Document:-

A/CN.4/SR.1963

Summary record of the 1963rd 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:-

1986, vol. I

the preamble to Additional Protocol I of 1977 to the Geneva Conventions.[18] In order to include a reference to armed conflict, it might be useful to define the term "war crime" as follows:

"Any serious violation of the laws or customs of war or an armed conflict constitutes a war crime."

The meaning of "armed conflict" could be explained in the commentary.

81. With regard to methodology, article 2, paragraph (12), of the 1954 draft code simply used the words "acts in violation of the laws or customs of war". It might be useful, however, to include a non-exhaustive enumeration, as proposed in the second alternative of draft article 13, but with a number of changes. Subparagraph (*b*) (i) should be supplemented to include the additional elements referred to in article 130 of Geneva Convention III and in article 147 of Geneva Convention IV.[19] The specific points to be included would be "unlawful treatment of prisoners of war and protected persons, taking of hostages". In subparagraph (*b*) (ii), the parentheses around the words "in particular first use of nuclear weapons" should be removed. The deterrent effect of such a provision, pending the conclusion of a comprehensive convention on the subject, could not be over-emphasized.

82. As to part III of the fourth report, concerning "other offences", the Special Rapporteur raised the question (A/CN.4/398, para. 117) whether membership of an organization implicated in a criminal affair should constitute a separate offence or whether it should be subsumed under complicity or participation. Article 2, paragraph (13), of the 1954 draft code included the acts of conspiracy, direct incitement, complicity and attempt as offences. They were also separate offences under article III of the 1948 Genocide Convention. Yet draft article 14 did not expressly mention direct incitement or membership of a criminal group or organization as other offences.

83. The Indian Penal Code[20] dealt at considerable length with such concepts as: joint offenders, or the criminal responsibility incurred by each person when a criminal act was committed by several persons pursuant to a common intention; abetment, namely aiding or instigating the commission of a criminal act, or engaging in a conspiracy if an illegal act or omission took place pursuant thereto; criminal conspiracy, namely agreement to commit an illegal act or to commit an act that was not illegal by illegal means; membership of an unlawful assembly committing an offence pursuant to a common object; and attempts to commit an offence that was punishable with imprisonment, whether or not for life, and failed because of circumstances independent of the volition of the offender. In addition, the offences of abetment, conspiracy and attempt were specifically included in connection with offences against the State, offences relating to the armed forces and offences affecting the human body, such as culpable homicide and murder, and other serious offences. Even an attempt to commit suicide was a separate offence, with a prescribed punishment.

84. In view of the seriousness of the acts constituting offences or crimes against the peace and security of mankind, the Commission should include conspiracy, abetment or direct incitement, complicity and attempt in the draft code as separate offences. Such provisions should be placed in the part containing the list of offences, rather than among the general principles, since they dealt with the identification of an offender committing a specified act. As to draft article 14, he preferred the first alternative of section A. The substance of the second alternative should form the subject of a commentary elaborating on the term "conspiracy". Provision might also be made for the article to cover direct incitement, as had been done in the 1954 draft code, the 1948 Genocide Convention and the 1973 *Apartheid* Convention. No reference need be made to mere membership of an organization or group as an act constituting a crime, unless the person concerned came within the scope of the other provisions of draft article 14.

The meeting rose at 1 p.m.

[18] See 1959th meeting, footnote 6.

[19] See 1958th meeting, footnote 7.

[20] *The Indian Penal Code*, with commentary and notes by M. P. and R. Tandon, 12th ed. (Allahabad, Allahabad Law Agency, 1979).

1963rd MEETING

Tuesday, 10 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

[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 ... 1985*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences) (*concluded*)

1. Mr. MAHIOU said that the Special Rapporteur's argumentation in his fourth report (A/CN.4/398) was so convincing that it might make the Commission tend to forget the very complex underlying problems it would have to solve in formulating the draft code. The approach he had adopted, which combined the analytical with the synthetic method, was also entirely satisfactory. It had enabled him to identify general principles, as the Commission required of him, while avoiding the twofold danger of proposing too detailed definitions and, conversely, formulating unduly abstract principles that would be difficult to relate to concrete situations. In criminal law it was necessary to stay within the realm of the concrete.

2. Ideally, the draft code should meet three requirements: it should define offences against the peace and security of mankind; it should specify the corresponding penalties; and it should determine the court competent to characterize the offences and impose the penalties. As to the last requirement, it was not certain that States were opposed to the establishment of an international criminal jurisdiction, for the good reason that many of them would be embarrassed at having to try certain offences themselves and would probably be glad to refer them to an international court.

3. Precision and rigour were necessary for progress in formulating the draft code. In internal criminal law, particularly where the characterization of crimes was concerned, lack of precision was dangerous because it could lead to the violation of fundamental freedoms: any unduly flexible or general characterization might give rise to abuses. What was true of internal law was *a fortiori* true of international law, especially if, instead of providing for the establishment of an international court, the Commission recognized the principle of universal jurisdiction, according to which it would be for national courts to try the offences specified in the code. To provide against the risks—which would be even greater in that case—of contradictions and even errors in the interpretation of facts, the Commission would have to draft definitions that were as precise as possible. Of the different alternatives proposed by the Special Rapporteur in the draft code, he himself therefore preferred the most precise and rigorous, which were not likely to give rise to abusive or even erroneous interpretations.

4. The same concern for rigour might also lead the Commission to reduce the number of offences covered by the code and to retain only those whose inclusion was approved by the greatest number of States.

5. The Special Rapporteur had been quite right to try to draw up a list of criteria for characterization. The basic distinction he had made between crimes against peace, crimes against humanity and war crimes provided a very good starting-point at the present stage of the work. That distinction was, of course, relative, since one and the same offence could, for example, be both a war crime and a crime against humanity. But that was quite normal; the same relativity was to be found in internal law.

6. That fundamental distinction having been accepted, the question arose whether it would not be appropriate to introduce, in each of the three categories of crime, a further distinction between crimes whose definition did not give rise to any major objection by States or to any real controversy in judicial practice or legal doctrine, and crimes on which it was much more difficult to reach agreement.

7. For the former, which included, in particular, aggression, genocide and most war crimes, it would be sufficient to abide by the definitions and characterizations contained in the principal relevant international conventions—although, in the case of war crimes, "simple" crimes might be distinguished from those which were also crimes against peace or against humanity.

8. For the second group of crimes, however, it was essential to identify the elements which conferred their specific character upon offences against the peace and security of mankind and caused a particular act or occurrence to be included among the offences to which the code would apply. In that respect, the Special Rapporteur had greatly facilitated the Commission's task. In his analysis of crimes against humanity (*ibid.*, paras. 20-26), he had reviewed several elements, some of which were material, some psychological and others mixed. Such elements were: atrocity of the crime, infringement of a fundamental right, massive scale, official position of the perpetrator and motive. Taken separately, each of those criteria could, of course, be contested. It had been questioned in the Commission, for example, whether the element of massiveness was always necessary. In fact, of the five criteria contemplated by the Special Rapporteur, only that of motive appeared to be unanimously accepted.

9. It had also been asked whether an act or occurrence had to have all those characteristics at once in order to be qualified as a crime against humanity, or only some of them, and if so which? One thing appeared certain: one of the criteria alone was not enough, and some of them, in particular the official position of the perpetrator, were not decisive. For an individual, whether acting on behalf of a State or in a personal capacity, could certainly commit a crime against humanity. On the other hand, three elements were decisive: gravity, massiveness and motive. They must all be present together for a crime against humanity to be determined. That condition would keep the draft code from encroaching on internal law by dealing with ordinary crimes which came under the jurisdiction of the national courts. He therefore believed it would be inadvisable to adopt as many criteria as possible and lengthen indiscriminately the list of offences to be included in the code.

10. True, from the legal and ethical points of view, both the broad concept and the narrow concept of a crime against humanity could perfectly well be de-

fended. But the Commission also had to take account of the wishes of States. It needed to know what States were prepared to accept, or, more precisely, to tolerate, and how far it was possible to go without provoking unduly negative reactions on their part. It would be regrettable if the inclusion of crimes which were already covered by internal law, or which States might not wish to be included in the draft code, were to hinder the codification of provisions condemning the gravest and the most odious crimes.

11. The part of the report dealing with serious damage to the environment (*ibid.*, paras. 66-67) was perhaps rather too elliptical, and an uninformed reader might even think that damage resulting from an accident was placed on the same footing as damage resulting from an intentional act. More emphasis should therefore be placed on motive. Among cases of serious damage to the environment, which could result from acts committed either during an armed conflict or in time of peace and could therefore be classified either as crimes against humanity or as war crimes, mention should be made of damage resulting from the destruction of a nuclear power plant, the torpedoing of a giant oil tanker and the destruction of offshore oil-drilling installations. Those acts, the consequences of which were extremely serious, had their place among the offences to be made punishable under the draft code.

12. On the question whether the use of nuclear weapons should be included, it should be borne in mind, first, that an individual could make use of such a weapon contrary to the orders of his superiors. Hence the question of possible individual responsibility arose in that regard. The most controversial question, however, was whether only the "first use" of nuclear weapons should be included among war crimes. For his part, he doubted whether the distinction made between the "first use" and the response was justified. True, the first case constituted aggression, whereas the second was only the exercise of the right of self-defence. But since the response could cause damage as serious as or even more serious than the aggression, it too was a crime. In fact, he would be inclined to think that the "first use" of a nuclear weapon was both a war crime and a crime against humanity, and that the response, because of its consequences, was a crime against humanity. The distinction between "first use" and subsequent uses might perhaps be more justified if it were made in part II of chapter I of the draft articles, dealing with general principles. The case of the author of the response could be provided for in draft article 8, on exceptions to the principle of responsibility.

13. On the question of making the use of nuclear weapons a crime, opinions were far from unanimous. Those opposed to doing so argued, in particular, that it was a separate question and that certain States were already trying to draft a convention prohibiting the use of nuclear weapons. That argument, though impressive, was not decisive. For some of the other acts and occurrences referred to in the draft code were also the subject of negotiations between States or of discussions in other bodies, and that did not prevent the Commission from continuing its work of codification concerning them.

14. The Human Rights Committee, which was also considering that problem, had stated in its report to the General Assembly at its fortieth session[4] that:

> ... It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

and that:

> The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

15. The Commission could not remain indifferent to the view expressed by that body. If the use of nuclear weapons, as well as that of weapons having equivalent effects, were not dealt with in the draft code, a paradoxical situation would result, which would well illustrate the moral of La Fontaine's fable: "According to whether you are powerful or lowly, court opinion will make you white or black." For in that case, terrorism, which was the weapon of the weak and the poor, would constitute an offence against the peace and security of mankind, but the use of nuclear weapons, which belonged to the powerful and rich, would not.

16. In conclusion, he supported the draft articles submitted by the Special Rapporteur, on the understanding that some improvements would have to be made, in particular to achieve greater precision and rigour in the definition and characterization of the offences to be covered by the draft code.

17. Mr. RAZAFINDRALAMBO said that a detailed examination of the Special Rapporteur's fourth report (A/CN.4/398), which was quite up to the Commission's expectations, revealed a certain number of gaps, which were mainly due to Government delays. The Commission had decided at the outset to raise not only the problem of the criminal responsibility of the State, but also, especially, that of the implementation of the code, that was to say the questions of penalties and choice of jurisdiction. Although the question of the criminal responsibility of the State could be deferred without causing too much difficulty, the same could not be said of the implementation of the code, particularly the attribution of competence. A draft code that did not contain provisions on its implementation might well remain a dead letter.

18. Although it was probably impossible to go into that question further at the present stage of the work, it was nevertheless highly desirable that the Commission should inform the General Assembly that it urgently needed the directives necessary for carrying out its mandate and information concerning the modalities of application of the code and the type of jurisdiction chosen by the General Assembly.

19. As had been said repeatedly during the debate, the provisions of the code, because of their criminal nature, should be drafted with rigour and precision, so as not to be open to different interpretations. All the constituent elements of the general concepts and of the offences in-

[4] *Official Records of the General Assembly, Fortieth Session, Supplement No. 40* (A/40/40), annex VI, paras. 4 and 6.

cluded should appear in the texts of the articles themselves, not in the commentaries.

20. Furthermore, in formulating the draft articles, the type of court that would be required to apply them—national or international—should be taken into account. If the General Assembly opted for national jurisdiction, different courts could be called upon to try similar cases; and if the judge had to determine for himself the content and scope of certain concepts or definitions that were formulated too vaguely in the code, judicial precedents might not be uniform. But even if, as the Special Rapporteur seemed to expect, most States finally opted for an international criminal jurisdiction, he himself would still favour a precise and detailed formulation.

21. In chapter II of the draft code, which dealt with specific offences, the Special Rapporteur had divided offences against the peace and security of mankind into three groups, each of which had a separate title and was covered by a single article. Because of the method chosen, the articles, in which the offences referred to were treated in separate paragraphs and the examples presented in subparagraphs, were unusually long for criminal provisions. That method was not always very clear, because the list of acts or occurrences cited as examples did not appear to follow a pre-established order. Some members had even spoken of overlapping and duplication. But that was something which could be settled in the Drafting Committee.

22. As to the order in which the three categories of offences appeared, although the Special Rapporteur had departed from the Nürnberg Principles[5] and the 1954 draft code by choosing to place crimes against humanity before war crimes—a choice which the Commission might possibly reject—he had, by providing in part IV of chapter II for "other offences", namely conspiracy, complicity and attempt, followed the example of those instruments, which were obviously based on common-law systems. For in written-law systems, complicity and attempt were incorporated in the general principles, while conspiracy was a special case, either of complicity or of participation as co-author of a crime, or even, as in French criminal law, a separate crime.

23. He had reservations regarding the title of part IV. Since there were considered to be three categories of offences against the peace and security of mankind, the fact that a special part was devoted to "other offences" could at first sight imply that those offences did not constitute offences against the peace and security of mankind. Perhaps it would be preferable to discard that general formula and simply to identify each of the offences covered by its name and to leave it in the position which the Special Rapporteur had assigned to it.

24. In any event, draft article 14 should define the concepts of conspiracy, complicity and attempt instead of simply stating, for example, that "The following also constitute offences against the peace and security of mankind: A. Conspiracy to commit ...". It should not be forgotten that the code would be the only instrument of international law containing criminal provisions.

25. In that respect, where the offences specified were already defined in existing instruments, it would be preferable—especially if competence in the area of offences against the peace and security of mankind were to be attributed to internal jurisdiction—to repeat those definitions, if possible *in extenso*. It did not matter whether the instruments in question were conventions that had not been ratified by all States, or even General Assembly resolutions. It was generally accepted that those resolutions could embody principles of customary law, which were thereby binding on the international community.

26. Turning to the three major categories of offences, he said that, with regard to crimes against humanity, he fully endorsed the interpretation given to the word "humanity" in the report (*ibid.*, para. 15) as meaning the "human race as a whole". He also agreed with the qualifying criteria identified by the Special Rapporteur (*ibid.*, paras. 21-26). Seriousness and massiveness, in particular, were fully characteristic of crimes against humanity. Naturally, all such crimes presupposed a criminal intent; but the qualification ultimately depended on the motive, which, as the Special Rapporteur stressed, was a special, distinct intention, forming part of the crime.

27. As he had already said at the Commission's thirty-sixth session,[6] the draft code should retain the crimes referred to in the 1954 draft code, namely genocide and inhuman acts, together with those, such as *apartheid*, which were the subject of conventions that had been adopted and had entered into force subsequently. Inhuman acts should in his opinion retain their specific nature.

28. Moreover, all crimes against humanity which did not have the specific features of *apartheid* and genocide and which, in particular, did not have a mass element should be regarded as inhuman acts. That was the case of enslavement. Nevertheless, he would not be opposed to treating that crime, which was the subject of various international conventions in force, as a separate offence. However, he could not subscribe to the proposals to add to the list of inhuman acts, for example, the traffic in women or even drug trafficking. Those international crimes did not have the particularly serious character of offences against the peace and security of mankind and should be dealt with by internal laws.

29. Serious damage to the environment had a place among crimes against humanity. Although that crime—like genocide, *apartheid* and colonial domination—was also treated in the draft articles on State responsibility, its inclusion in the draft code and its qualification as a crime did not appear to raise serious reservations within the Commission.

30. Regarding war crimes, he was fully in favour of extending the scope of the draft code to include non-State entities such as national liberation movements. That would only be affirming the provisions of Additional Protocol I to the 1949 Geneva Conventions.[7] He

[5] See 1958th meeting, footnote 4.

[6] See *Yearbook ... 1984*, vol. I, pp. 11-12, 1816th meeting, paras. 41-42.

[7] See 1959th meeting, footnote 6.

approved of the various proposals to retain the traditional expression "war crime" and agreed with the Special Rapporteur that there was a clear difference between crimes against humanity and war crimes.

31. Regarding the wording of draft article 13, he said that, if a consensus were reached on a non-restrictive list, he would not be opposed to the Commission adopting that solution despite the risk that the list might be interpreted broadly.

32. Subparagraph (*b*) (ii) of the second alternative of draft article 13 included among war crimes "the unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately ...". If, as appeared to be the case, that provision was accepted in principle, it was difficult to see how it could be claimed that it did not cover the use of nuclear weapons. While it could admittedly be argued that it would be more realistic not to mention the use of nuclear weapons, in order to avoid rejection of the entire draft code by the nuclear Powers from the outset, it could also be argued that, in the event of a nuclear holocaust, there would be no judges or accused persons left on earth.

33. However, from the strictly legal standpoint, since the indiscriminate use of weapons of mass destruction had always been considered contrary to the laws and customs of war and since prohibition of those weapons had been enshrined in the Additional Protocols to the Geneva Conventions, it was difficult to claim that the use of nuclear weapons, which were undeniably weapons of mass destruction, was not illegal. Furthermore, to the extent that the Commission agreed to punish acts resulting in serious damage to the environment, it should draw the inevitable conclusions and recognize that the use of nuclear weapons would undeniably cause serious damage to the environment.

34. However, no rule of international law, except those deriving from the Treaty on the Non-Proliferation of Nuclear Weapons,[8] which many States had not ratified, prohibited the manufacture of nuclear weapons. It would therefore be difficult to prohibit possession of such weapons and to order the destruction of existing stocks.

35. In part III of the report, the Special Rapporteur analysed the difficult concepts of conspiracy, complicity and attempt with exemplary thoroughness.

36. With regard to conspiracy, he endorsed the Special Rapporteur's proposal to retain the concept of conspiracy as an offence not only for crimes against peace, but for all offences against the peace and security of mankind. Furthermore, in keeping with the Convention on the Prevention and Punishment of the Crime of Genocide, membership in a group or organization or participation in a concerted plan should be characterized as crimes, since that was the only way to reach an individual belonging to a criminal organization. For the reasons invoked earlier, all elements constituting conspiracy should be listed in the text of the paragraph covering that offence.

37. Complicity should also be clearly defined. Section B of draft article 14 provided a good starting-point in that respect.

38. With regard to attempt, he recalled that the 1954 draft code covered acts preparatory to the use of armed force and attempt, with no other explanation, for all offences against the peace and security of mankind. Since section C of draft article 14 said nothing on that point, the Commission should give a clear explanation of the scope it intended to give to the concept of attempt in international criminal law—instead of implicitly referring to the solutions offered by internal criminal law—and, especially, decide whether voluntary desistance should enable the charge to be set aside. The definition should make it clear that attempt was an unequivocal and direct type of conduct, which represented a substantial step towards the commission of an offence against the peace and security of mankind, but which had not succeeded because of circumstances beyond the perpetrator's control.

39. Mr. RIPHAGEN said that two different approaches could be adopted to the elaboration of a code of offences, one concerned with strengthening the rules governing relations between States, and the other dealing with offences, the perpetrators of which, because of the bias of the competent national authorities, were often inadequately punished or, because of the transnational character of their acts, were not easily punished solely within the framework of a domestic legal system.

40. The first approach, with which his remarks would be concerned, involved three interrelated considerations. First, not all rules governing relations between States required strengthening; secondly, there was *a priori* much to be said in favour of limiting the code to offences which had a "State-like" character; and thirdly, crime and punishment in relation to individuals necessarily implied a moral element.

41. The strengthening of rules governing relations between States entailed providing for the legal consequences of internationally wrongful acts beyond the legal framework of such relations. The rules governing the criminal responsibility of individuals came into play. That was particularly necessary since, as experience showed, it was exceedingly difficult to punish States as such without either adversely affecting the interests of other States, or acting contrary to fundamental human rights, including the right to self-determination. The aim would be to give direct effect to particular rules which had a *jus cogens* character. That direct effect—which would concern, firstly, persons not acting on behalf of the State and, secondly, legal relationships which were not regulated by rules affecting relations between States—necessarily implied an adaptation of the content of rules governing relations between States and must have an impact on normal rules concerning the jurisdiction of the State and mutual assistance between States. In a sense, the whole operation of establishing a code was meant to bring the rules governing relations between States back to the original and final subjects of law, namely human beings. That was true even where punishment was meted out by the authorities of a State or of an international organization

[8] United Nations, *Treaty Series*, vol. 729, p. 161.

and where the interests of the international community of States as a whole were involved, or at least invoked.

42. Reverting to his original three interrelated considerations, he said that the first consideration evoked the connection between the crimes to be dealt with in the draft code and the concept of international *jus cogens*. The hard core of international *jus cogens* would seem to lie in the conditions which marked the boundaries of the system of coexistence of separate and sovereign States, which suggested that the offences to be defined in the code should be limited to what had, somewhat loosely, been described as the "most serious" offences. In that connection, he seriously doubted, for example, that interference by the authorities of one State in the internal or external affairs of another State could be described purely and simply as a crime against peace entailing individual criminal responsibility (draft article 11, para. 3). That was too wide a concept to be dealt with in rules of individual criminal responsibility.

43. The second consideration concerned the so-called "mass element". The Commission was confronted with the necessity of adapting the content of the rules of international law in order to make them applicable to an entirely different relationship deriving from individual criminal responsibility. In his view, it was entirely correct not to limit such criminal responsibility to persons acting on behalf of the State. On the other hand, the behaviour to be covered by the draft code must be distinguishable from common crimes, which were a matter solely for domestic judicial systems. The distinction would seem to be that the conduct punishable under the code—necessarily individual conduct—must be shown to form part of a pattern of behaviour or general design involving interrelated but separate acts, perpetrators and victims. That was what he had meant by "State-like character", a concept which would not be easy to express in the code. Naturally, criminal intent of the individual perpetrator was part of the interrelationship between the elements of the overall pattern of behaviour, as were the object and purpose of the behaviour itself. Indeed, such patterns of behaviour would normally include a form of organization on the active side, and the singling out of a group of persons as "enemies" on the passive side, again a "war-like" situation and corresponding "State-like" behaviour.

44. The third consideration—the moral element—was addressed mainly in draft articles 8 and 9 submitted by the Special Rapporteur. It included the "moral choice" of the perpetrator concerning a command given to him. However, the moral element did not stop there. There was also a moral element involved in the nature of the punishment and the punishing authority. Moral determinations as to the justification of a punishment tended to become "timeless", in that the idea of *hic et nunc* tended to prevail over consideration of both past and future circumstances. While that was to some extent unavoidable, he nevertheless wondered whether it was really just, in respect of all the offences provided for in the code, to ignore the passage of time. There again, the Commission should be wary of an overdose of abstraction.

45. Mr. EL RASHEED MOHAMED AHMED said that the report under discussion (A/CN.4/398) was a source of pride for all African scholars. He proposed to make some general remarks on that admirable report, while at the same time making a brief reference to the general principles of Islamic law on certain issues, thereby widening the ambit of comparison.

46. With regard to crimes against humanity, the Special Rapporteur stated (*ibid.*, para. 7) that the doctrinal bases for the regulation of armed conflicts had been laid down in the *Summa theologiae* of St. Thomas Aquinas and in *De Jure Belli ac Pacis* by Grotius. No doubt that was true, but St. Thomas, and indeed Grotius, could have been influenced by earlier doctrine embodied in the teachings of Islam.

47. Tradition had it that the Prophet Mohammed ordered his armies not to kill the wounded, the elderly, women or children and not to cut down trees. However, with regard to human heritage, it was difficult, if not impossible, to draw a clear line of demarcation. Civilizations, cultures, races, tribes and ethnic groups intermingled, disappeared and sometimes dissolved into larger societies. Despite the fact that human history had been marked by a constant series of struggles, what remained was the human heritage. The Koran contained an account of how Kabeel (Cain) had slain Habeel (Abel) out of jealousy and greed. As a result, the Koran stipulated: "That was why We laid it down for the Israelites that whoever killed a human being, except as a punishment for murder or other wicked crimes, should be looked upon as though he had killed all mankind; and that whoever saved a human life should be regarded as though he had saved all mankind."[9]

48. Man thus appeared as the epitome of humanity, so that a person who transgressed the right of one man to live transgressed the very right to life itself. According to Islamic jurisprudence, there were five essentials which had to be protected and preserved: (1) the self; (2) the mind; (3) offspring; (4) property; (5) religion. A careful examination of those five essentials made it possible to discern the true meaning of crime. The Koran had been preceded by the Old Testament and the New Testament. The Ten Commandments had been revealed in the three divine books.

49. The question arose of how to draw the line of demarcation between serious crimes and other crimes. Some crimes remained serious all the time, whereas others might not be so at all times and in all places. The various criteria proposed (*ibid.*, para. 21), such as "barbarity, brutality or atrocity", "humiliating and degrading treatment" and "outrages upon personal dignity", were not precise. The one nearest to precision was perhaps "infringement of a right". Possibly the best test would be the comprehensive one of infringement of the five essentials to which he had referred. That was in any event the test which he proposed to apply when discussing the various types of crime.

50. Genocide, squarely met that test. Literally, "genocide" meant the killing of a race. It was difficult, however, to confine genocide to its literal meaning or even to restrict it to the killing of a race, a group or a

[9] *The Koran*, translated by N. J. Dawood (Penguin Books, 1974), pp. 390-391, sura 5, verse 32.

nation. He himself did not agree with those who, like Vespasien Pella, felt that killing a political group did not fall within the scope of genocide. On the other hand, he agreed with those members of the Commission who considered that, for the crime of genocide to be present, there must be a systematic pattern or design of acts against a group of people. In the absence of a more precise definition of genocide, the definition contained in the 1948 Genocide Convention could be accepted, if only for practical reasons. Thus he supported the Special Rapporteur's proposal that the crime of genocide should be included in the draft code.

51. *Apartheid* could also be included, since it outraged the conscience not only of Africa, but of the whole world. Although it was confined to one country, its consequences affected other countries as well, as shown by the recent raids against Zambia, Zimbabwe and Mozambique.

52. He fully agreed with Mr. Balanda (1960th meeting) on the subject of the environment. Much of Africa had become a desert as a result of deforestation. In his own country, Sudan, a serious drought was forecast for the current year. The dumping of nuclear waste constituted another threat to the environment. When it took place in the territories of developed countries with a high standard of safety measures, such dumping might perhaps not affect other countries. A much more dangerous situation capable of affecting the whole African continent would arise, however, if a recent plan to dump nuclear waste in the African desert materialized. An article on protection of the environment should therefore be included in the draft code.

53. On the question of war crimes, he favoured retaining that term, which had become accepted in international law. Its meaning should, of course, be extended so as to embrace all armed conflicts. For the purposes of drafting, the distinction between war crimes and crimes against humanity was important, although there was some inevitable overlapping. Since war was now illegal, any act consequential of war was also necessarily illegal. Such acts could vary in degree and in nature. As far as their definition was concerned, therefore, he favoured a combination of a general formula with a non-exhaustive list.

54. While terrorism was a dangerous phenomenon of the contemporary age, he doubted whether it would be helpful to try to draw a distinction between its various forms. In any event, any distinction which might be drawn was unlikely to gain unanimous acceptance. The best course would therefore be to condemn terrorism in all its forms, since an international criminal code would be incomplete if it did not include provisions on the subject.

55. He agreed that the question of nuclear weapons was a delicate one and that it was not possible to stop the manufacture, stockpiling or testing of such weapons. Nevertheless, he saw no reason why an effort should not be made to prohibit the use of nuclear weapons.

56. On the subject of "other offences", he found himself in broad agreement with Mr. Jagota (1962nd meeting). The Penal Code of Sudan, notwithstanding certain amendments to introduce Islamic provisions, was based on the Indian Penal Code. The terminology of both codes was the same and could be useful at the international level.

57. He agreed on the desirability of including "other offences" in the draft code. He had no difficulty with such concepts as conspiracy and attempt, but had serious doubts with regard to the validity of the concept of membership of a group. Such membership ought not to serve to incriminate any member of the group, unless the group itself was illegal and the member was tried on that account alone. He agreed with Mr. Jagota that "other offences" such as attempt and conspiracy should be dealt with in separate provisions and not be included among the general principles.

58. Lastly, he agreed that the draft code would be deficient if it did not contain any provisions on implementation. The absence of such provisions, however, would not make the adoption of the code a futile exercise. He recalled that the General Assembly, in its resolution 40/69 of 11 December 1985, had stressed that the elaboration of a code of offences against the peace and security of mankind

> ... could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations.

Clearly, the Governments represented in the General Assembly wanted the draft code prepared and accepted. It would be paradoxical if, when the code was completed and it came to the point of signing and ratifying the convention embodying it, the same Governments were to object to it.

59. In any event, the adoption of an international code of offences would be useful in many practical ways. It would strengthen international peace, as stated in resolution 40/69; it would influence legal thinking in various parts of the world; and it would ultimately enable differences to be reconciled and common ground to be found.

60. Mr. DÍAZ GONZÁLEZ joined previous speakers in congratulating the Special Rapporteur. The debate on the first three parts of the fourth report (A/CN.4/398), which was coming to an end, led him to wonder whether it was not impossible or too difficult to draw up a draft code of offences against the peace and security of mankind. Despite the adage that there was nothing new under the sun, the debate had shown that to speak of genocide, *apartheid* and colonialism was to display both romanticism and grandiloquence. Consequently, if for one reason or another the Commission was not able to define genocide or aggression by using existing definitions, it would have to return the study to the General Assembly and explain that it had to wait for romanticism to give way to realism in order to pursue its task. Only then would it be in a position to draft the articles in question.

61. It had been said that the Commission's task was neither political nor sociological. Was law to be found in a pure state only in a test-tube? Was law not a creation of the mind? Did it not evolve? He asked those questions because everything governed by law was in fact of sociological, even political, origin. Man

established rules of law designed to regulate his own conduct and even that of States. Thus the institution of marriage did not "legalize" mating until millennia after man appeared on earth. The aim had been to protect first the stability of the family, then the rights of the child. Currently, marriage was a legal institution as well as a sociological, biological and physiological institution. Over the centuries, that institution had evolved; it was constantly changing. Perhaps one day the principle inherited from the Romans, *Infans conceptus pro nato habetur quoties de commodis ejus agitur* would even disappear. Marriage was no longer based on procreation, which had been called into question by abortion and *in vitro* conception, for example. In the light of those considerations, he cautioned members of the Commission against becoming too attached to the idea that the Commission could not go forward because it had to deal with law and not politics.

62. Why had the General Assembly invited it to attempt to draft an international criminal code? The Commission had based its work on the Nürnberg proceedings. Those proceedings had as their point of departure not the law, but the decision of the victors of the Second World War to punish the perpetrators of atrocities committed during the conflict. On that occasion it had been necessary to violate the legal principle *nulla poena sine lege*. Although the law had been violated, justice had been done, at least from the point of view of the Allies who had triumphed in the Second World War. Mankind had applauded the procedure adopted, although numerous crimes, such as colonialism, had not been condemned at that point. The Commission was now attempting to ensure that the crimes referred to in the draft code were punished not on the basis of a decision by one State, but because they were against the law.

63. Nevertheless, although Nazi terror had been brought to an end, mankind currently lived in fear of a nuclear conflict and was being subjected to a balance of terror. The purpose of the code which the Commission was to elaborate was to prevent a State from taking it upon itself to play accuser, judge and executioner at the same time by imputing a crime to another State on the basis not of the law, but of the force or power at its disposal or at the disposal of its allies and protectors. That was the reason for the existence of an international criminal code. Moreover, any codification effort was aimed not only at establishing norms, but also at creating the organ that would apply them. He therefore endorsed the idea that the Commission should consider the creation of an international court as a mechanism for the application of the code it was to elaborate. Even if such a step could be described as romantic, it must be attempted.

64. Referring to the Spanish text of the fourth report, he was pleased to note that the word *crimen* had definitively replaced the term *delito*. Furthermore, he agreed with the philosophy underlying the report and approved of the form in which the Special Rapporteur had approached questions, informing members of his doubts and requesting Member States to indicate their points of view.

65. On the matter of the offences dealt with by the Special Rapporteur in his fourth report, he noted that many appeals for caution had been made throughout the debate concerning the definition of the term "genocide". Although all members of the Commission appeared to be in agreement on which offences to include in the code, they were seeking pretexts for avoiding mention of that term. Whether or not the Convention on the Prevention and Punishment of the Crime of Genocide had been ratified by a large number of States, it did contain a definition of genocide, which had not prevented the Commission from devoting a good part of its time to debating the meaning of that term. One of the advantages of the Nürnberg trials had been not to have debated the question and to have set forth a definition of genocide. While he understood the appeals for caution made by some members of the Commission, those appeals should refer not only to the draft code, but to the work of the Commission in general. However, in the specific case of the draft code, the Commission should be extremely precise. He agreed with those members who had defended the idea of limiting the scope of the code and of not extending it to include offences already punishable under internal laws.

66. The draft code rightly covered acts causing serious damage to the environment. When a State bombed another country, indiscriminately destroying its flora and fauna, it was committing a crime against humanity by condemning the people of the country in question to die of thirst and starvation.

67. It was quite justifiable to include a provision on State terrorism in the draft code. In considering terrorism, it was the underlying causes that should be sought. It had been said that terrorism was the weapon of the poor. In fact, it was also the supreme means available to a people struggling for its liberation and independence, whence its links with colonialism. A people subjected to colonialism and over whom the colonial Power exercised State terrorism had no resources other than violence. He cited the example of the Latin-American countries in the nineteenth century and of the French who had joined the resistance under the occupation and whom the Germans had described as subversive terrorists. Similarly, the black population of South Africa had no recourse other than violence and terrorism. Numerous heads of State and of Government, moreover, had practised terrorism in their time to win independence for their countries. In the framework of the draft code, terrorism should be limited to State terrorism and colonialism. For those who believed colonialism was a thing of the past, he noted that, unfortunately, it had not disappeared in Latin America, or even in Europe and other continents where there were still occupied territories and colonies. The Declaration on the Granting of Independence to Colonial Countries and Peoples[10] had established the principle of self-determination of peoples, but what was to be said of the occupied territories which were not acceding to independence and which were to be re-attached to the territories from which they had previously been separated?

[10] General Assembly resolution 1514 (XV) of 14 December 1960.

68. All such crimes were interconnected. Colonialism went hand in hand with serious damage to the environment. In America, a colonial power occupied two-thirds of the cultivable area of an island country and was using it for firing-ranges and military training camps, and in so doing was committing a crime against humanity. Colonialism should appear among the crimes condemned by the code, whether the Commission decided to call it a crime of a colonial nature, colonial domination, or something else.

69. It had been said that it would be difficult to characterize *apartheid* as a crime in the code, because it was not very clear what the term signified. Supposedly, *apartheid* was comprised of a set of acts already sanctioned by internal law and would therefore not lend itself to a definition that could be encompassed in the code. In his view, *apartheid* was clearly a set of crimes, among the most abominable committed by man against man, and should be condemned by the code.

70. He recalled that Mr. Boutros Ghali (1961st meeting) had advocated referring to what had been done on continents other than Europe to combat offences against the peace and security of mankind. As early as 1820, many years before the founding of the Red Cross by Henri Dunant, Bolivar, representing Colombia, and General Morillo, representing the King of Spain, had signed a treaty regulating and humanizing war. In that respect, reference might also be made to the conventions that had been elaborated and the studies that had been carried out on offences against the peace and security of mankind either under the auspices of OAS or otherwise.

71. In conclusion, the question of nuclear weapons was a political one. Indeed, everything was political and sociological in origin and everything that man sought to regulate had appeared in his environment and not in a pure state in a test-tube. He did not believe that the Commission could succeed in drafting a concise article on what should be understood by a ban on nuclear weapons. He also believed that no distinction should be made between a State which made first use of nuclear weapons and a State which used them as a response. In either case, the main loser would be mankind as a whole. The prohibition always came after the experience, as shown by the case of toxic gases, which had been used during the First World War and then prohibited by conventions. But in the case in hand, the General Assembly was not preventing the Commission from condemning the use of nuclear weapons, or at least attempting to do so. The question of the use of nuclear weapons should not remain a matter for political bodies alone.

72. Mr. KOROMA congratulated the Special Rapporteur on the analytical and empirical qualities of his fourth report (A/CN.4/398). While recognizing that the hypotheses on which the draft code was based were valid, he did not agree in all respects with the content of the report. For example, he could not accept the idea of ascribing a degree of cruelty to technological progress in itself; nor would he place self-defence and peace-keeping in the same category of exceptions to the use of force.

73. In his view, the Commission should refrain from dealing with topics that were too politically controversial and which, in the absence of any common ground, afforded no possibilities for progressive development or codification. Consideration of such topics should be deferred until sufficient areas of agreement for their codification had been reached.

74. Those considerations had made him at first reluctant to speak on the topic. In order to overcome his misgivings, he had applied the tests of relevance and utility to the topic. As the debate had developed, he had arrived at a positive conclusion with regard to the utility of the topic and its relevance for the maintenance of international peace and security.

75. The Commission had a mandate to develop progressively and codify those values which the international community had in common, and must therefore identify conduct which was harmful or injurious to the common interests of mankind as a whole. In that connection, the international community considered the use of force in international relations illegal. In the event of armed conflict, however, the laws and customs of war had to be respected. He favoured retaining the reference to "customs", since otherwise the suggestion would be that all the laws and customs of war had been codified, which was not the case.

76. The draft code that the Commission was called upon to elaborate would prohibit the use of force and regulate the conduct of armed conflicts so as to avoid unnecessary harm or cruelty to those directly or indirectly involved in such conflicts. Such a code could serve not only preventive, but also educational purposes. It would enhance respect for human rights throughout the world.

77. Turning to the draft code itself, he approved of the tripartite division of offences into crimes against humanity, war crimes and other offences. In his view, in order to qualify as an offence against the peace and security of mankind, an act had to meet certain requirements. First, the act—or omission—had to be of a serious nature; secondly, a mass element had to be present, except for certain types of offences where a systematic pattern of behaviour might be sufficient, although criminal intent (or at least recklessness) also had to be present.

78. The source of law applicable to those offences could be found in conventions, in custom, in international instruments and in case-law. He agreed, however, that the Commission should not legislate by reference and that the code itself should specify the acts that were to be regarded as offences.

79. He agreed that crimes against humanity had acquired an autonomous standing—distinct from war crimes—and that they could be committed in time of peace. For an act or omission to be qualified as a crime against humanity, certain elements had to be present, such as intent to cause harm or inflict suffering, cruelty or suffering inflicted on human beings, and the degradation of human beings. He agreed with the Special Rapporteur's proposal to combine a general formula with a non-exhaustive list in the definition of crimes against humanity.

80. Genocide should come first in the hierarchy of crimes against humanity. The unique nature of that offence lay in the intent to destroy in whole or in part a national, ethnic, racial or religious group. Without such intent, mass killings would qualify as homicide punishable under internal law. On the other hand, where that intent was present, the murder of even a single individual could constitute genocide.

81. *Apartheid* should be given autonomous status as a crime against humanity. It had been defined in the relevant Convention of 1973 in terms of policies and practices of racial segregation and discrimination as practised in southern Africa for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. Hence acts of *apartheid* must have been perpetrated in the context of southern Africa for the purposes described above. *Apartheid*, which the international community had declared to be a crime against humanity and a violation of the principles of international law, constituted a very serious offence.

82. The 1973 Convention, which had declared *apartheid* to be a crime, had been in force for some 10 years and had been ratified or acceded to by some 90 States, not only from Africa, but also from Europe, Asia and Latin America. The Convention could thus be said to have received universal approval. It was clear from article II of the Convention that its effect was confined to southern Africa. Articles III and IV showed that the aim was not to indict everyone in South Africa, but only the representatives of the State of South Africa, such as the members of the executive.

83. It was interesting that some States which had ratified neither the 1973 *Apartheid* Convention nor the International Covenants on human rights were none the less in the forefront of the struggle against *apartheid* and of the promotion of human rights. Thus the absence of such ratifications in no way detracted from the universal acceptance of those important instruments. Moreover, the decisions of the ICJ in a number of cases reinforced the conception of *apartheid* as an autonomous offence and a crime against humanity.

84. Slavery and the slave trade should also be included among crimes against humanity. Those acts had been prohibited by many international conventions and, given their serious nature, there was universal consensus that they constituted an affront to mankind.

85. He supported retaining the term "war crimes", on the understanding that, as the Special Rapporteur indicated (A/CN.4/398, para. 76), the word "war" related to the material aspect of the offence. In that connection, he supported the definition proposed by Mr. Jagota (1962nd meeting, para. 80), which had the advantage of being both simple and clear.

86. The issue of nuclear weapons was divisive; and as for the question of damage to the environment, it was linked to other topics currently being considered by the Commission.

87. Finally, the question of what was to be included in the draft articles depended on the nature of the draft code. If the code was to serve simply as a standard, some further offences could be included in it. If, however, the Commission hoped that States would adopt the draft code, it should confine itself to those areas on which there was universal consensus.

The meeting rose at 1.15 p.m.

1964th MEETING

Wednesday, 11 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf. Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART IV (General principles) *and*

PART V (Draft articles)

1. Chief AKINJIDE said that his remarks on the Special Rapporteur's excellent fourth report (A/CN.4/398) were in the nature of suggestions intended to assist in improving the draft and to contribute material for the Special Rapporteur's next report.

2. The present topic was one of the most important on the Commission's agenda. It was also a very sensitive one in that it dealt with matters connected with the very existence of mankind and brought back painful memories of the Second World War. For his part, he agreed on the need for a draft code that would attract as much support as possible and hence foster peace and harmony throughout the world.

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[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 ... 1985*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).