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A/CN.4/SR.2349

Summary record of the 2349th 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:-
1994, vol. I

lem would be if the Commission reopened discussion on the definition of the concept in article 19: if it did so, it would never complete the first reading on time.

52. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to place on record that he had been appointed Special Rapporteur in 1987 and had produced articles in reports almost every year since 1988, but the only time the Drafting Committee had elaborated articles had been in 1992. This had been because the Commission and the General Assembly had had what they had regarded as more urgent business, above all the draft Code of Crimes against the Peace and Security of Mankind. The drafting work on State responsibility had thus been delayed. He would do his best to meet the deadline by 1996, which was possible if the Commission was firm, in 1995 and 1996, in setting aside all the time necessary for the Drafting Committee to do its work. Indeed, the Commission should be able to complete not only "crimes" but also articles 11 and 12, whatever remained on part two and also part three, which should present fewer difficulties.

53. He wished to reassure members of the Commission who were concerned about the use of the term "crime". For the time being, he was ready, if it were really necessary, to refer to "crimes" as *la chose* (the thing). He was unable to refrain from noting, however, that the term "crime" was, none the less, important: it could not be ignored that the term "crime" was in common use among the public and in the media. Even if, as Mr. He had said, one could substitute for the term "crimes" the expression "most severe delicts", the impression would still remain that, in such cases, something was involved that went beyond mere reparation.

54. Be that as it may, one should keep in mind that the term "crime" was embodied in an article adopted on first reading in 1976. For his part, he would try, the following year, to prepare articles dealing with the consequences. It would be for the Drafting Committee to work out the name.

55. The CHAIRMAN said that if he heard no objection, he would take it that the Commission agreed to approve his proposed conclusions.

It was so agreed.

The meeting rose at 5.30 p.m.

2349th MEETING

Friday, 3 June 1994, at 10.40 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN invited the members of the Commission to resume their consideration of the articles of the draft Code of Crimes against the Peace and Security of Mankind.

2. Mr. MAHIOU said that article 1 raised the question whether the Code should include a conceptual, generic definition or simply a reference to the crimes which would be listed in it. A good conceptual definition would be acceptable, but was not absolutely necessary. Article 1 as drafted was not a definition and its title (Definition) was therefore deceptive. It would be better to entitle it "Scope of the Code" and to simplify the text in the following way: "The crimes defined in this Code are crimes against the peace and security of mankind." In any case, the Drafting Committee might base its work on the proposal put forward by the Government of Bulgaria (A/CN.4/460, para. 8).

3. Article 2 should be reduced to its first sentence only, the second being controversial and not really necessary. Article 3, paragraph 3, raised the problem of attempt, a concept not applicable to all crimes. The solution would therefore be to delete the square brackets and specify the relevant articles. The suggestion made by the Government of Belarus (ibid., para. 27) that the competent courts should be given the right to decide for themselves whether the concept of attempt was applicable to specific cases before them was attractive, but, unlike criminal courts, which, in most legal systems, had unlimited competence and were empowered to interpret certain concepts, the international criminal court would have well-defined powers and it was not certain that States would want to leave it a great deal of room for manoeuvre. Circumspection was therefore called for. Article 4 could be deleted provided that article 14, with which it was connected, was amended accordingly; otherwise, the wording of article 4 would have to be changed.

4. Article 5 was entirely justified: it was true that the Code was meant to apply only to individuals, but the

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* Resumed from the 2347th meeting.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

[3] Ibid.

crimes committed by individuals which it covered were often committed on behalf of the State or for its account. The wording, however, was confusing, as it could be interpreted to refer to two types of criminal acts, that of the individual and that of the State. That was more than a drafting problem. Article 5 had to be read in conjunction with some articles of the draft on State responsibility, namely, articles 5 and 8 of part one[4] and article 10, paragraph 2 (*d*), of part two.[5] On the last of those points, it should be noted, in particular, that satisfaction did not relieve the State of other possible consequences of the crime, such as reparation. The best way to deal with the problem, taking all those links into account, would be to redraft article 5 to read:

> "The prosecution of an individual for a crime against the peace and security of mankind shall be without prejudice to any responsibility of the State under international law."

5. Article 6 raised the problem of the harmonization of the draft Code and the draft statute for an international criminal court. The wording of articles 6, 8, 9 and 10 of the draft Code could not, except for very specific reasons, differ from that of the corresponding articles of the draft statute. He had some reservations about article 6, paragraph 2. While recognizing the importance of the criterion of territoriality in international law and the need to take it into account, he warned the Commission about two risks: that of too lenient or accommodating a judgement, which would be dangerous, and that of a judgement prompted more by revenge than by a concern for justice. A country that requested the extradition of an individual suspected of a crime against the peace and security of mankind had to produce sufficient proof in support of its request.

6. He would prefer crimes against the peace and security of mankind, being crimes of the gravest magnitude, not to be subject to statutory limitations. He nevertheless considered that the possibility of a pardon should not be ruled out and that the extremely rigid rule stated in article 7 should be made more flexible; the statutory-limitation period should be as long as possible, but should not be spelled out and should depend on national legislation.

7. He would not comment on articles 8 to 10 of the draft Code until he had acquainted himself with corresponding articles 44, 45 and 41 of the draft statute. The question was whether those articles should or should not be drafted in identical terms.

8. Mr. BENNOUNA said he was concerned that work was going on in parallel on subjects closely related to each other, one being the draft Code of Crimes against the Peace and Security of Mankind, thus giving rise to a problem not only of coordination, but also of substance.

9. Was the Code linked or was it not to the existence of an international criminal court? The original hypothesis had been that of universal jurisdiction. Now, however, the concept of international criminal jurisdiction was beginning to loom large. Did the Commission intend to elaborate a code which would be incorporated in the statute of an international criminal court or an autonomous code which would contain only general principles drawn primarily from international conventions and a general list of crimes not accompanied by penalties and to which it would be possible to accede without becoming a party to the statute of the international criminal court? Did the Code and the court form a single whole? So long as those questions had not been answered, it would be futile and unsound to undertake a technical analysis of the articles of the draft Code. The Commission could not sidestep taking a legal policy decision when the need for one was imperative.

10. Mr. PAMBOU-TCHIVOUNDA said that the idea of considering draft articles 8, 9 and 10 together had not arisen only out of concerns as to method and efficiency. What was involved, rather, was a regrouping under the uniform banner of the general principles of law common to all the major contemporary legal systems which governed legal proceedings, and particularly criminal proceedings, and the functioning of the court. It was apparent from the intrinsic unity of the three provisions that there was indeed a connection between the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court; to separate the work on the two drafts for the purpose of the exercise would perhaps have been nothing more than a tactic which, in the final analysis, would prove to be artificial. It was impossible, when examining the articles of the draft Code, not to think of the draft statute. The Code existed only through the instrument that would apply it—the court. The *raison d'être* of the court was the application of the Code. It would be extremely surprising if the initial, basic provisions of the Code had but one practical objective, one basic ideology—to reassure States as to the approach to, and the actual bases of, the mechanism for the protection of international law and order against a large scale of crimes whose adverse effects transcended borders. The function of the three articles was therefore not only to provide reassurance, but also to point the way.

11. Viewed, then, from the standpoint of their overall function, the three articles provided for a highly civilized approach to the policy for dealing with crime which could have a direct effect on mankind and could give it an image that was less abstract, less distant, less unreal, one concerned with peace-keeping and with self-regulation.

12. The starting-point and the point of arrival, the core of the system it was hoped would be established, was the accused, in other words, one person, or group, a part of mankind itself. That person must be given all the guarantees necessary for the success and effectiveness of the treatment that any extraordinary offender deserved. The object of draft articles 8, 9 and 10 was therefore the same.

13. He was a little perplexed as to where the articles should be placed and in which instrument or instruments they should be included. If the question arose with respect to the draft Code, namely, with respect to one

[4] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[5] *Yearbook... 1993*, vol. II (Part Two), p. 76.

instrument, it arose *a fortiori* when two or more distinct instruments were designed to meet the same concern, each embodying provisions drafted in strictly identical terms—as could be seen, incidentally, from the table of the articles common to both drafts which had been circulated to the members of the Commission by the secretariat. At some point or other, the Commission would have to coordinate the two instruments now being drafted—the draft Code and the draft statute. He trusted that such coordination would result in a consolidation of their respective content in a logical and harmonious manner, failing which, as Mr. Bennouna had stated, the Commission would not be doing its job properly. That line of reasoning was all the more valid because the rules set forth in draft articles 8 to 10 were designed to be applied. They dealt with the law to be applied—irrespective of whether the rules were substantive or procedural—by the international criminal court. The Commission should ponder the ultimate purpose of the separation it planned to make in the context of the formulation of those rules and, in the final analysis, the practical value of such separation, and should ask itself in which direction it was heading and why its work took that, and not some other, form.

14. Mr. FOMBA said that he had no special comment to make on article 8, which dealt with judicial guarantees, one of the fundamental rules of international law and of human rights instruments. With regard to article 9, however, it would be difficult for him to take a position until he had an answer to the questions whether, first, the court would in fact be established and, if so, whether it would have exclusive jurisdiction and, secondly, whether, in that case, its jurisdiction would extend to the "crimes of crimes", such as genocide, or to all crimes that might be contemplated. The Special Rapporteur envisaged two possibilities: either the decision would be handed down by an international criminal court or it would be handed down by a national court, in which connection he adduced highly relevant arguments. He himself did not yet know what his final position on the article would be, but he agreed that, in the absence of anything better, the wording borrowed from article 10 of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[6] was acceptable.

15. The rule of non-retroactivity laid down in article 10, which was also well established in criminal law, provided that the law should stipulate for the future, not the past, though there was nothing to prevent States from agreeing on rules with retroactive effect. The unconditional application of such a rule in the context of the Code would certainly give rise to difficulties, but the arguments put forward in paragraph 4 of the commentary to article 10[7] were fairly persuasive in justifying the retention of paragraph 2 of the article.

16. Mr. HE said that, in his view, article 9, paragraph 3, as adopted on first reading was incompatible with the *non bis in idem* principle with which the article dealt and which was a basic principle of criminal law. The new wording proposed by the Special Rapporteur in paragraph 104 of his twelfth report was based on article 10 of the statute of the International Tribunal, which was not very felicitous. The International Tribunal had been set up by a resolution of the Security Council[8] which provided for measures that were binding on all States Members of the United Nations to maintain peace and security in the region, whereas the draft Code and draft statute were addressed only to States that would become parties to them on a voluntary basis. Moreover, the International Tribunal had primacy over national courts and had power to review decisions handed down by national courts in the States of the region. The international criminal court would be created under completely different conditions and would not have the same functions. It was therefore doubtful whether it was necessary and feasible to include provisions in the draft Code similar to those that appeared in the statute of the International Tribunal. It was clear that the *non bis in idem* principle would be difficult to apply at the international level, as States were not generally ready to accept the jurisdiction of an international court except in cases where, in view of the seriousness of the crimes committed, exclusive jurisdiction had to be conferred on an international court. He trusted, however, that it would be possible to find a more suitable and better balanced form of wording to provide for the application of the principle within the framework of an international criminal court acting in parallel with national courts.

17. Mr. GÜNEY said that, in his view, article 9, paragraph 3, as worded was incompatible with the *non bis in idem* principle. The Special Rapporteur's proposed new wording, which was based on the statute of the International Tribunal, was more acceptable and should enable the problem to be solved.

18. He said that he had no objection to make with regard to article 10, paragraph 1, which restated a fundamental principle of criminal law, that of non-retroactivity. Since paragraph 2 set forth exceptions, which also formed part of the fundamental principles of criminal law, it should be retained in the draft Code provided that the expression "in conformity with international law" was deleted to avoid any confusion in practice.

19. Article 13, dealing with official position and responsibility, entirely excluded immunity arising out of the official status of the person who committed a crime. Some thought should perhaps be given to the question of the immunity the leaders of a State might enjoy with regard to judicial proceedings.

20. Article 14 dealt both with defences and extenuating circumstances. Two different concepts were involved, however. Defences divested an act of its wrongful character, whereas extenuating circumstances did not remove the wrongful character of the act, but merely mitigated the criminal consequences. It would

[6] Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

[7] For the commentary to article 10, originally adopted as article 8, see *Yearbook . . . 1988*, vol. II (Part Two), p. 70.

[8] Security Council resolution 808 (1993) of 22 February 1993.

therefore be preferable for the two notions to be the subject of two separate provisions.

21. Mr. de SARAM said that he was concerned about the provisions of article 9, which obviously raised technical difficulties, as could be seen from the Special Rapporteur's exhaustive commentary. The *non bis in idem* principle was indisputably a fundamental principle of law generally applied by national courts. His misgivings concerned the way in which the principle was transposed to the international level. Referring to article 14, paragraph 7, of the International Covenant on Civil and Political Rights, which set forth the principle in question, he wondered precisely what interpretation should be placed on the last words of the provision, "in accordance with the law and penal procedure of each country". It also appeared, as one Government had pointed out, that article 9, paragraph 3, was incompatible with the corresponding provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. He therefore wondered whether it would be possible to achieve the objective sought in the draft statute and the draft Code if such an approach was adopted and whether justice would be any better served if a person was prosecuted again for a crime for which he or she had already been tried and convicted. He feared that that provision would not facilitate acceptance of the draft Code or the draft statute by all States.

22. Furthermore, he did not think that paragraph 2 (*b*) of the new text of article 9, proposed by the Special Rapporteur, which was modelled on article 10 of the statute of the International Tribunal, diminished those difficulties, for, while that provision might be applicable in the context of the International Tribunal, it had no place in a statute or code of a more general nature. No account was taken, for example, of the fact that, in many countries, judges strove, despite many difficulties, to ensure respect for the principles of law. He thus did not regard that provision as conducive to general accession to the Code. He asked for clarification and the opinion of the Special Rapporteur on that point.

23. Mr. ROSENSTOCK said he thought that, as currently formulated, article 11 was likely to pose serious problems. There was no connection between the existence of an order from a Government or from a superior and the question of guilt. To suggest otherwise was to ignore established law and practice. The part of the sentence following the words "criminal responsibility" should be deleted or at least re-examined at a later date. He noted in passing that, contrary to what was stated in the point of view of the Special Rapporteur to that article, the General Assembly had not adopted that principle, but had simply taken note of it.

24. Article 12 also raised a number of problems. The logical starting-point would be the phrase "if they knew or had information", which introduced a notion that was correct, but that was perhaps stated rather too simplistically. The specific criteria according to which a superior could be regarded as responsible for an act should be spelled out. The general idea underlying the article was acceptable, but the concept of "presumption of responsibility" referred to in the report warranted further consideration, bearing in mind the rule stated in article 8 concerning the presumption of innocence.

25. Article 13 was acceptable. The same could not be said of article 14 and, in particular, of the Special Rapporteur's proposed new text which, in his view, was an oversimplification of the previous text and was likely to give rise to a regrettable confusion between self-defence in the case of an individual and that provided for in Article 51 of the Charter of the United Nations. Self-defence as referred to in article 14 could be invoked only in extremely limited circumstances. He also thought that the article would need to be expanded if it was intended to include the notion of state of necessity.

26. Lastly, he was ready to accept article 15, although he pointed out that the word "mitigating" would be preferable to the word "extenuating", but he wondered whether consideration should not also be given to dealing with aggravating circumstances.

27. Mr. KABATSI said that he endorsed article 8, which set forth the minimum guarantees to which any accused person must be entitled. He also accepted the *non bis in idem* principle embodied in article 9. However, he found it harder to accept the exceptions to that principle which were provided for. If the international criminal court was set up, he could understand that, in certain cases and in so far as it represented the international community, it should be empowered to assess the impartial or independent nature of a judgement of a national court and, where appropriate, to initiate a second trial. Like Mr. Sreenivasa Rao (2347th meeting), however, he could not accept that a State should be empowered to pronounce on the impartiality and independence of the institutions and judicial system of another State and to try an accused person for a second time. He thus welcomed the fact that the Special Rapporteur ruled out the possibility of States trying a case in their own courts which had already been tried by another national court.

28. With regard to the content of article 9, paragraph 5, or the new text of article 9, paragraph 3, proposed by the Special Rapporteur, he thought that, even when the international criminal court was empowered to try an accused person for a second time, the trial must not take place if the accused had already received a sentence equal to or more severe than the maximum sentence that the court was able to pass. In his opinion, the text should take account of that consideration.

29. Article 10 posed no problem of principle. However, he thought that only paragraph 1, which referred to the Code itself, was really necessary. The reference to other treaties or to domestic law contained in paragraph 2 was redundant.

30. Mr. FOMBA said that he had no difficulty in accepting draft articles 11 to 13, which reflected his point of view on the matters under consideration.

31. Articles 14 and 15, concerning defences and extenuating circumstances, were the result of the Special Rapporteur's proposal to divide former article 14 into two new articles. On the question whether separate articles should be devoted to those two notions, he consid-

ered that such an approach was justifiable, noting that it was difficult to rely on a comparative approach between domestic criminal law and the international criminal order and, furthermore, that a brief analysis of the new French Penal Code was in any case scarcely conclusive. As to substance, he thought that the two articles constituted an acceptable basis which could certainly be improved.

32. Lastly, with regard to the statement in the twelfth report, that judicial practice originating in Anglo-American law made no distinction between the notions of coercion and state of necessity, he noted that the expressions used in the French Penal Code, "act governed by the need for self-defence", "act strictly necessary to the objective pursued" or "act necessary for the protection of the person or property", for example, did not seem to be any more specific.

33. Mr. Sreenivasa RAO said that, in the case of acts as grave as crimes against the peace and security of mankind, he wondered whether the Code should even provide for defences and extenuating circumstances relevant for the determination of the penalties to be imposed. If such a regime were to be included, it should perhaps take into consideration the observation of the United Kingdom of Great Britain and Northern Ireland on article 14, according to which the more grave the crime, the less likely it was that a wide panoply of defences and extenuating circumstances would be permitted.

34. Furthermore, the Commission must clearly specify in the Code the defences and extenuating circumstances that it considered pertinent in order to avoid any double standards or arbitrariness in sentencing. Governments had been nearly unanimous in calling for clarity and precision in that regard. In that connection, the Commission should deal not only with extenuating circumstances, but also with aggravating circumstances. He did not share the view, expressed by the Special Rapporteur in his twelfth report, that it was not appropriate to discuss aggravating circumstances since the crimes considered there were deemed to be the most serious of the most serious crimes; that would be missing the point. The Commission needed to consider the circumstances under which the crime was committed rather than the elements constituting the crime. It might, as had been suggested by the Government of Norway, combine various factors dealt with or potentially to be dealt with under articles 11 to 13 and group them into two categories: extenuating circumstances and aggravating circumstances. The Commission should take the time to carry out that task if only to demonstrate its interest in the observations of Governments which had taken the trouble to study the draft articles. Nevertheless, in the event that the Code was applied by national courts, an easy solution would be to refer to the laws of the country involved for the determination of extenuating or aggravating circumstances, as had been suggested by the Government of Paraguay. At the same time, the reference in former article 14 to the "competent court" did not help to clarify the issue.

35. By failing to make it any clearer whether reference was being made to a national court or to an international court, the proposed new article 15 was hardly more enlightening. It was fair to assume, as the Belarusian Government had done, that, if the provisions of the Code were to be applied by national courts, it could be stipulated that the crimes should be punished in a manner commensurate with their extreme danger and seriousness. However, it should be noted that the defences provided for under national law were not based on the same premises as the defences referred to in the draft Code and therefore had to be adapted to the requirements of the Code. Among the many defences and extenuating circumstances cited by Governments, there was one on which the Commission had to take a stand, namely, that of insanity, which was invoked almost automatically by national courts, but which threatened to make the draft Code meaningless, since the perpetrators of such horrible crimes could all be considered insane. There might also be aggravating circumstances, including the status and personality of the author of the crime, awareness of the seriousness of the consequences of the crime, premeditation or coercion leading to a crime.

36. A comparative analysis of the draft Code, the draft statute for an international criminal court and the statute of the International Tribunal demonstrated that articles 11 to 14 of the draft Code were not strongly reflected in the two other instruments and that the few concepts they had in common differed in the importance and interplay of their various elements. In view of the observations of Governments, the Commission must develop those concepts as fully as possible in order to ensure the widest possible acceptance of the Code and so that the development of international criminal law would be based on the most solid foundations possible.

37. Mr. de SARAM said that, as mentioned by the Special Rapporteur, article 11 was based on principle IV of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[9] but the element added to that principle, namely, that it was possible for an individual not to comply with the order of a superior, might lead to very serious problems in applying the Code. In respect of article 14, failure to provide for defences would deprive the accused of a fundamental right. At the same time, was the Commission obliged to engage in the legal casuistry that tended to dominate national criminal law? In fact, it would suffice to state that the applicable law was that of the country of which the criminal was a national, that of the country of which the victim was a national or that of the territory in which the crime had been committed. In respect of article 15, extenuating circumstances would be determined by the judge pronouncing the sentence and, therefore, as the Special Rapporteur had indicated initially, article 15 was unnecessary.

38. Mr. VILLAGRÁN KRAMER said that the debate the Commission had just begun on the issue of extenuating or aggravating circumstances was of the highest order and that the Commission must always bear in mind the observations of Governments. The tragedy of the Second World War had given rise to the doctrinal rigidity of the 1950s, but, with time, the international community had gained a better understanding of the issues and was able to demonstrate more flexibility. In the case

[9] *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45.

of obeying the orders of a superior, for instance, those issuing blatantly illegal orders were considered responsible, without extenuating or aggravating circumstances: that had been recognized even by national courts, such as a court in the United States of America which had had to try a famous case of that kind during the Viet Nam War.

39. How could an aggressor exercise the right of self-defence? The Commission had thus to choose between a rigid system of correspondence between crimes and punishments, which would make it necessary to provide for extenuating or aggravating circumstances, and a system of minimum and maximum penalties, which left it to the court to evaluate the circumstances. As to defences, it was difficult, not in legal, but in human terms, to admit that such crimes could be justified and, for that reason, it was best not to mention that matter.

40. Mr. MAHIOU said that the proposed new wording of article 14 raised more problems than it solved. None of the defences it mentioned could justify an act such as genocide, for instance. The clear-cut text might make it seem that such crimes could be justified. The ambiguity could at least be mitigated somewhat by incorporating into the article the conditions of admissibility set forth in the Special Rapporteur's twelfth report. Paragraph 159 of the report also introduced a further ambiguity between the self-defence provided for in Article 51 of the Charter of the United Nations, which could be invoked by States, and individual self-defence as provided for in criminal law. Possible confusion between those two types of self-defence might lead to serious consequences and article 14 therefore had to be clarified and supplemented; otherwise, the defences in question could not legitimately be invoked.

41. Mr. THIAM (Special Rapporteur) said that the self-defence referred to in article 14 applied only to aggression and not to any other crime. Short of leaving the way open for all kinds of abuses, it was entirely legitimate for the leaders of a State accused of aggression to invoke self-defence if that State had been attacked. The same self-defence invoked by the attacked State should be able to be invoked by the leaders of that State.

42. Mr. MIKULKA said that the Special Rapporteur's reply clarified even less the ambiguity pointed out by Mr. Mahiou because it completely contradicted the first sentence of paragraph 159 of the report, which stated that the self-defence referred to in the article was not related to the international responsibility of the State provided for in Article 51 of the Charter of the United Nations. He agreed with the third sentence of that paragraph, which indicated basically that, where the leaders of a State ordered the exercise of the right of self-defence, that act did not constitute a crime within the meaning of the Code, but he did not believe that that should be considered as a general justification. Humanitarian law was applicable to all and, in the case of aggression, it applied both to the aggressor and to the victim. The concepts of coercion and state of necessity referred to in that paragraph applied to acts by individuals and not to acts by States; self-defence must therefore be understood in the national law sense and was perhaps not justified in the context of article 14. Self-defence was, moreover, always subject to the rule of proportionality, so that the defence of physical integrity in the event of aggression could not justify genocide, colonialism or apartheid. The Special Rapporteur's basic idea was that, because national legislation provided for defences, the draft Code should do the same, but the wording of article 14 was none the less hardly satisfactory.

43. The CHAIRMAN said that the Special Rapporteur might wish to include his reply to Mr. Mikulka in the general statement that he would make on the topic as a whole at the next meeting, after which the Commission would decide whether to refer the draft articles to the Drafting Committee.

The meeting rose at 1.10 p.m.

2350th MEETING

Tuesday, 7 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Welcome to Mr. Nabil Elaraby

1. The CHAIRMAN extended a warm welcome to Mr. Elaraby, the new member of the Commission.

2. Mr. ELARABY thanked the Chairman for his welcome and said that he greatly looked forward to working with his fellow members of the Commission.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

3. The CHAIRMAN invited the Special Rapporteur to sum up the debate.

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[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook ... 1994*, vol. II (Part One).

[3] Ibid.