives of draft article 13 in his seventh report (A/CN.4/419 and Add.1), the Special Rapporteur drew a distinction between "breaches" and "violations". The crimes themselves were "breaches", the term "violations" being used to denote the difference between the conduct required by the legal rule and the conduct which had actually taken place. The concept of "gravity" would vary according to whether it applied to "breaches" or to "violations": a breach like homicide was more serious than a breach like theft, because it was more important to protect human life than property. Within one and the same breach, some violations were more serious than others, depending on how far the actual conduct was removed from that required by the legal rule: for example, homicide compared with homicide with aggravating circumstances, or theft of a large sum of money compared with theft of a small sum. By referring to "gravity", the intention was that the code would cover only those acts which were serious enough to undermine the peace and security of mankind, since the latter were the object of its protection. Clearly, appraising the gravity of violations was essentially a judicial function, whereas appraising the gravity of breaches was a legislative function. It would therefore be best to refer, in article 13, not to "violations", but to "breaches". Paragraph (*a*) would then be redrafted along the following lines: " . . . the following breaches of the rules of international law applicable in armed conflict constitute war crimes". It would be followed by the existing paragraph (*b*), and by the list of crimes. The list should not be indicative, and the words "in particular" should therefore be omitted.

8. It had been argued that a general definition, followed by specific examples, would suffice. That had been the formula used in defining aggression. However, in that case, if a particular act was not listed, it was easy to determine whether it fell within the scope of the general definition of aggression. By contrast, the proposed list of war crimes was not preceded by any general definition, but merely by a reference to other international instruments and to custom, which provided no such general definition and established only that certain conduct constituted specific war crimes. A reference to specific crimes was no substitute for a general definition. A court which had to determine whether a particular form of conduct not included in the list was a war crime would have to decide on the basis of analogy with crimes of similar gravity, and that was not a permissible approach in a liberal system of criminal law. It had been said that the code must be flexible in order to cover all the breaches that might arise in the future. National penal codes, however, did not define every conceivable offence, nor did they claim to cover future offences by reasoning on the basis of analogy with existing ones, which was forbidden in criminal law. As for the desired flexibility, it was impossible to have the advantages of a code without its disadvantages.

9. He wondered why an exhaustive list should be an insuperable problem. There was very little likelihood, after all, that any existing grave breaches would be excluded, and future ones would be largely covered by custom (as was now the case) until such time as it was agreed to include them in the code. The proposed list had one drawback not found in the 1949 Geneva Conventions: it did not specify which categories of persons were protected. The result might be confusing, since war was inevitably directed against persons and property, perceived as military targets. Serious attacks on persons and property and intentional homicide could not be prohibited unless war itself was done away with. A list of war crimes had been proposed by Mr. Malek at the thirty-eight session, in 1986;[9] that list took account of protected persons and could perhaps be used as a basis for the new one.

10. Mr. SHI said he fully recognized that compiling an exhaustive list of war crimes would be a formidably difficult, if not an impossible, task. The list proposed by the Special Rapporteur in paragraph (*c*) was an indicative or illustrative one, and was essentially a slightly modified version of the list submitted in his fourth report in 1986.

11. In his opinion, the crimes should be set out in separate subparagraphs, in the interests of consistency with the drafting style used for other categories of crimes. Secondly, he doubted whether the taking of hostages in combat should be included as a war crime. Article 6 (*b*) of the Charter of the Nürnberg Tribunal defined the killing of hostages as a war crime, but not the taking of hostages. Thirdly, the concept of "deportation or transfer of civilian populations from an occupied territory" was too vague. In article 6 of the Nürnberg Charter, the purpose of deportation was an important element of the crime. The transfer of civilian populations to ensure their safety during hostilities could not be made a war crime. What was forbidden in the Nürnberg Charter was deportation for the purpose of slave labour or the like. Again, the words "destruction or appropriation of property" should be replaced by the words used in article 6 of the Nürnberg Charter, namely "wanton destruction . . . " and "plunder of public or private property". Such a formulation would make it clear that it was the gravity of the destruction that made it a war crime under the present code.

12. Paragraph (*c*) (ii) could be deleted. The unlawful use of weapons was a difficult question for codification.

[8] *Ibid.*, footnote 4.

[9] *Yearbook . . . 1986*, vol. I, p. 95, 1958th meeting, para. 6.

Moreover, it was already partly covered in international conventions and would be further developed by disarmament conferences.

13. In his view, the proposed list of crimes could be referred to the Drafting Committee.

14. Mr. OGISO said that the Special Rapporteur had originally been hesitant about including a list of crimes and he himself had shared that view. He still believed that an indicative list was bound to create problems. For instance, paragraph (*c*) (ii) referred to the "unlawful use of weapons and methods of combat", which raised the question of what constituted "unlawful use". Moreover, the reference to weapons and methods of combat raised the issue of weapons of mass destruction. Clearly, the list would pose more difficulties than it sought to resolve.

15. If a list was to be attached to the definition of war crimes in draft article 13, however, a few points called for brief comments. First, paragraph (*c*) (i) made no mention of attacks against a civilian population, which were covered by article 85, paragraph 3 (*a*), of Additional Protocol I to the 1949 Geneva Conventions. Paragraph (*c*) (i) referred indirectly to the matter, but it was essential to lay down in direct terms a prohibition on attacks against civilian populations.

16. The same problem arose in paragraph (*c*) (ii) with regard to the unlawful use of weapons of mass destruction. The paragraph spoke of weapons "which by their nature strike indiscriminately at military and non-military targets"; yet a weapon used against a military target could also harm the civilian population. Weapons used to attack and destroy whole cities should be expressly prohibited.

17. He was also struck by the absence of any reference whatsoever to the ill-treatment, or inhuman treatment, of prisoners of war. It was essential to introduce a reference to that offence in either paragraph (*c*) (i) or paragraph (*c*) (ii), or possibly in a separate subparagraph altogether. Inhuman treatment of prisoners of war, including the use of prisoners of war for forced labour, both during and after hostilities, should certainly be characterized as a war crime.

18. It was questionable whether the list of crimes would be of assistance in making progress on the present topic. Mr. Shi had suggested that paragraph (*c*) (ii) should be deleted; but the provisions it contained covered an important component of war crimes and reflected the progress made on the matter since the end of the Second World War. The subparagraph should be retained, but he would none the less urge caution with regard to the inclusion of a detailed list of war crimes.

19. Mr. CALERO RODRIGUES expressed appreciation to the Special Rapporteur for presenting a list of war crimes in response to the wishes of some members, for it would be useful not only to them, but also to members like himself who did not approve of the idea of including a list in draft article 13. All members were agreed, however, that it was practically impossible to draw up an exhaustive list, largely because of the many instruments that were applicable. For example, the four Geneva Conventions of 1949 and the two Additional Protocols thereto dealt with grave breaches which constituted war crimes. The prohibition of certain weapons resulted from a large number of international agreements dating back in some cases more than a century. Further crimes would certainly be added as a result of international legislation in the process of formulation.

20. Hence there was an additional disadvantage to a list of war crimes: it would have the effect of freezing the concept of war crimes at a particular point in time and the list would have to be amended every time a new act was made unlawful. Mr. Boutros-Ghali (2096th meeting) had suggested that the inclusion of a list would be a valuable means of mobilizing world public opinion. The important point, however, was that an illustrative list was of no great value for legal purposes, which were the purposes the Commission should primarily have in mind. Public relations were a secondary matter.

21. The two alternatives of draft article 13 submitted by the Special Rapporteur differed only in terminology: the second used the expression "armed conflict" instead of the term "war". As to substance, the two provisions were identical. The adjective "serious" was acceptable because it corresponded to the distinction drawn in the Geneva Conventions between common breaches and "grave breaches". Mr. Barboza, in his remarkable statement, had drawn a useful distinction between serious violations and grave breaches.

22. The best course would be for the Commission to draw on the terms of article 147 of the Fourth Geneva Convention, an important provision which he had cited at the 2099th meeting (para. 48) and which would be of assistance to the Commission in solving the problem it now faced. The Geneva Conventions made the important distinction between grave breaches and other breaches. On that basis, article 147 of the Fourth Convention, and the corresponding articles of the other Conventions, specified that "Grave breaches . . . shall be those involving any of the following acts . . . ". There followed an exhaustive list of the acts in question.

23. The exhaustive list of acts in article 147 was not a list of war crimes as such, but of acts which, if involved in a particular course of conduct, made that conduct a "grave breach". It would be noted that article 147 made frequent use of the words "wilful" and "unlawful". In the case of wilful killing, the emphasis was on the killing of a protected person, whether a prisoner or a civilian, as a violation of the laws or customs of war. Clearly, the broad expression "wilful killing" did not meet the case unless qualified by the words "if committed against persons or property protected by the present Convention".

24. He was not opposed either to retaining or to deleting paragraph (*c*) (ii) of the list proposed by the Special Rapporteur, but would point out that it referred to the "unlawful use" of certain weapons and methods of combat. The provision thus dealt with acts which were forbidden by existing international law. It did not deal with the problem of first use of such weapons.

25. As rightly pointed out by Mr. Barboza, draft article 13 did not contain a real definition of war crimes; it gave only an indication. Of course, only serious violations would constitute war crimes.

26. His own suggestion would be for an article 13 along the following lines: first, a paragraph (*a*) as in the second alternative proposed by the Special Rapporteur; secondly, if desired, a paragraph along the lines of paragraph (*b*) of

the second alternative, even though that provision was not essential, since it merely expressed a self-evident fact. Those paragraphs would be followed by a new paragraph (*c*), reading: "For the purposes of paragraph (*a*) above, serious violations shall be those involving any of the following acts . . . ", followed by the list of acts from article 147 of the Fourth Geneva Convention. Such a method would combine the approach suggested by Mr. Barboza with the system used in the Geneva Conventions.

27. It was clear that the Commission would find it difficult to agree even on an indicative list. Problems of terminology would also arise. For example, the list now under consideration used the term "intentional homicide", which was obviously a translation of the original French *homicide intentionnel*. Yet the term used in the official English text of the Geneva Conventions was "wilful killing". Difficulties were bound to arise from that kind of discrepancy.

28. Mr. FRANCIS said that he had been impressed by Mr. Barboza's statement, which had proved the obvious need for a list, if only because the code could not otherwise be effectively implemented by national courts. An illustrative list of war crimes would not be necessary if the code was to be applied by an international tribunal. National courts, for their part, would need guidance because of their lack of familiarity with international law. He also strongly supported Mr. Barboza's plea for a definition.

29. He wished to propose that drug trafficking should be classified as a crime against humanity, the subject-matter of draft article 14. The question had been raised as early as 1985 by Mr. Reuter, who was a leading authority on the international instruments on the control of narcotic drugs and the struggle against the drug traffic.

30. The CHAIRMAN suggested that that proposal should be made at the end of the present discussion.

31. Mr. BARSEGOV said that it was clearly not at all easy to draw up a precise list of war crimes, but it was absolutely necessary to do so. The task therefore had to be undertaken. The Special Rapporteur had made an excellent contribution to that task by submitting paragraph (*c*) of draft article 13, which provided a good basis for the Commission's consideration of the issues involved. On those issues, there were bound to be different views, as the discussion had shown.

32. With regard to the purpose of the list, some statements made during the discussion had been interpreted to mean that the list would be of value only as a way of impressing public opinion and that it was devoid of legal significance. He did not share that view. The Commission was concerned with the preventive function of the law, which was a primordial task of law and justice.

33. The list proposed by the Special Rapporteur could no doubt be improved. The Drafting Committee would make changes and additions to it, in the light of the discussion in the Commission. In that constructive spirit, he wished to offer some comments.

34. In his earlier statements, he had expressed himself in favour of a precise definition with as comprehensive a list as possible of acts constituting war crimes under the code. As he saw it, that approach was a prerequisite for the success and effectiveness of the code. Many members probably agreed with him on that point. The difficulties inherent in the topic, to which the Special Rapporteur had referred, were connected with the complex political problems involved. That being so, the question arose of the course to be adopted by the Commission. It could, of course, ignore the problems in question and abandon the idea of drawing up a list, or formulate a list which reflected the conditions prevailing at the end of the nineteenth century and the beginning of the twentieth century, when the major concern had been to prevent the use of such weapons as explosive bullets, which inflicted unnecessary suffering, and other similar issues. But the world today was faced with altogether different problems. New methods of warfare had been evolved and weapons of mass destruction had been introduced. In particular, the use of nuclear weapons was considered by many jurists not only as a war crime, but also as a means of genocide. With the weapons of mass destruction now available, it was possible to wipe out the whole of mankind. The terms "technological genocide" and "omnicide" had appeared in specialized legal literature. And with the aid of technology, it was possible to commit those crimes "in white gloves".

35. The inclusion of the use of nuclear weapons in the list of crimes had been on the agenda for many years. The difficulty, however, was to decide whether first use alone should be treated as a crime, response being regarded as part of legitimate self-defence, or whether any use of nuclear weapons should be prohibited. The arguments for and against those propositions were familiar to members, and the upshot was that the Commission had not settled the question. The Special Rapporteur had suggested that the word "first" could be placed between square brackets, thus leaving the matter open, but that, according to the Special Rapporteur, would prolong the debate indefinitely and prevent the adoption of the code. The Special Rapporteur had therefore now suggested a broader formula covering all weapons of mass destruction which struck indiscriminately at military and non-military targets. It was a diplomatic approach, and one to which it was difficult to raise objections, for it would break the deadlock and allow progress to be made. Its drawback was that it lacked specificity and disputes might arise as to what constituted the "unlawful use" of such weapons. Many would agree that the use of a weapon as a response was not unlawful. The question again, however, was whether first use was lawful, which was to revert to the initial question.

36. What counted most was not any possible *post facto* distinctions, for example after a nuclear weapon had been used; what mattered was the fact that failure to characterize the use of such weapons as wrongful under the code weakened the preventive function of the code. Although the Special Rapporteur would no doubt have liked to have some more specific form of wording which would serve to prevent such crimes, he had been guided by considerations of realism, having in mind the results of many years of debate on the issue.

37. Times had changed, however, and new thinking was increasingly permeating areas of international relations in which there had seemed to be no prospect of improvement. Formerly, when approaching such matters, States—and, in their turn, scholars and legal experts—had acted on a basis of suspicion and mistrust; but such suspicion and mistrust were now increasingly being replaced by confidence and trust. Nowadays no sensible person could regard the use of

nuclear weapons as reasonable. It was necessary to approach the question from that standpoint and to take the broader view.

38. Should some members feel that the "first use" formula was an obstacle to outlawing the use of nuclear weapons and making it a punishable offence under the code, then—in the spirit of growing trust—he would suggest that the use of nuclear weapons be included in the list of war crimes without confining it to the first-use concept. In that way, the Commission would be taking a practical step in the interests of mankind and of strengthening peace and security. He fully appreciated that matters of political significance, which could not be finally resolved by the Commission, were involved, and that regard must be had to the results of the talks on disarmament. In his view, however, in that sphere, as in other areas of the Commission's work, members could come forward with initiatives provided that such initiatives were designed to strengthen the law, the legal order, and peace.

39. In addition to those points, he wished to raise some other issues concerning the applicability of restrictive or prohibitive norms to anti-colonial and national liberation movements. The humanization of the law of war should not only apply to wars between States. It seemed impossible to him to restrict the application of the code to occupied territories, excluding any reference, for example, to the criminal nature of the inhuman treatment of civilians, their deportation, and the destruction of their property in territories populated by peoples living under colonial domination or subject to other forms of foreign domination.

40. He agreed that the text proposed by the Special Rapporteur should be referred to the Drafting Committee, together with the comments made during the debate.

41. Mr. McCAFFREY said he agreed that the question at issue had to be answered in the light of the method to be adopted for enforcing the code. If it was envisaged that the code would be enforced by an international criminal tribunal, a general definition would raise no difficulty, for such a tribunal would have the necessary expertise to apply the definition and its decisions would be consistent. It was unlikely, however, that the decisions of national tribunals, which might be unfamiliar with international law and particularly with the laws and customs of war, would achieve that consistency whereby a body of law could be developed to provide for the uniform interpretation and application of the code.

42. It had been said that the code would be applied and interpreted more frequently by national tribunals than by an international criminal court. If so, it was a frightening prospect, for the reasons he had stated in the past. Without a particular tribunal to which the States parties could assign the authority to make decisions regarding any violations of the terms of the code, it would not be possible to be sure how its provisions, including those on war crimes, would be interpreted and applied.

43. In his view, to try to draft a list of war crimes would be to open Pandora's box. A very specialized area was involved, one that called for the mobilization of expertise as to current practices in the conduct of hostilities. In endeavouring to draw up an indicative list, the Commission would face two problems, the first being the extent to which such a list departed from the 1949 Geneva Conventions, which were among the most universally adopted of all international instruments. To depart from them might cast doubt on the continued validity of the Conventions, and it was most unlikely that the Commission intended to do that. The other problem was that, should the Commission decide to establish a list which did not merely contain a reference to those Conventions, but charted a path of its own, considerable time and resources would be required to update the Conventions so as to take account of the modern techniques of warfare.

44. Like Mr. Ogiso and other members, therefore, he would be very reluctant about trying to draw up a list. Admittedly, his position was somewhat ambivalent, since he also felt that it might create a dangerous situation if there were no list and if enforcement were left to national tribunals. But if there was to be a list, it certainly could not be exhaustive: the Commission lacked the resources and, even if it did have them, the list would probably be out of date by the time the code came into force.

45. The proposed text of paragraph (*c*) illustrated the difficulties of trying to compile a list of war crimes. It had been suggested, for instance, that the word "protected" should be inserted before "persons". If that meant protected by the rules of international law applicable in armed conflict, then it was probably necessary to say so specifically. Alternatively, the terms "protected person" and "property" should be defined. As also rightly pointed out, the expression "intentional homicide" had undergone some changes in its various translations. The phrase "deportation or transfer of civilian populations from an occupied territory" would also require close examination, bearing in mind that that particular crime was limited in various ways under the Geneva Conventions, and that some reference should be made to the purpose of the deportation. Again, the expression "inhuman treatment" could be interpreted in a number of ways. Lastly, the expression "appropriation of property" raised many questions as to its precise meaning, and he would have thought that the Commission would have been more concerned with the destruction than with the appropriation of property.

46. Another difficulty stemmed from the fact that the list went a step further than the Geneva Conventions. Indeed, the code itself was not restating the terms of the Conventions but was endeavouring to identify violations of them that would threaten and endanger the peace and security of mankind. He would not touch on the question of the first use of nuclear weapons; that was an intrinsically political issue and no useful purpose would therefore be served in addressing it. The suggestion that the Commission should seek to identify grave or serious breaches in the context of the Geneva Conventions bore scrutiny, however, and should perhaps be considered further.

47. For all those reasons, he would be very hesitant about referring the proposed list to the Drafting Committee. He favoured a more general definition, in which connection it might well be possible to draw on article 19 of part 1 of the draft articles on State responsibility.[10] Such a definition could perhaps be linked to the Geneva Conventions, to provide some guidance for national courts which had to apply the code. He would tentatively suggest, for further

[10] See 2096th meeting, footnote 19.

consideration, some wording such as: "War crimes within the meaning of this Code are serious breaches on a widespread scale of the laws and customs of war", possibly followed by a definition, along the lines suggested by Mr. Calero Rodrigues (para. 26 above), of what constituted a grave breach.

48. Mr. KOROMA thanked the Special Rapporteur for his prompt response to the Commission's request for a list, albeit indicative, of war crimes. The complexity of the exercise was commensurate with its importance, which was no less than that of the draft code as a whole. He agreed with Mr. McCaffrey that both time and expertise would be needed to carry it out successfully, particularly in the light of developments in modern weapons technology.

49. In comparison with the list of crimes set out in the Nürnberg Principles,[11] for example, the list before the Commission was indeed brief. Given the rigorous approach expected of the Commission, no effort should be spared to seek out the widest variety of pertinent sources, in addition, of course, to the 1949 Geneva Conventions, in order to present an authoritative, if non-exhaustive, list to the international community.

50. It should not be forgotten that the war crimes concerned could be committed both by soldiers in the field and by civilians and that, in its work on the draft code, the Commission had decided to confine its attention to the criminal responsibility of the individual and to exclude the question of the criminal responsibility of States. From the point of view of drafting, it might be preferable to replace the words "in particular" in the introductory clause of paragraph (*c*) by "*inter alia*", since the present wording was likely to give the impression that the crimes listed were the most serious types of war crimes, which was not the intention of the draft.

51. The question of seriousness or gravity, although discussed at length, remained of crucial importance when it was borne in mind that it would be possible for a national or international court to initiate criminal proceedings in the case of war crimes. To introduce the criterion of gravity might be to introduce an element of subjectivity: for example, a State would be in a position to decide for itself whether a given crime was sufficiently serious to warrant prosecution. He continued to believe that any individual, whether military or civilian, who committed an act violating the rules of international law governing armed conflict should be liable to punishment as a war criminal: such an assumption precluded the criterion of seriousness. Mr. Barboza had said that the concept of gravity referred not to the act itself, but to the deviation from the rule of international law. However, he personally believed that the act itself constituted the deviation that violated international law, and he therefore found the distinction between the act and the deviation unduly subtle. After all, in criminal law for example, theft was still theft whatever the scale on which the offence was committed, and the offender was held liable accordingly. The most satisfactory approach might be, as Mr. Calero Rodrigues had suggested (para. 26 above), to have a general definition and to specify the acts considered as war crimes under the code. The definition itself, however, should not state that a violation must be "serious" in order to constitute a war crime.

52. Paragraph (*c*) (i) referred to "intentional homicide", a somewhat infelicitous expression which should be replaced by "wilful killing". That, however, need not be discussed at length, since it was a matter of drafting, as was the useful suggestion already made that each act should be made the subject of a separate subparagraph.

53. He was reluctant to address the question of the first use of nuclear weapons, which was highly controversial. Although there was a substantial body of opinion in the international community which held that the first use of nuclear weapons would constitute the most serious of crimes, the Commission was not the most appropriate forum in which to discuss such issues. However, as he saw it, paragraph (*c*) (ii) generally covered the use of weapons prohibited under various relevant international instruments. It should be understood to refer, *inter alia*, to prohibited projectiles such as those containing asphyxiating gas, to bacteriological weapons and to the bombardment of undefended towns and villages.

54. Lastly, he wondered whether the Commission might not wish to extend the scope of paragraph (*c*) (i) to include experiments which were not strictly of a biological nature. To do so, however, it would have to draw on some technical expertise from outside.

55. Mr. BEESLEY expressed his appreciation to the Special Rapporteur for taking into account views he did not himself necessarily share. The Commission should adopt a similar approach in dealing with a topic which was of the highest importance, and particularly in referring texts to the Drafting Committee.

56. It might be best when submitting texts for consideration by the Sixth Committee of the General Assembly or for scrutiny by the international community of States to offer an element of choice, since there was an ever-present danger of straying from the legislative function into the quasi-judicial function. In earlier exercises in the progressive development and codification of international law, such as those which had led to the 1974 Definition of Aggression[12] or the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[13] it had been clear which was the United Nations organ where the legislative function lay and which was the United Nations organ where the quasi-judicial or judicial function lay. That was not the case with the draft code, and the Commission must constantly keep in mind the question of what tribunal would be implementing or applying the code.

57. Although it could be argued that it was highly dangerous to leave it to national tribunals to apply a non-exhaustive list of crimes, it was equally hazardous to present national tribunals with too general or generic a definition of war crimes. The complexity and range of issues involved—such as *mens rea*, presumption of innocence, and extradition—were such that the Commission's work could be emasculated unless some guidance were received from the international community. It ought not to be for the Commission to decide how the code would be implemented.

[11] *Ibid.*, footnote 14.

[12] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[13] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

58. At the same time, progress had been made towards consensus on the scope of the draft code. It had been agreed that it dealt with the relations between States and individuals and not between States themselves, and that the purpose of the exercise, as Mr. Barsegov had stated, was primarily preventive.

59. On the question of seriousness or gravity, he was of the opinion that the very inclusion of a crime in the draft code itself implied that it was sufficiently serious to warrant prosecution. The whole issue, however, was more judicial than legislative in character. In that connection, he agreed with the points made by Mr. Barboza and Mr. Calero Rodrigues, particularly with regard to the importance of the 1949 Geneva Conventions in general, and of article 147 of the Fourth Convention in particular, in pointing the way to a solution of the problems raised by the criterion of gravity.

60. The difficulties inherent in an indicative list of crimes were apparent from the list in paragraph (*c*) proposed by the Special Rapporteur, but the only important issue was whether some especially serious crime had been omitted. The use of chemical weapons could have been specifically mentioned, but there seemed little point in protracted discussions once the basic principle of a non-exhaustive list had been agreed upon.

61. The Commission was making progress in its work, despite the difficulties it faced and the need for special expertise. It might be premature for the proposed texts to be referred to the Drafting Committee if they were to include a list, but he had no objection to such a course and hoped that there would be time to evaluate the results before the Commission's proposals were presented for consideration by the Sixth Committee.

62. Mr. YANKOV said that he wished to join in the expressions of gratitude to the Special Rapporteur for the list submitted in paragraph (*c*). As he understood it, the task now before the Commission was to decide whether the format of a list combined with a general definition was feasible, and if so, to determine how the general and specific elements were to be combined.

63. The definition should contain more constituent elements. Individual serious violations should be regarded not as examples of criminal acts, but as essential components of the legal notion of a war crime as a violation of the rules of international law applicable in armed conflicts. That approach might seem unrealistic, but in his view it was sound, both because of the analogy with municipal criminal law and because any tribunal must be able to refer to basic rules incorporating not merely an indicative list, but also a legal definition of a war crime embodied in the code itself. In arriving at that definition, the source material provided by the Nürnberg Principles[14] and the 1949 Geneva Conventions had not been superseded, and would repay careful study.

64. It might be appropriate to incorporate a safeguard clause to the effect that any other serious violations of the rules of international law applicable in armed conflict were covered by the definition, but the definition itself should contain all the essential elements relating to the legal notion of a war crime.

65. The list proposed by the Special Rapporteur provided a useful basis for discussion, but it needed further scrutiny and elaboration. In particular, the treatment of protected persons should specifically include both combatants and non-combatants. Similarly, deportation and the destruction of undefended towns and villages, as covered by the Charter of the Nürnberg Tribunal, should be included, as should a reference to proscribed weapons and methods of warfare. With regard to the matter of weapons of mass destruction, there seemed to be differences of opinion, but his own view was that the modern legal and moral concept of weapons of mass destruction should be explicitly reflected in the text by a reference to "nuclear and other weapons of mass destruction". The issue did have political implications, but he believed that the specific inclusion of nuclear weapons was important from the point of view of realism and prevention.

66. Lastly, the text proposed by the Special Rapporteur, together with the suggestions made during the debate, should be referred to the Drafting Committee for consideration.

The meeting rose at 1.05 p.m.

2107th MEETING

Wednesday, 24 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, 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 and Add.1,[3] A/CN.4/L.431, sect. D, ILC(XLI) Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 13 (War crimes)[4] (*concluded*)

1. Mr. Sreenivasa RAO said that, since he had been unable to take part in the general debate, he would make

[14] See 2096th meeting, footnote 14.

[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, and 2106th meeting, para. 2.