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Summary record of the 2102nd meeting

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

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

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

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

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

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

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

It was so agreed.

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

It was so agreed.

56. The CHAIRMAN proposed that the Commission should adjourn to allow the Drafting Committee to meet.

It was so agreed.

The meeting rose at 11.30 a.m.

2102nd MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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

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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 . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the text, see 2096th meeting, para. 2.

[5] For the text, *ibid.*

concerned more with drafting than with substance, he said he agreed that each crime should in principle form the subject of a separate article and understood that a decision to that effect had been reached in the Drafting Committee, but the matter should be dealt with after points of substance had been settled.

2. The discussion of draft article 13, on war crimes, had focused on the question of definition and on the concept of gravity, to which he would therefore confine his remarks. It was apparent from the debate that differences subsisted between those who favoured a general definition and those who favoured a list of crimes which, if not exhaustive, was at least indicative. The former took the view that, since war crimes were already the subject of codification and since many conventions stated the positive law in the matter, a list of crimes that simply reflected the existing law would be of little use. It might also be somewhat hazardous for the Commission to embark on progressive development of the law, particularly when certain matters had yet to be agreed between States. That, however, was a point to be resolved by the Commission. It had likewise been said that a non-exhaustive list of crimes would be of little use because it would not be in conformity with the principle *nullum crimen sine lege*. In fact, such a list had never been drawn up and was impossible to devise: hence the Martens clause contained in the 1907 Hague Convention and reproduced in Additional Protocol I to the 1949 Geneva Conventions (see A/CN.4/419, para. 5). Those were the reasons which, he believed, had persuaded some members that it would be better to be content with a general definition.

3. Other members took the view that a general definition would not suffice and that a few indicative examples should be given to provide the court with an idea of the profile of a war crime. The discussion on that point, however, would be never-ending. For a long time, there had been no satisfactory attempt at compiling an exhaustive list of war crimes; there had only been conventions on specific questions, such as the 1868 Declaration of St. Petersburg, the 1899 Hague Declaration on expanding (dumdum) bullets, the 1922 Washington Treaty and the 1925 Geneva Protocol (*ibid.*, footnote 21). Only much later had there been any attempt to arrive at a general codification of the law of war as reflected, for instance, in the 1907 Hague Convention, the 1949 Geneva Conventions and the Additional Protocols thereto. Those conventions none the less differed in the methods they employed. The 1907 Hague Convention, for example, did not lay down a general definition but merely set forth a non-exhaustive list and referred to the laws and customs of war. The Charter of the Nürnberg Tribunal referred to the laws or customs of war and set forth a non-exhaustive list, while the Charter of the Tokyo Tribunal covered only violations of the laws or customs of war, without incorporating any list. Thus two instruments, drawn up at the same time and for the same purpose, had employed totally different methods.

4. Moreover, the lists incorporated in the Geneva Conventions and the Additional Protocols pertained only to humanitarian law and said nothing whatever about other war crimes, such as the unlawful use of weapons, repeating the very old provision to the effect that there was no unlimited right with respect to the use of the methods and means of warfare. Once a list was involved, the matter became more complicated. It was easy to enumerate the violations of humanitarian law, by referring to existing Conventions, but it was much more difficult to list crimes pertaining to the unlawful use of weapons, for new weapons were constantly being invented. Hence ICRC had expressly pointed out that Additional Protocol I contained no formal prohibition on specific weapons.

5. Some of those who advocated a non-exhaustive list had referred to the list prepared by the International Association for Penal Law. As he had explained in earlier reports, he had felt unable to follow that list because it referred solely to humanitarian law, and war crimes, of course, went beyond humanitarian law.

6. His own position had changed. In the first draft, as submitted in his fourth report in 1986, he had proposed two alternatives for article 13.[6] The second alternative, unlike the first, had contained a list as well as a general definition. In examining that list, the Commission had been confronted with the problem of the use of nuclear weapons and had spent a great deal of time considering whether or not to refer to that type of weapon. He had therefore decided to draw up a list in which the use of nuclear weapons was mentioned between brackets; but that too had incurred strong opposition on the part of some members. Having therefore decided that it would be preferable to leave nuclear weapons aside, he had introduced the present draft, which did not include a list.

7. The positions of members on the concept of gravity were quite clear-cut. Some considered that it should not come into play as a distinguishing factor between the various war crimes. Mr. Arangio-Ruiz (2097th meeting) thought it important not to shatter the well-known principle of the indivisibility of the concept of war crimes and had stressed that that was what he had always been taught. The world had changed, however, and the concept of gravity had long been used in the definition of war crimes. For example, the 1949 Geneva Conventions had introduced the concept of a grave breach and had drawn a distinction: States were required to bring proceedings only in the case of grave breaches, it being left to their discretion to do so in the case of other breaches. Article 19 of part 1 of the draft articles on State responsibility[7] also made a distinction between crimes and delicts on the basis of their seriousness, in which connection he would draw attention in particular to paragraph 3 of that article. Article 19 had yet to be finally adopted, but the element of gravity was already part of positive law since there were conventions in force that differentiated between serious breaches and other breaches. As Mr. Francis (2099th meeting) had rightly pointed out, it was not possible to condemn with equal severity someone who deprived a soldier of food for a day and someone who subjected that soldier to torture.

8. Another argument, invoked by Mr. Koroma (2097th meeting), was that it was for the judge, not for the law, to make a finding as to the gravity of an act. In that connection, the definition of an act and the characterization of an act were not the same. Definition consisted of a description of the specific features of the act. Characterization was something different. In domestic law it was the legislator who defined and distinguished between, say, involuntary homicide, which involved the commission of an act that caused death without intent, murder, which involved the commission of an act that caused death with intent,

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[6] See 2096th meeting, footnote 4.

[7] *Ibid.*, footnote 19.

and killing (*assassinat*), which involved premeditation. When a person was prosecuted, it was the court which characterized the act in question and, on the basis of that distinction, classified it within one of those categories. Thus gravity itself was determined by the legislator. The position was no different in international law. Genocide and *apartheid* were defined in conventions and it would be for the international court, or any other court to which a case was referred, to decide within which of the categories in the conventions the act fell. It was a delicate issue, but the Commission must try to make the necessary distinctions.

9. On the question of terminology, there was more or less general agreement that the expression "war crimes" should be retained in the title of article 13 and the majority of members favoured the second alternative of the article. Some, including Mr. Ogiso (2099th meeting) and Mr. Beesley (2100th meeting), had suggested that the two alternatives might be combined. That, again, was a point for the Commission to decide.

10. As to draft article 14, on crimes against humanity, he had explained in his fourth report[8] that the word "humanity" should be understood not in the sense of philanthropy or charity but rather in the sense of respect for human values and of concern to protect mankind against barbarity. It was necessary to ensure that humanity did not fall into moral degradation and to defend the values on which universal civilization was based. Mr. Barsegov (2097th meeting) had rightly drawn attention to the joint declaration of May 1915 by the Governments of France, Great Britain and Russia in connection with the massacres perpetrated by the Ottoman Government against the Armenian minority. That declaration was important not only because it used the expression "crimes against humanity", but also because it introduced into international law for the first time the notion of criminal responsibility, including that of individuals. The declaration had not, however, introduced the notion of crimes against humanity into positive law, for at the Paris Peace Conference the expression "crimes against humanity" had been opposed by the Government of the United States of America and consequently dropped. Only after the Second World War, and because of the crimes committed during that war, had the United States agreed to the use of that expression at the London Conference on war crimes.

11. Mr. Barsegov had also referred (2100th meeting) to the distinction between intent and motive—a distinction which, as Mr. Reuter (2101st meeting) had suggested, was perhaps chiefly a question of the different terminology used by various legal systems. Under the system with which he was most familiar, the distinction between intent and motive was an easy one. Intent meant acting with awareness and resolve, and intending the consequences of one's acts. He agreed entirely that intent was a component element of all crimes, whether crimes against humanity or ordinary crimes. But motive was a different matter. It involved a sentiment and, as such, constituted an element of differentiation between crimes against humanity and ordinary crimes—unlike intent, which could not serve as a basis of distinction inasmuch as all crimes presupposed a guilty intent. So far as motive was concerned, there were, for instance, crimes committed for gain, crimes of passion, and crimes committed for the basest of motives: it was precisely the latter, committed as they were because of racial, religious or political hatred, that were covered by the draft code. For a crime to be characterized as a crime against humanity, it had to violate a deep-rooted sentiment of humanity. That, in his view, was the criterion for any distinction between intent and motive. Once again, however, it would be for the Drafting Committee to see whether some expression could be found to reflect the various legal systems concerned.

12. With regard to the specific crimes set out in article 14, he pointed out that the number of accessions to the Convention on the Prevention and Punishment of the Crime of Genocide had increased and that the United States had acceded to that instrument at the end of 1987. A particular feature of the proposed provision on genocide was that it contained an enumerative rather than an exhaustive list, which was a prudent approach. He had also decided to distinguish genocide from other inhuman acts, in which respect he felt that the 1954 draft code lacked a certain precision. Genocide was itself an inhuman act, but it had been incorporated in a separate provision because it was the prototype, as it were, of what constituted a crime against humanity.

13. Some members wanted to broaden the definition of *apartheid* because they held the view that the proposed provision could give the impression that *apartheid* was limited to South Africa. He had placed the words "as practised in southern Africa" between square brackets in the second alternative to draw the Commission's attention to the fact that only South Africa would be covered. But he did not want to make *apartheid* seem commonplace. There were, of course, various forms of racial discrimination and they could perhaps be encompassed by a reference to "*apartheid* and other forms of racial discrimination". The expression "customary *apartheid*" was, however, quite unacceptable and could only cause confusion, particularly since custom was a source of international law. A reference to customary *apartheid* should not be included and some other expression must be found.

14. The International Convention on the Suppression and Punishment of the Crime of *Apartheid* had not yet been universally accepted and it was important to find wording that would not create obstacles to further accessions by States. Mr. Reuter (2098th meeting) had referred to the Vienna Convention on Succession of States in respect of Treaties as an example of how slow the codification process was. It was to be hoped that an equally long period—in which *apartheid* might well disappear—would not be required to finalize and adopt the draft code: it would be regrettable if the Commission were to find itself dealing with "ghosts" or "fossils". Moreover, in his view *apartheid* was a violation of *jus cogens*.

15. There had been a lengthy discussion on the application of the concept of inhuman acts to attacks on property and he found himself in broad agreement with other members of the Commission. He believed, however, that a distinction should be drawn between attacks on property as war crimes, which were already specifically covered by article 85 of Additional Protocol I to the Geneva Conventions, and such attacks considered as crimes against humanity, which constituted a separate issue. The prohibition of attacks on property in wartime was relative in that it entailed exceptions, for example destruction of property for reasons

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[8] *Yearbook . . . 1986*, vol. II (Part One), pp. 56-57, document A/CN.4/398, paras. 12-15.

of military necessity or cases in which the property was adjacent to military targets. No such limitations applied to attacks on property considered as crimes against humanity: in such instances the prohibition was absolute.

16. The question of harm to the environment raised many very complex issues, especially with regard to intent. In that connection, article 19 of part 1 of the draft articles on State responsibility had been the source of numerous reservations and he had accordingly tried to use a different formulation in the present draft. The problem lay in the element of intent: since lawful activities by States sometimes caused environmental harm, what criteria were to be used in distinguishing between intentional and non-intentional acts which occasioned such harm? Draft article 14 was solely concerned with environmental harm resulting from acts committed with criminal intent. But there were areas in which the courts, however well instructed, would find it difficult to establish such intent. Nevertheless, such elements of culpability as gross error or grave negligence could be subsumed within the concept of criminal intent. Acts causing environmental harm in wartime were already covered by article 35, paragraph 3, of Additional Protocol I and in any case came within the purview of draft article 13. Attacks on the environment in peacetime, on the other hand, should be the subject of a separate provision. He had been asked to clarify the expression "vital human asset", as used in paragraph 6 of draft article 14, and found it difficult to define the expression except as meaning "essential to life". But if it were deemed unsatisfactory he would be open to suggestions for an improved wording.

17. The 1954 draft code had included enslavement as an international crime, but slavery should be given greater prominence and he had accordingly made it the subject of a separate provision. It might be appropriate to distinguish between slavery as a war crime and as a crime against humanity.

18. The question of mass expulsions had also been aired during the debate, particularly with regard to the implications of the term "transfer" (para. 4 (*a*)). Mr. Tomuschat, Mr. Pawlak and Mr. Reuter had all mentioned instances related to a specific region that would be duly taken into account. Again, distinctions should be drawn between transfers effected for humanitarian reasons and those covered by the draft code. The former were in the nature of rescue operations which were carried out when a population in a country not its own found itself threatened by torture or death. The latter were forced transfers of people from their country of origin to another country: such transfers clearly constituted inhuman acts and should fall within the scope of the code.

19. His position in respect of international drug trafficking had become less firm as a result of the Commission's discussion. The motives of international drug traffickers were undoubtedly base, and their actions could, if they succeeded in destabilizing States, be regarded as crimes against the peace and security of mankind. But it was important to distinguish between such motives and the motives which constituted the criteria for characterizing crimes against humanity.

20. Some members had stressed the importance of the question of an international criminal court. He himself had not proceeded on the assumption that a system of universal jurisdiction was to be excluded, but he would not ignore the possibility of introducing an appropriate draft article or provision at a subsequent session of the Commission. The General Assembly had given no clear instructions in that regard.

21. In conclusion, draft articles 13 and 14 could, if the Commission so decided, be referred to the Drafting Committee. As Special Rapporteur, he would submit a list of war crimes for discussion in the Committee, taking into account the suggestions made by members of the Commission.

22. The CHAIRMAN said he understood that the Commission wished to refer the draft articles to the Drafting Committee and that members of the Commission would transmit their suggestions regarding the list of crimes to the Committee's Chairman in the next few days.

23. Mr. BARBOZA said it was his impression from the Special Rapporteur's summing-up that he (Mr. Barboza) had been construed as opposing the inclusion of the criterion of gravity in connection with war crimes. If so, that was not correct. Like other members of the Commission, he thought it important to include the concept of gravity and also a list of the crimes concerned, without which it would be impossible to determine which crimes came within the scope of the code, a task which in any case could not be left to a court or to a judge.

24. He agreed that the draft articles should be referred to the Drafting Committee. Regarding the list of crimes to be considered by the Commission, if sufficient time were not available, it would be appropriate to defer compilation of the list until the next session.

25. Mr. ARANGIO-RUIZ said that he had perhaps not made himself sufficiently clear when he had questioned (2097th meeting) the unqualified use of the concept of gravity or seriousness in connection with war crimes. It was no doubt relatively easy in the case of crimes against the peace and security of mankind to confine the scope of the code to the most serious offences, but in respect of war crimes in a narrow technical sense it was much more difficult. In dealing with the situation in which war crimes were committed during an armed conflict, some conventions and instruments relied on the criterion of seriousness, but he was not quite prepared to agree that a belligerent's right or obligation to prosecute and punish should be envisaged in the code solely in the case of serious crimes. A belligerent State which had been injured, or whose armed forces or population had been injured, by war crimes *stricto sensu* was entitled under existing law to proceed or not to proceed against the captured criminals whatever the degree of gravity of the violation. The code should in no way restrict that right by introducing the concept of gravity for war crimes in a narrow sense. Moreover, the obligation to prosecute and punish eventually introduced by the code should be expressly extended to cases in which the criminals concerned were members of the country's own armed forces. The problem was not merely aesthetic, namely whether to retain the unity of the concept of war crimes, but one of substance which should be referred to the Drafting Committee for further consideration.

26. The CHAIRMAN said that he did not think the intention was to change the concept of war crimes in general. Rather, it was a question of which war crimes the Commission felt should be included in the draft code.

27. Mr. FRANCIS said that he welcomed the Special Rapporteur's comprehensive summing-up and flexible approach. It would be recalled that, at the previous meeting, he had asked for time to consult with other members of the Commission, particularly Mr. McCaffrey, before making any further statement on the list of crimes to be submitted to the plenary session of the Commission. Since he had not yet completed those consultations, he would defer further comment.

28. Mr. DÍAZ GONZÁLEZ noted that the Special Rapporteur had referred, in connection with the crime of *apartheid*, to the need to avoid using concepts that would become obsolete with time. However, in drafting article 14 the Commission was trying to legislate in global terms: even if *apartheid* were to disappear in South Africa, that did not mean it would necessarily vanish from the face of the earth. In the case of genocide, for example, the Nazis still had their disciples and the crime could not be regarded as extinct. Similarly, although the process of decolonization was largely complete, there were still peoples which did not fully enjoy their right to self-determination. He therefore believed that the square brackets in the second alternative of paragraph 2 should be deleted, so that the crime of *apartheid* could be punished as appropriate if and when it arose in future. Lastly, in his opinion draft articles 13 and 14 should be referred to the Drafting Committee.

29. Mr. BARSEGOV said that he was very grateful for the Special Rapporteur's highly interesting and detailed summing-up, with which he found himself largely in agreement.

30. It was his impression that difficulties with regard to the role of intent and motive had significantly narrowed. In his view, it was generally agreed that the element of intent must be present in the definition of the crimes concerned. If it were absent, the crime might be qualified in a completely different way: for example, if a doctor killed a patient unintentionally, he would none the less be guilty of negligence. As regards the element of intent in relation to crimes characterized by their massive and systematic nature, the only point at issue related to whether it was necessary or not to prove its presence. There were differences, however, with regard to the element of motive. Difficulty arose from the fact that the French text frequently referred to *mobile*, which was sometimes translated by "motive", but more often by "intent".

31. That was a question of translation, but a further difficulty related to substance. While every criminal had motives (such as jealousy in the case of a *crime passionnel*, for example) and international crimes were also motivated, to establish motive as a constituent element of such crimes would mean that the offender would be liable to prosecution only if it could be proved that the crime concerned was committed specifically for the motives alleged. Fortunately, in dealing with such serious crimes as genocide or *apartheid*, the international community had agreed that motive need not be taken into account: it was thus immaterial whether an act of genocide was committed, for instance, for State interests or for racial or other motives. That was the crux of the problem, and that was why he was concerned that the draft code should not introduce a subjective element into the definition of crimes against mankind.

32. He welcomed the Special Rapporteur's elucidation of the expulsions or forcible transfers of populations which fell within the scope of the draft code. The formula used by the Special Rapporteur was satisfactory in that it was understood to refer to the forcible transfer of a population from its own territory, whatever the reasons for that transfer, and not to transfers carried out pursuant to peace treaties or regulations. The formula used made it possible to avoid a very thorny problem, namely whether the draft code covered expulsions of a population within its own territory or in occupied foreign territory. He thought it would be a highly complex exercise to limit the question to the latter cases. Such crimes as *apartheid* or genocide, of which expulsion was a constituent element, were generally committed in the territory of the population concerned, although the First and Second World Wars had provided examples in which genocide against a population had been initiated in the territory of the perpetrator State itself and subsequently continued in the territory of neighbouring countries. The Special Rapporteur's wording offered promising prospects for the handling of an extremely complex issue.

33. On the question of the campaign against the international traffic in narcotics, he agreed that the problem of illicit trafficking was indeed of the highest importance. It was true to say that, while the traffickers were acting from motives of profit, the result of their crimes was an attack on mankind in general. It was therefore appropriate to consider the question of drug trafficking in the context of crimes against mankind.

34. Turning in conclusion to a question of history concerning the concept of crime against humanity, he said that the Special Rapporteur was not correct in stating (para. 10 above) that the United States had not accepted that concept. It was known that the United States had not opposed the 1915 declaration on the Armenian massacres, and indeed that it had been transmitted to the Ottoman Government by the United States, which at that time adhered to a policy of neutrality.

35. Mr. ROUCOUNAS, referring to the mass destruction of property as a crime against humanity, said that the Special Rapporteur had drawn a distinction, with which he agreed, between the destruction of property in wartime and in peacetime. Actually, war crimes might include crimes against humanity taking the form of mass destruction of property. Moreover, such crimes should have a qualitative as well as a quantitative aspect, to cover destruction of property that was not necessarily on a large scale. Bearing in mind that society's awareness of the common heritage of mankind was constantly developing, he wondered if the Special Rapporteur would agree that individual items, such as monuments, designated by UNESCO as being of great value to mankind should be afforded special protection.

36. Mr. HAYES observed that the forcible transfer of populations raised several serious questions. In the light of the Special Rapporteur's explanation that it did not include transfers for humanitarian reasons and referred only to the removal of a people from its country of origin, he wondered in what circumstances the transfer of foreigners might be justifiable. He was particularly anxious to clarify how long foreigners would retain alien status before becoming citizens of their new country of residence. If forcible transfer could be justified on humanitarian grounds, artificial threats could well be directed against foreigners in order to create a situation supposedly justifying the need to move them. Furthermore, could transfers of population be justified on

grounds of famine, as in Africa in recent years? The definition of forcible transfer did not make that clear.

37. Mr. KOROMA said that he was still uncertain whether forcible transfer referred to removals between countries, between territories, or both. There had been many such transfers, especially in southern Africa, where thousands of people had been moved from their fertile ancestral lands to arid terrain on which they had to scavenge for a living. Such transfers, carried out in the name of economic development, were not confined to southern Africa. In his opinion, they ought to qualify for inclusion under the rubrics of genocide and *apartheid.* They certainly amounted to more than a denial of self-determination. As an item for the Planning Group to discuss, he suggested that a topic for future consideration by the Commission should be the law concerning the movement of people, either within or between States.

38. Mr. THIAM (Special Rapporteur), referring to the comments made by Mr. Díaz González, said he was convinced that *apartheid* would disappear one day. Certainly, *apartheid* was practised in a systematic fashion in only one country, South Africa. That was the practice referred to in draft article 14; the other instances mentioned were cases of racial discrimination. In response to Mr. Hayes, he explained that forcible transfer of populations was intended to refer only to removals from the country of origin to another, and not to internal transfers, whether for economic or for other reasons. In reply to Mr. Barsegov, he recalled from his own reading that, during the First World War, the United States of America, because of its positive-law tradition, had been reluctant to accept the concept of crimes against humanity, on the basis of the principle *nullum crimen sine lege.*

39. The CHAIRMAN suggested that draft articles 13 and 14 should be referred to the Drafting Committee, leaving time for consideration of the proposed list of war crimes at a future meeting.

It was so agreed.[9]

State responsibility (A/CN.4/416 and Add.1,[10] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[11]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

NEW ARTICLES 6 AND 7 OF PART 2

40. The CHAIRMAN recalled that the Special Rapporteur had introduced his preliminary report on the topic (A/CN.4/416 and Add.1) at the previous session[12] but that it had not been considered due to lack of time. He invited the Commission to consider the report, as well as the new articles 6 and 7 of part 2 of the draft contained therein, which read:

Article 6. Cessation of an internationally wrongful act of a continuing character

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

Article 7. Restitution in kind

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

(*a*) is not materially impossible;

(*b*) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(*c*) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

(*a*) represent a burden out of proportion with the injury caused by the wrongful act;

(*b*) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (*c*) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) reminded members that his preliminary report (A/CN.4/416 and Add.1) contained a general outline of the proposed work on parts 2 and 3 of the draft (chap. I), followed by a treatment of cessation of the unlawful conduct (chap. II.B) and restitution in kind (chap. II.C). He suggested that consideration of the topic should begin with the latter two questions, proceeding afterwards to the general outline.

42. His forthcoming second report—to be considered later—would, together with the preliminary report, cover all the substantive consequences of a wrongful act, i.e. consequences which derived immediately from the commission of an internationally wrongful act, as distinct from measures taken by the injured State in consequence of the

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[9] For the Commission's discussion on the proposed list of war crimes, see 2106th and 2107th meetings.

[10] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[11] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[12] See *Yearbook . . . 1988*, vol. I, pp. 265 *et seq.*, 2081st meeting, paras. 37-57, and 2082nd meeting, paras. 1-24.

act. However, whereas the preliminary report dealt only with cessation and *restitutio in integrum*, the second report would complete the substantive consequences by adding reparation by equivalent, pecuniary compensation, satisfaction, and guarantees against repetition.

43. Mr. BARBOZA congratulated the Special Rapporteur on his most distinguished preliminary report (A/CN.4/416 and Add.1). Unfortunately, there were a number of errors in the Spanish translation and he would be submitting corrections to the Secretariat.

44. The Special Rapporteur proposed to deal in the new articles 6 and 7 of part 2 of the draft with cessation and restitution in kind. The text of article 6 submitted by the previous Special Rapporteur had been considerably altered and served as the basis for both of the new articles. As the Special Rapporteur explained in his report (*ibid.*, para. 24), he felt that the whole subject-matter should be covered in greater detail and include, in particular, reparation by equivalent, satisfaction and the distinction between compensation for material injury and compensation for moral damage. The Special Rapporteur also proposed to deal separately with the legal consequences of international delicts and of international crimes, since it was not wholly clear whether those consequences had a common denominator.

45. There was no reason to object to the Special Rapporteur's approach. His statement that

> the Special Rapporteur does not question, for the purposes of the Commission's present task, the choice made by the Commission with regard to the notion of international responsibility and to the definition of the legal relationships and situations created by an internationally wrongful act (*ibid.*, para. 16)

was important, meaning that the Commission held to the view that the injured State had the right to demand reparation and that the author of the wrongful act could be punished either by the injured State or by a third party. The basic idea that there were two kinds of legal relationship resulting from the breach of an obligation was thereby preserved. The Special Rapporteur also proposed to deal with "implementation" (*mise en oeuvre*) within the sections of the draft on the consequences deriving from international delicts and from international crimes, and in parallel with the substantive rights and obligations deriving from such delicts and crimes. The proposed outline of work for parts 2 and 3 of the draft seemed sensible.

46. Much of the first part of the report dealt with cessation, drawing certain important conclusions. First, cessation *per se* had a different remedial function than did restitution, compensation or satisfaction (*ibid.*, para. 22). It also differed from the remedies included in the concept of reparation in that it pertained to the wrongful act itself, rather than to the legal consequences (*ibid.*, para. 31). Cessation was to be ascribed not to the effects of the secondary rule brought into operation by the wrongful act, but to the continued, normal operation of the primary rule violated by the wrongful conduct. Cessation was of interest only where the wrongful act was continuous in character (*ibid.*, para. 33). Cessation must also be clearly distinguished from reparation; the latter corresponded to the requirement, defined by the PCIJ in the *Chorzów Factory* case, that all the consequences of the breach of an international obligation on the relations between the author State and the injured State should be wiped out (*ibid.*, para. 39). Cessation was not defined, but it was clear that it did not cancel any legal or factual consequences of the wrongful act; its target was the wrongful conduct *per se*, in other words the very source of responsibility (*ibid.*, para. 40).

47. The Special Rapporteur also referred (*ibid.*, footnote 59) to the decision of 5 March 1955 by the Franco-Italian Conciliation Commission in the *SNCF* case. Apparently, the Special Rapporteur regarded the return of the railway material from Italy to France as a "cessation" of the wrongful act. The wiping out of the consequences, in other words restoring the material to its previous undamaged condition, was reparation. However, what practical purpose was served in that instance by the legal distinction drawn between the act and its consequences? Cessation might also be a legal consequence of the wrongful act, of the same kind as the other consequence, namely Italy's obligation to restore the material to its previous condition.

48. Cessation was, as he saw it, principally a legal consequence of the violation of the primary obligation. It was not by any means actual compliance with that obligation: it had a completely different meaning from compliance. To illustrate that difference, one could take the hypothetical example of State A, found responsible for taking members of the embassy of State B as hostages. The primary obligation of State A was not to tamper with the personal freedom of persons with diplomatic status, and specifically with those from State B. State B would then claim immediate cessation of the situation, so that State A had to return the hostages. That was the content of cessation, to return the hostages. However, returning the hostages was a completely different thing from refraining from putting them in gaol, i.e. the content of the primary obligation. The content of cessation was the conduct required of a State that was in the wrong—a conduct completely different from that required by the primary obligation.

49. Obviously, cessation could not have been requested had it not been for the breach of the primary obligation. It was therefore a consequence of the breach of the primary obligation and compliance with the request for cessation did not mean that the primary obligation had been fulfilled. The primary obligation which had been violated continued to be in breach after cessation. The violation of the obligation was complete with the initiation of the wrongful act. Cessation required conduct which was different from that required by the primary obligation. In his example, the hostages were restored to the situation of freedom which they had enjoyed before the breach, but it would be a gross mistake to consider their release as the fulfilment of the primary obligation.

50. If one were to follow the Special Rapporteur's view, the legal consequences of the violation would have to be ascribed to two different sources in a case such as the *SNCF* case between France and Italy: the return of the railway material would be a consequence of the primary obligation and the restoration of the condition of that material would be a consequence of the secondary obligation. That point of view, apart from its doubtful character, would introduce a conceptual cleavage in the distinction between primary and secondary rules. By definition, the realm of the primary rule was the time before the violation and that of the

secondary rule after the violation. That had been precisely one of the considerations on the basis of which the Commission had made the topic of State responsibility independent from that of responsibility for the treatment of aliens. Accordingly, it would certainly be conceptually disturbing to admit the Special Rapporteur's position.

51. Cessation thus seemed to be one of the components of reparation. A wrongful act remained a wrongful act until the other components of reparation were complied with, i.e. until the other consequences of the breach were wiped out. In his report, the Special Rapporteur considered that cessation applied to omissions as well as to positive acts, and hence that there could be "continuing omissions" as well as "continuing acts". In fact, however, non-compliance with any obligation to do something (*obligation de faire*) would imply a continuing omission and cessation would then apply to that category of obligations. Cessation, however, was a negative concept which, if superimposed on the other negative concept of omission, made for two negatives. Did States ask for the cessation of non-compliance with an obligation not to do something, or did they simply demand specific performance of an obligation that had been violated? Cessation did not appear to be a useful tool in those cases, even in the case of a State that failed to pass a law which it had a duty to enact pursuant to its international obligations.

52. Mr. RAZAFINDRALAMBO said that, before commenting on the Special Rapporteur's excellent preliminary report (A/CN.4/416 and Add.1), he wished to draw attention to some shortcomings in the presentation. In particular, the method of grouping all the notes at the end was unsatisfactory. They had to be read in conjunction with the paragraphs of the text to which they referred and each of them should have been placed at the foot of the relevant page.

53. He was in broad agreement with the Special Rapporteur's proposals concerning the outline of part 2 of the draft as well as those for the draft articles. The Special Rapporteur was also right to say that articles 1 to 5 of part 2, which had already been provisionally adopted by the Commission, should be retained and that they could constitute a preliminary chapter of part 2 to be provisionally entitled "General principles". He noted with interest the Special Rapporteur's intention to recast draft articles 6 to 16 of part 2 and draft articles 1 to 5 of part 3 as submitted by the previous Special Rapporteur. Considering that those articles had been referred to the Drafting Committee before the start of the term of office of the Commission's present membership, the new members should have an opportunity to express their views on the content, forms and degrees of international responsibility and on the question of the peaceful settlement of disputes.

54. The most interesting innovation was the Special Rapporteur's intention to prepare two chapters on the legal consequences arising from an international delict and those arising from an international crime. In proposing for methodological reasons and on grounds of prudence to examine the consequences of delicts and those of crimes separately, he would be departing from the method adopted by the previous Special Rapporteur, who had set forth in draft articles 6 to 13 of part 2 the various consequences of wrongful acts in general, as consequences that applied both to delicts and to crimes. Consequently, the Special Rapporteur seemed to have returned to the approach adopted by the Commission in paragraph (53) of the commentary to article 19 of part 1 of the draft articles, in which it had emphasized that "it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act"[13] without any distinction.

55. The Special Rapporteur's analysis (*ibid.*, para. 14) of the distinction between the various forms of reparation—a matter of substance—and the measures aimed at securing reparation—a matter of procedure and of form—was very pertinent because it could serve to bring out the differences between the situation regarding delicts and the situation regarding crimes. It also served to justify the separate treatment given to questions of cessation and reparation, on the one hand, and questions relating to the adoption of measures by the injured State, on the other.

56. As to the Special Rapporteur's suggestion to consider the content of part 3 of the draft in terms of the peaceful settlement of disputes rather than "implementation" (*mise en oeuvre*), as early as 1975 the Commission had considered the question of implementation as one connected with the peaceful settlement of disputes.[14] Since then the two questions had been considered inseparable. The previous Special Rapporteur had confined himself to the settlement of disputes in the texts he had submitted for draft articles 1 to 5 and the annex of part 3, drawing on the provisions of articles 65 and 66 and the annex of the 1969 Vienna Convention on the Law of Treaties. The present Special Rapporteur was simply following that example, but suggesting the more correct title: "Peaceful settlement of disputes". The reasons given by the Special Rapporteur (*ibid.*, para. 19) seemed convincing. For his own part, he would go even further and say that the implementation of international responsibility belonged not only in part 2 of the draft, but also in part 1 in the case of an international obligation relating to the treatment of aliens and the question of the exhaustion of local remedies (art. 22).

57. Chapter II of the preliminary report dealt with the two legal consequences of an internationally wrongful act: cessation and restitution in kind. The previous Special Rapporteur had dealt with both of those forms of remedy for the violation of international law in a single provision in part 2, namely draft article 6, but the present Special Rapporteur considered that that article was insufficient and that the whole subject-matter should be covered in greater detail and depth. After a penetrating analysis of the relevant legal writings and international judicial and arbitral practice, the Special Rapporteur had arrived at the conclusion that cessation was not a form of reparation, although it had often been confused with *restitutio in integrum*. Cessation and restitution differed both by their nature and by their role and purpose: restitution went further than cessation of the wrongful conduct and required actual restoration of the object in the state in which it had been before the lawful owner had been dispossessed, i.e. restoration of the *status quo ante* (*ibid.*, para. 52).

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[13] *Yearbook . . . 1976*, vol. II (Part Two), p. 117.

[14] See *Yearbook . . . 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 44.

58. The Special Rapporteur was therefore right to propose that cessation of an internationally wrongful act should form the subject of a provision separate from those on other forms of reparation, and particularly restitution in kind. The new draft article 6 was entitled "Cessation of an internationally wrongful act of a continuing character", but since international delicts and international crimes were to be treated separately, a better title would be "Cessation of an international delict of a continuing character".

59. The new draft article 6 was framed from the standpoint of the obligations of the author State, and independently of the rights of the injured State. The obligation to cease the wrongful act thus found its source in the primary rule which had been violated and which existed prior to the claim by the injured State. He endorsed the formulation "A State . . . remains . . . under the obligation to cease . . . " and would point out that the French expression *est tenu* did not fully render the nuances of the term "remains". On the other hand, he had doubts about the words "action or omission", a formula which the Commission had so far adopted only in the case of an act consisting of a "series of actions or omissions" or a "complex act" consisting of a succession of "actions or omissions", i.e. the situations dealt with in article 18, paragraphs 4 and 5 respectively, and in article 25, paragraphs 2 and 3 respectively, of part 1 of the draft.

60. If the aim was to indicate that cessation applied both to the breach of an obligation to perform an act (omission) and to the breach of an obligation to refrain from an act (action), it was not enough to speak of an internationally wrongful act of a "continuing character". Reference should also be made to the "composite act" and the "complex act" mentioned in article 25, paragraphs 2 and 3 respectively, of part 1. The effect would be to lengthen considerably the text of draft article 6 and the best course might therefore be to employ the formula used in the title of article 25 and to speak of a State whose action or omission constituted an internationally wrongful act "extending in time".

61. Moreover, since the obligation of cessation was outside the scope of reparation and the resulting legal relationships, to which the Special Rapporteur—unlike his predecessor—intended to give separate treatment, it was useful to indicate that it did not affect the legal consequences of the responsibility already incurred as a result of the wrongful conduct. However, the wording used for that purpose in article 6, namely "without prejudice to the responsibility it has already incurred", was not altogether satisfactory. It could be replaced by "independently of the responsibility already incurred".

62. It was, however, on the question of reparation in its various forms that the Special Rapporteur was proposing the most significant modifications in comparison with the provisions of draft articles 6 and 7 submitted by his predecessor. He had adduced abundant material, both legal writings and State practice, in support of his conclusions, which pointed to the primacy of restitution in kind. His explanations of the definition of *restitutio in integrum* were acceptable, as was the approach he employed of merging the element of reparation with that of compensation. That approach was consistent with the general principle of law which imposed upon the author of a wrongful act the obligation to make reparation for all the consequences of its wrongful conduct by restoring the situation that would have existed if the breach had not occurred; that justified restitution in kind *stricto sensu* and, where appropriate, an additional financial compensation.

The meeting rose at 1.05 p.m.

2103rd MEETING

Wednesday, 17 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. RAZAFINDRALAMBO, continuing the statement he had begun at the previous meeting, noted that the Spe-

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

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Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting, para. 40.