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Summary record of the 2107th meeting

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

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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

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[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.

some comments on the question of war crimes before referring to the list of crimes proposed by the Special Rapporteur in paragraph (*c*).

2. First, the Commission could treat the expression "war crimes" as a term of art and explain in the commentary that the expression could be understood to refer to any armed conflict, whether or not it was considered as a "war" in the traditional sense. It should also be noted, as Mr. Solari Tudela (2100th meeting) had pointed out, that war as an instrument of national policy and as a legal institution was prohibited by customary law and under Article 2, paragraph 4, of the Charter of the United Nations.

3. Secondly, the code should deal only with "serious" crimes, as the Commission had already decided, but it might also apply, as some members had suggested, to crimes which could be regarded as serious by virtue of their implications for the peace and security of mankind, even if the criminal act itself did not entail immediate serious consequences.

4. Thirdly, the code should contain a list of war crimes, which would be drawn up on the basis of the instruments applicable to the law of international armed conflicts, such as the 1949 Geneva Conventions and their 1977 Additional Protocols, bearing in mind, however, the views and interests of the majority of States in order to ensure that the list was as universally acceptable as possible.

5. Fourthly, a list of that kind would be essential if the code was to achieve its objective of deterrence—even if it was difficult to draw up, even if it must be flexible enough to be subsequently expanded to include certain acts which the international community would come to regard as wrongful, and even if it was admitted that the list could never be complete and exhaustive. For that reason, he would accept a general definition of war crimes, to be followed by a list introduced by the words "*inter alia*", rather than "in particular", in order to avoid any idea of priority. In that connection, it should be noted that the second alternative of draft article 13 could not be followed by a list of crimes, since it provided no definition: it merely referred to various international instruments and did no more than state the obvious. Thus, if the code was to be of any value as a legal instrument, it had to be as self-contained as possible.

6. Turning to the proposed list of war crimes in paragraph (*c*), he said he, too, considered that the expression "intentional homicide" should be replaced by "wilful killing" and that it would be useful to draw upon the acts listed in article 147 of the Fourth Geneva Convention[5] in characterizing "grave breaches", even if the Special Rapporteur preferred to use the expression "serious violation". The list contained in paragraph (*c*) (i) should also be carefully analysed in the light of various relevant international instruments in order to update those texts and reflect the international consensus as closely as possible. That was a task that could be entrusted to the Drafting Committee. Similarly, the doctrine of military necessity should be given close scrutiny by the Commission, not only where it related to the appropriation of property, but also where it was used as a justification for destroying property or for other acts which might otherwise be regarded as "crimes" involving excessive injury and harm and unnecessary suffering. The concept should be reviewed in the light of recent trends in humanitarian attitudes and of the content of the code itself. The same was true of the concept of "suffering", firstly because some means and methods of combat could cause not only immediate, excessive and unnecessary "suffering" to the combatants, but also long-term damage to the environment and natural resources, and also because such "suffering" might extend over a period of time or appear only after a certain period of time. Those were elements which might serve as criteria for determining whether an act causing great suffering did or did not constitute a war crime.

7. While it was true that the Commission did not have to reinvent international humanitarian law and that it should confine itself primarily to codification, it should at the same time not hesitate to engage in a creative analysis of current trends and of the aspirations of the international community. After all, it was also the Commission's mandate to promote the progressive development of international law, and it would be failing in its duty if it did not carry out the necessary re-examination of the concepts of "military necessity" and "suffering".

8. With regard to paragraph (*c*) (ii), his first reaction was, as other members had suggested, that it should be kept as a separate provision and not be incorporated in paragraph (*c*) (i). The crimes listed in paragraph (*c*) (ii) belonged to a special category. Taking a cautious approach to that delicate issue, the Special Rapporteur had worded the provision in general terms, although he could also have referred to nuclear, chemical and bacteriological weapons, which were by common consent acknowledged to have the consequences described in the provision. He himself would be prepared to accept the provision if it were approved by the majority of members and if it would encounter less resistance by those who were opposed to a specific reference to nuclear, chemical and bacteriological weapons.

9. However, a serious matter which the Commission could not evade without risking being accused of ducking the issue was that of the legality of the use of nuclear weapons and of other weapons of mass destruction. That was admittedly primarily a political question, but it could not be denied that it also had a legal dimension, as was evident from much of the literature in which it had been analysed in detail in terms of the application and interpretation of the rules relating to armed conflict, humanitarian law, the survival of mankind, genocide, the parallel with poisonous gases and with bacteriological weapons or weapons causing unnecessary, indiscriminate or disproportionate suffering, long-term effects on the environment, etc. In his view, it was legitimate to regard the use of nuclear weapons not merely as a war crime, but also as a crime against humanity and a crime against peace. The Commission might even make it a crime common to all three categories, instead of listing it under one of those headings. He therefore agreed with the members who had already urged that the Commission should seize the opportunity of dealing with that important issue and benefit from the new climate of understanding and trust among States, the awareness of world public opinion of the dangers of a nuclear accident—not to mention the disaster a nuclear war would cause—and the intense desire of the international community to live in a world free of nuclear weapons. The earlier doctrine

[5] See 2099th meeting, footnote 21.

of limited nuclear war had radically changed and public opinion was now exerting pressure on Governments to abandon such concepts. The manufacture of nuclear weapons as legitimate instruments of national defence policy must give way to the prohibition of the manufacture and use of such weapons and to the destruction of stockpiles. Nuclear disaster must be avoided by eliminating the possibility of the intentional use of nuclear weapons and by eliminating any risk of accidental explosion through a prohibition on the movement of nuclear weapons anywhere in the world. World leaders recognized that necessity. As a body that was responsible to the international community, the Commission must also come to grips with that new challenge.

10. Mr. HAYES thanked the Special Rapporteur for having done the impossible by submitting a clearly drafted list of war crimes in so short a time. He had been one of the members who had imposed that burden by saying that the code should contain something other than the general definition of war crimes given in draft article 13—which was, moreover, not even a definition *stricto sensu*. More specific guidelines should be given to the courts, no matter what courts would be called upon to try war crimes within the scope of the code, so that the code would be applied uniformly.

11. Members had already expressed concern about the possibility of wide variation in the interpretations of national courts having different backgrounds and with judges differing greatly in their experience, leading to inconsistencies in application of the code and a consequent diminution of its status. Even in a unitary jurisdiction it would be difficult to apply a general definition and, in particular, to assess the gravity of the act committed. He believed that gravity was an essential component of a war crime and therefore that the word "serious" must be retained in article 13, although it was open to divergent interpretations. A list of war crimes would assist courts in their assessment of gravity and in their interpretation of the word "serious", a task that belonged to the court in each particular case.

12. The fact remained that it seemed to be difficult to reach agreement on a list: should it be indicative or exhaustive? There was no emerging consensus on what should be included even in an indicative list. It would therefore be appropriate to consider the suggestion made by Mr. Calero Rodrigues at the previous meeting (para. 26), namely to follow the example of article 147 of the Fourth Geneva Convention of 1949 by listing elements one of which must be present to render a violation serious. Such a list would offer two advantages: first, it would give guidance to the judge on the nature of the acts covered by the code; and, secondly, it would be exhaustive in the sense that new violations could come under the general definition and their gravity could be assessed in terms of the elements listed.

13. The task was probably more difficult than it might appear to be, but that suggestion could be a way of solving the problem and reconciling the divergent views of the members of the Commission. The Commission should certainly look into that possibility before referring the matter to the Drafting Committee.

14. The CHAIRMAN, speaking as a member of the Commission, recalled that, during the debate, several members, including himself, had said that a non-exhaustive list of war crimes would be necessary in order to give substance to the abstract definition contained in draft article 13. The Commission had to be specific in describing the kind of violations to be covered by the code, whether cases were to be decided in a national court or in an international criminal tribunal. It was for that reason that the Charter of the Nürnberg Tribunal contained an indicative list of war crimes; there could be no question of leaving everything to the discretion of judges.

15. It should, however, not be forgotten that there were already rules applicable to the punishment of war crimes, as Mr. Arangio-Ruiz had pointed out several times, and that, even if the code contained no provision in that regard, it would thus be possible to apply the existing régime. To the extent that war crimes were, at the same time, grave breaches within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto, they would be subject to the universal jurisdiction of national courts under that régime.

16. The Commission did not, of course, have to repeat the definition of "grave breaches" contained in the Geneva Conventions and it could not confine itself to reproducing the list of breaches given in those Conventions, because there were many other "serious" war crimes which had their basis in other instruments and in customary law. However, it could also not question acts which were already described as grave breaches in the Geneva Conventions and in Additional Protocol I, such as the taking of hostages (art. 147 of the Fourth Convention[6]) and the deportation or transfer of civilian populations within or outside an occupied territory (art. 85, para. 4 (*a*), of Additional Protocol I[7]). The Commission was thus not required either to define new crimes or to establish whether certain acts were war crimes: that had already been done. It simply had to decide whether some of the war crimes already characterized as such were serious enough to be covered by the code.

17. If article 13 was to begin with a general definition, as proposed in the second alternative, an indicative list could be appended of specific acts illustrating the kinds of violations which were serious enough to be considered war crimes within the meaning of the code. To shape the list, he proposed three separate categories of war crimes, as set out in a document which he had circulated to members.

18. Paragraph (*a*) of the second alternative would be followed by a paragraph (*b*) reading: "Serious violations within the meaning of paragraph (*a*) are, in particular, the following acts:". Crimes against persons would then follow in a subparagraph reading:

> "(i) wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful confinement, the taking of hostages, if directed against protected persons (sick and wounded, prisoners of war, *parlementaires*, soldiers *hors de combat*, women, children, etc.), and the deportation or transfer of civilian populations from and into occupied territories."

19. The second subparagraph would refer to crimes committed on the battlefield in violation of the rules of war, but without quoting the sources. It would read:

[6] *Ibid.*

[7] See 2096th meeting, footnote 11.

"(ii) making the civilian population, individual civilians or other protected persons the object of attack, launching an indiscriminate attack affecting civilian and other protected persons and objects, launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause loss of life or injury to protected persons, mass destruction and appropriation of goods not justified by military necessity."

20. The third subparagraph would cover all crimes constituted by the use of prohibited weapons. It would be based on existing law and might read:

"(iii) the unlawful use of weapons, means and methods of warfare, and particularly of weapons, means and methods of warfare which by their nature cause unnecessary suffering or strike indiscriminately at military and non-military targets; the perfidious use of the distinctive emblem of the red cross or other protective signs."

21. What he was proposing was simply a possible way of drawing up a list which could be readily amended or shortened. It would have the advantage of making the general definition more precise, but without inventing new war crimes or interfering with existing instruments. As at Nürnberg, the definition would simply state what was covered by the code.

22. As he had already said (2101st meeting), he would prefer to have a special provision defining the use of nuclear weapons as a serious war crime and a crime against humanity. That would, on the one hand, stress the importance of banning the use of such weapons in general and, on the other, supplement the code, since it would be unthinkable for such a crime to be left out. If States were not prepared to accept such a provision, they would say so.

23. In conclusion, he suggested that the Drafting Committee should be requested to complete work on the list, taking account of the suggestions made during the debate.

24. Mr. RAZAFINDRALAMBO, referring to the difference between a "violation" and a "breach", said it had already been pointed out that the term "serious" involved an element of subjective appraisal and that it could be attributed only to a "violation". Appraising the seriousness of a "violation" was thus a judicial function, whereas appraising the seriousness of a "breach" was a legislative function. That view was acceptable, in so far as a violation was an infringement of a given rule by means of an act or an omission, whereas a breach was a complex concept that had a judicial content and several constituent elements (delicts and crimes, for example). A violation and a breach were thus two different aspects of the same thing, but a breach could be seen rather as the result or consequence of a violation of the law.

25. It was therefore quite possible for a "serious violation" to take the form of a "grave breach", since it was difficult to see how a "serious violation" could be nothing more than a minor breach. At all events, the gravity of a violation of the laws of war was a *sine qua non* for a war crime or, in other words, for a breach described as a "war crime". Hence the term "serious" was crucially important in the draft code, whether the code contained no list of crimes at all or one of an illustrative or indicative nature based on the criterion of gravity.

26. Paragraph (*c*) of article 13 proposed by the Special Rapporteur had some drawbacks. Subparagraph (i) referred to "serious attacks on persons" and then to "serious harm to physical integrity or health". That might, however, simply be a drafting problem that the Drafting Committee would be able to resolve.

27. It might also be asked whether it was appropriate to refer to "serious attacks" in subparagraph (i) and to "unlawful use" in subparagraph (ii). According to the line of reasoning he had advanced at the beginning of his statement, the concept of gravity was already inherent in the concept of a violation and the crimes contained in the list were, by definition, grave breaches. Logically, therefore, attacks on persons had to be serious attacks. Similarly, the adjective "unlawful" was unnecessary because it was difficult to see how the use of methods which struck indiscriminately at military and civilian targets could be considered "lawful". The Special Rapporteur had probably been thinking of the case of self-defence. But the concept of unlawfulness was already present in the words "serious violation of the rules of international law applicable in armed conflict".

28. It was also open to question whether the element of intent had to be referred to in connection with certain crimes. There was no reason why the infliction of great suffering should have to be intentional and why, for example, causing harm to health should not. The expression "intentional homicide" was, moreover, not very apposite because it brought to mind an act committed by one individual against another. It would be better, as at Nürnberg, to refer to murder or killing.

29. As to the use of nuclear weapons, which some members wanted to include in subparagraph (ii) on weapons and methods of combat, he thought that the provision already implicitly covered the point. However, if the Commission wished to include a specific reference to nuclear weapons, he would not object.

30. Mr. Graefrath had just proposed a very detailed and appealing version of the list of crimes (paras. 18-20 above) and he reserved the right to give the Drafting Committee his own reactions to it. The comments he had just made related purely to form: in terms of substance, he fully agreed with the Special Rapporteur.

31. Finally, he suggested that the proposed list of crimes be referred to the Drafting Committee.

32. Mr. SOLARI TUDELA said that he had some problems with the words "in particular" in the introductory clause of paragraph (*c*). As Mr. Koroma (2106th meeting) had said, the words "*inter alia*" would be better. It was by no means certain that the list would be a complete enumeration of the most serious crimes and, from that point of view, the words "in particular" would be unacceptably vague, whereas the words "*inter alia*" would avoid that problem.

33. With regard to the content of the proposed list, Mr. Shi (*ibid.*) had rightly pointed out that the relevance of some of the crimes had to be questioned, since the code was supposed to cover only the most serious ones. In view of the difference of degree between, for example, the killing of hostages and the taking of hostages, the Commission had to choose between them.

34. In paragraph (*c*) (ii), the expression "the unlawful use of weapons and methods of combat" could be justified only if the square brackets were removed from the word "serious" in the general definition. Otherwise, there would be a risk of including acts which were not serious enough. In addition, the word "unlawful" gave the impression that some weapons or some of the ways in which they were used were lawful, for example in the case of self-defence. That was a risky approach, but one which the Commission should not be afraid to take.

35. In conclusion, he said he agreed with Mr. Francis's proposal (*ibid.*) that drug trafficking should be listed as a crime against humanity. That would be particularly opportune because, at present, that crime went hand in hand with terrorism, which was covered by the draft code, thus constituting a new type of crime known in some countries as "narcoterrorism".

36. Mr. TOMUSCHAT said that the task of compiling the list of crimes showed just how difficult it was to draw up an exhaustive text. The more the Commission thought about the problem, the more doubts it would have, especially because the principle *nullum crimen sine lege* meant that it had to be very careful. The problem was further complicated by the need to ensure that the future code did not clash with instruments already in force. On that point, it was necessary to be very clear: were the existing instruments to be faithfully followed—by reproducing their wording or incorporating global references to them—or was the Commission to break fresh ground, or even restrict the scope of those instruments? The Commission had chosen to follow existing texts. That was what it had done in the case of aggression and the Special Rapporteur was proposing to do so again in the case of genocide and in one of the alternative texts he had submitted on *apartheid*.

37. The list of crimes proposed in paragraph (*c*) was not entirely clear. The examples of war crimes it contained were all taken from the 1949 Geneva Conventions, in which connection he cited several articles. The Fourth Convention,[8] however, referred in article 147 to the "taking" of hostages, whereas, as pointed out by Mr. Shi (2106th meeting), the Charter of the Nürnberg Tribunal (art. 6 (*b*)) referred only to the "killing" of hostages. Article 147 also spoke of "destruction *and* appropriation of property", not of "destruction *or* appropriation of property".

38. Furthermore, the two proposed subparagraphs started with expressions that went far beyond the Geneva Conventions, subparagraph (i) referring to "serious attacks on persons and property" and subparagraph (ii) to "the unlawful use of weapons and methods of combat". In his view, the adjectives "serious" and "unlawful" should be deleted.

39. Subparagraph (ii) caused him some difficulty, for, while its wording was very similar to that used in article 51 of Additional Protocol I[9] to the Geneva Conventions, its terminology was not entirely accurate. For example, it referred to "military and non-military targets", but it was difficult to see how there could be non-military "targets" in wartime: that was a contradiction in terms. Also, as Mr. Graefrath had pointed out, the provision failed to mention one of the most serious crimes imaginable, namely "making the civilian population . . . the object of attack", as referred to in article 85, paragraph 3, of Additional Protocol I.

40. On the question of nuclear weapons, he would advise caution. So long as no rule of absolute prohibition had been implemented by States, even in the case of self-defence, it would, in his view, be impossible to make the use of nuclear weapons a crime and, to that end, to provide for individual criminal responsibility.

41. The four Geneva Conventions were already in force and constituted a system that was at once applicable and functional. Under their terms, national courts had jurisdiction over war crimes, whether those who committed such acts were nationals of the State in question or aliens. There could be no question of doing away with or limiting that system. There was, however, no need to rush. The list of crimes proposed by the Special Rapporteur deserved consideration in the further light of the text proposed by Mr. Graefrath (paras. 18-20 above). The task was difficult, but not impossible.

42. Mr. AL-KHASAWNEH said that, by the time the fourth edition of the book *The Legal Effects of War* had appeared in the 1960s, the expression "armed conflict" had become more fashionable than the term "war". In the preface to that edition, the authors had quoted Sir John Harington's words:

> Treason doth never prosper, what's the reason?
> For if it prosper, none dare call it Treason.[10]

He, too, thought that wars were still being waged, but that none dared call them wars. He therefore felt that the use of the terms "war" or "armed conflict" was a question of taste.

43. With regard to the characterization of crimes, he considered that whichever approach was adopted—whether a definition or a list—the problem would never be solved completely. As he saw it, the list approach raised three problems. First, there would always be disagreement about the inclusion in the list of a particular crime. Secondly, no list could be exhaustive, which inevitably raised the question of the ultimate usefulness of the one the Commission was trying to draw up. Thirdly, there were nuances between the crimes, but those nuances changed and the instruments by which they were recognized were themselves a reflection of the times. If the aim was to reflect all those nuances, the exact wording of the instruments already in force would have to be reproduced. But then the code would be no more than a compendium of provisions, and that was not the intention.

44. For his part, he would have preferred the approach of a definition. It would certainly be possible, however, using appropriate legal drafting, to combine it with a list. All those problems could be settled in the Drafting Committee, to which the proposed texts should be referred.

45. Mr. DÍAZ GONZÁLEZ, congratulating the Special Rapporteur on having drawn up in record time the list of war crimes requested of him, said that the Commission should not lose sight of the mandate entrusted to it by the General Assembly, which was to prepare a *code* of crimes.

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[8] See 2099th meeting, footnote 21.

[9] See 2096th meeting, footnote 11.

[10] A. D. McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge, The University Press, 1966), p. vii.

Thus, according to the principle of legality, under which there could be no offence without a law, it had to decide which acts constituted war crimes. Obviously, it could do so only on the basis of the international instruments in force and, in particular—but not only—on the basis of the 1949 Geneva Conventions. As Mr. Al-Khasawneh had just pointed out, however, its work was not simply to make a compilation of existing instruments.

46. At the outset of his work on the topic, the Special Rapporteur had put forward a series of arguments to show that acts constituting grave violations of the laws applicable to armed conflict should be regarded as war crimes. That criterion of gravity, used by the Special Rapporteur to distinguish a war crime from an ordinary crime, was taken from the Geneva Conventions, in which there had also appeared, for the first time, the distinction between a violation and a breach. In his view, that was an extremely subtle distinction, since the two terms were in fact synonymous. The Geneva Conventions, however, dealt with violations of pre-existing obligations, whereas the work of the Commission was to draft an instrument from which obligations would arise for States, namely to refrain from committing the acts characterized as crimes. War crimes having been defined as the most serious crimes, there was no need for the Commission to ask itself about their degree of gravity or to be concerned with determining which court would apply the code. That court, of whatever kind, would have to take account of the degree of gravity of the act only in order to decide whether to admit mitigating or aggravating circumstances, not to characterize the act as a crime, for that was precisely what the code should do.

47. For his own part, he was neither for nor against the list method. He would perhaps favour a provision that would combine a general definition with an indicative list, provided it did not simply quote, or refer to, existing instruments, but reflected a serious attempt to arrive at a definition. The Commission could, as Mr. Shi (2106th meeting) had suggested, adopt the method used for article 19 of part 1 of the draft articles on State responsibility[11] and devote a separate subparagraph to each act characterized as a crime. In any event, the main thing was for the code to determine which acts constituted crimes, for characterization should not be left to the discretion of those who would apply the code.

48. With regard to subparagraph (ii) of the list proposed by the Special Rapporteur in paragraph (*c*), he noted that the Commission had already discussed the question of the use of nuclear weapons at some length. It was true that it was a multifaceted question: mention had already been made of the problem of reprisals and, in addition, there was the problem of self-defence. It was true, too, that the code was not meant to apply to States, but to individuals, and that it was difficult to imagine an individual being able to use a nuclear weapon. The international community would, however, not understand how the most abhorrent means of war, the most inhuman means of mass destruction, could be excluded from a code of war crimes. He was therefore convinced that the Commission should make the use of nuclear weapons a crime. The political risks to which reference had been made did exist, but a legal body such as the Commission did not have to pay too much attention to them.

49. As for referring the proposed list to the Drafting Committee, every time the Commission encountered a delicate problem it should not, in his view, pass it on to the Drafting Committee, whatever the latter's merits might be. When it came to such a basic issue, the problems should be resolved in plenary after a very thorough discussion.

50. Mr. THIAM (Special Rapporteur), replying to the comments made by members on paragraph (*c*) of draft article 13, said that the law of war was one of the most closely regulated subjects and that there was no lack of provisions on war crimes. He could therefore easily have incorporated all those provisions, but he had not thought that such a compilation would serve much purpose. Admittedly, in the part of the draft which dealt with crimes against humanity he had used the provisions of existing conventions almost in full. However, while a list of crimes against humanity was feasible, the same did not apply to war crimes, and those who had made such attempts following the two World Wars had had to give up the idea. While he had not repeated the provisions of existing conventions literally, however, he had at least made certain not to depart from their terms, since it would be unwise to try to be innovative in that area. War crimes were the subject of a traditional set of rules that was solid, well-defined and formed part of the law of war, which, through its treaty and customary rules, had a recognized place in international law.

51. The list of war crimes proposed in paragraph (*c*) was based chiefly on article 147 of the Fourth Geneva Convention, but also on other articles of the 1949 Geneva Conventions. In his view, it would again be preferable not to depart from their terms as regards drafting. He therefore regarded as dangerous some of the proposals made by members, particularly the distinction drawn by Mr. Barboza (2106th meeting) between violations and breaches. In French law at any rate, the two terms were synonymous and it would be better to avoid innovations that might disturb the established terminology. Since the expression "grave breaches" had a specific technical meaning, as laid down in the Geneva Conventions and in Additional Protocol I thereto, its use should be reserved for the offences set forth restrictively in those instruments. Moreover, as he explained in his seventh report (A/CN.4/419 and Add.1, para. 19), the concept of "war crimes" was broader than that of "grave breaches" within the meaning of the Geneva Conventions, since it also covered breaches of the law of war; he had therefore proposed that the word "violations" should be used, but without seeking to establish a general distinction between violations and breaches.

52. The other comments made by members were more matters of drafting. Mr. Graefrath had proposed that the list should be supplemented by other crimes, which the Drafting Committee would have no difficulty in doing, since the proposed text did not claim to be exhaustive.

53. Some members had asked which persons and property were covered by paragraph (*c*) (i). The answer was easy: all those protected by the Geneva Conventions—and hence, above all, civilian populations. In the same subparagraph, the expression "intentional homicide" had been criticized. While the expression was perhaps not suitable in English, the French text was taken literally from the Geneva

[11] See 2096th meeting, footnote 19.

Conventions, which were more comprehensive on that point than the Charter of the Nürnberg Tribunal, which provided only for murder. Also in paragraph (*c*) (i), it would be better to refer to "destruction *or* appropriation" than to "destruction *and* appropriation", since one could occur without the other. That, too, was a point which could be settled by the Drafting Committee.

54. As had been noted, much could be said with regard to paragraph (*c*) (ii), particularly concerning reprisals. The place for all such considerations was, however, in the commentary to the articles, rather than in the body of the text itself.

55. The majority of the members of the Commission considered that the proposed list should be referred to the Drafting Committee. For his own part, he did not want the question of the respective powers of the Drafting Committee and the Commission to be discussed once again. If it was necessary to wait until the list received the unanimous agreement of all members, it would never be referred to the Drafting Committee, unless it was put to the vote—and that would be contrary to the Commission's practice. That practice had always been to refer to the Drafting Committee any draft articles on which the Commission had been unable to reach agreement. In the circumstances, how could it be explained to the Sixth Committee of the General Assembly why the text under consideration had not been referred to the Drafting Committee? The Commission must decide whether or not it wanted a list. He was fully prepared, once again, to abide by the Commission's decision, but it would not be right, in the case of that particular provision, to invoke the argument that there was lack of agreement among members.

56. The CHAIRMAN suggested that the proposed list of crimes should be referred to the Drafting Committee and that the Committee should try, in the light of the comments and proposals made during the discussion, to formulate a text which the Commission could discuss in a more constructive manner.

57. Mr. DÍAZ GONZÁLEZ said that he was not opposed to that suggestion. In reply to the comments by the Special Rapporteur, however, he pointed out that what the Commission submitted to the Sixth Committee was the outcome of its own work, not that of the Drafting Committee's work.

58. Mr. McCAFFREY said that he was not opposed to the proposed list being referred to the Drafting Committee. As a general rule, however, it was better that a question should first be discussed in detail in plenary so that the Drafting Committee would have all the necessary information.

59. Mr. FRANCIS recommended that illicit drug trafficking, a question to which Mr. Reuter had drawn the Commission's attention in 1985,[12] should be included as a crime in the draft code. Mr. Barsegov (2102nd meeting) and Mr. Solari Tudela had stated that, although drug trafficking was already covered by a number of existing instruments, it should also be included in the code on the same basis as aggression, genocide and serious crimes. He agreed with that view and was convinced that the Drafting Committee should consider the question, which could be dealt with both under the heading of crimes against peace and under that of crimes against humanity.

60. As Mr. Reuter had pointed out in 1985, illicit drug trafficking had a destabilizing effect on some countries, particularly smaller ones, and hampered the smooth functioning of international relations. The Caribbean and Latin-American countries had learned that to their cost. He regretted that the question had not been discussed in the Commission until now because of the lack of interest on the part of its members. Over the years, however, he had collected information that showed just how enormous the problem had become. A few years previously, for example, drug traffickers in Latin America had, fortunately without success, offered officials in charge of drug traffic control more than $US 300 million if they would cease their activities. Some time later, after customs officials in a European country had intercepted an enormous quantity of drugs, the authorities of that country had had to call on the three branches of the armed forces to conduct constant surveillance in order to prevent attempts to import drugs. The media were full of examples of that kind. Members of the Commission could not remain indifferent to the problem and, as citizens, should assume their responsibilities by considering the possibility of including that crime in the draft code, for, in addition to its destabilizing aspect, which made it a crime against peace, it had recently taken on the dimensions of a crime against humanity.

61. In that connection, he said that, originally, the drugs exported by traffickers had been intended for addicts who had bought them voluntarily. But the situation was different now: potential buyers were no longer only voluntary users. The new strategy was to establish a society where people would become addicted not voluntarily, but by force, and where traffickers would encourage children and young people to use drugs so that they would later have a steady supply of adult customers. Young people were thus lured with "crack", with sweets and drinks laced with drugs and with substances to be sniffed, which all led to addiction. According to a newspaper article he had read, 1 person in 10 in a large city in Asia was a drug addict. Elsewhere, an eight-year-old child had just been imprisoned for being a courier for the transport of hard drugs. In a Caribbean country, two children under the age of seven who had been forced to use drugs had had to undergo psychiatric treatment for detoxification. The drug barons were obviously implementing a strategy that was designed to perpetuate the drug culture by focusing on young people, who, after having tried drugs, became incapable of deciding for themselves whether they wished to fall into that vice or not and stayed addicted all their lives unless they had an opportunity to receive treatment.

62. Lastly, he quoted the third preambular paragraph of the 1961 Single Convention on Narcotic Drugs,[13] which read: "... addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind". Under article 36, paragraph 2 (*a*) (iv), of that Convention, moreover, "serious offences ... committed either by nationals or by foreigners shall be

[12] *Yearbook ... 1985*, vol. I, pp. 9-10, 1879th meeting, para. 31.

[13] Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 (United Nations, *Treaty Series*, vol. 976, p. 105).

prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found". The Commission might draw inspiration from those texts.

63. Mr. REUTER reminded members that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances had been signed in Vienna on 20 December 1988.[14] Its basic thrust was the establishment of universal jurisdiction and the obligation for States either to extradite or to prosecute. The Convention, which had already been signed by 64 States and should enter into force in late 1990, did not deal with the offences being discussed by the Commission, namely those committed by an individual as the representative of a State. It did, however, contain a definition of the "seriousness" of the acts in question and stated that an offence was deemed "particularly serious" because of "the fact that the offender holds a public office and that the offence is connected with the office in question" (art. 3, para. 5 (*e*)). Articles 4, 6, 7, 8 and 9, which dealt respectively with jurisdiction, extradition, mutual legal assistance, transfer of proceedings and other forms of co-operation and training, could be of interest to the members of the Commission, to whom it would be useful to distribute the text of the Convention.

64. For a long time, it had been believed that, in the case of illicit drug trafficking by sea, there was justification for universal jurisdiction, including the right of search on the high seas over vessels flying a flag other than that of the State conducting the search or even no flag at all. It had been hoped that a provision along those lines could be adopted as early as 1958, but, at the 1988 Vienna Conference, it had been decided that States would not have universal jurisdiction for pursuit on the high seas. They would therefore have to rely on bilateral conventions.

65. His own view was that, in order to discuss that question, the Commission would have to wait until an official commentary to the 1988 Convention had been published. It would therefore be premature to take a decision on the question at present, even if the participants in the Vienna Conference were known to have shown a great deal of enthusiasm for action to combat the illicit drug traffic.

66. Lastly, he said that, since he did not share the views of the Chairman and the Special Rapporteur on the work in progress, he might not be able to associate himself with the list of crimes or with the draft code as a whole. As he saw it, the proposed list was not in keeping with what a serious convention should be.

67. Mr. DÍAZ GONZÁLEZ said that the problem of illicit drug trafficking, which Latin-Americans had to deal with every day and which had taken on global proportions, was not a new one and he recalled that, in the nineteenth century, a great colonial Power had waged the opium wars against China to impose the use of drugs for purposes of trade. Today, that crime was committed not by States, but by individuals or by multinational or transnational corporations which handled fabulous amounts of money and were a threat to Governments precisely because the resources they possessed were sometimes larger than the budget of the State in whose territory they operated. The laundering of such drug money also created problems in other countries. For those reasons, he supported the idea of including illicit drug trafficking as a crime against peace and against humanity, as Mr. Francis had proposed.

68. Mr. THIAM (Special Rapporteur) said that the question of illicit drug trafficking had been raised during the consideration of one of his earlier reports. At the time, he had not been much in favour of making such trafficking a crime because he had had the impression that it was an ordinary offence, the basic motive for which was to make money. Developments which had taken place since then nevertheless suggested that, although the traffickers' purpose was still to make money, political considerations might also be involved and that, in any case, the consequences of the crime were often of a political nature. In the circumstances, he would have no objection to dealing with the question in two provisions, one under the heading of crimes against peace and the other under that of crimes against humanity. The question could be referred to the Drafting Committee.

69. The CHAIRMAN said that, although no member of the Commission had objected to the idea of including illicit drug trafficking as a crime within the meaning of the draft code, it might be better if the Commission first had a text on the subject, which could then be referred to the Drafting Committee.

70. Mr. THIAM (Special Rapporteur) suggested that Mr. Francis should be requested to prepare such a text.

71. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had no objection to the Special Rapporteur's suggestion, but pointed out that usually, when the Commission referred draft articles to the Drafting Committee, it requested the Committee to take account of all the opinions expressed during the discussion. The Drafting Committee could therefore consider the question even without a text.

72. Mr. KOROMA said he was not sure that the Commission had reached the stage where it could draft a provision on the question.

73. The CHAIRMAN said that the Commission could either request the Drafting Committee to prepare a text based on the discussion which had taken place in plenary or wait for a proposal by the Special Rapporteur which it could then refer to the Drafting Committee.

74. Mr. McCAFFREY said that he thought it would be better to discuss all aspects of the question, taking account of the work of the 1988 United Nations Conference in Vienna, before entrusting any task to the Drafting Committee. He would, however, have no formal objection if the question were referred to the Drafting Committee.

75. The CHAIRMAN suggested that the Special Rapporteur should be requested to prepare a draft text on illicit drug trafficking which the Commission could consider before referring it to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

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[14] For the text, see E/CONF.82/15 and Corr.2.