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Summary record of the 2153rd meeting

Topic:

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

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low-ranking members of the armed forces who had participated in the aggression should not be punishable on the basis of alleged complicity.

47. On the subject of conspiracy, the Special Rapporteur had submitted two alternatives for paragraph 2 of draft article 16, explaining that the first was based on the idea of collective criminal responsibility and the second on the idea of individual criminal responsibility. Actually, the Special Rapporteur appeared to favour collective responsibility, for he argued:

> Today, [there is an] ever-greater need to deal more and more with the continuing growth of collective crime and with the new problems to which it gives rise... The law therefore responds to this new dimension of crime by providing a new definition of criminal responsibility, which in the cases in question takes a collective form, since it is becoming increasingly difficult to determine the role played by each participant in a collective crime. (*Ibid.*, paras. 54-55.)

In that regard, he wished to emphasize what he had said at the Commission's thirty-eighth session, in 1986, namely that individual responsibility should, as far as possible, be treated as a general principle in the case of war crimes. The concept of conspiracy, if the Commission decided to include it in the draft code, should apply only to crimes against peace, as well as to genocide, as already provided in article III (*b*) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

48. In general terms, he agreed with the Special Rapporteur's definition of attempt as "any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention" (*ibid.*, para. 65). As he had pointed out at the thirty-eighth session, however, mere preparation, not followed by execution, should not be interpreted as a criminal act. The Special Rapporteur's present definition of attempt, which referred to "commencement of execution", would contribute to making fairly clear the borderline between attempt and preparation.

The meeting rose at 12.45 p.m.

2153rd MEETING

Tuesday, 8 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/419 and Add.1,[2] A/CN.4/429 and Add.1-4,[3] A/CN.4/430 and Add.1,[4] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y[5] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*continued*)

1. Mr. BEESLEY said that he had certain points of principle and substance to make.

2. So far as principles were concerned in the case of the topic under consideration, it was apparent that it was very difficult for any special rapporteur, however able and hard-working, as in the present case, to reconcile the various national legal systems in one text. In his view, therefore, the Commission should explore the possibility of seeking the technical assistance of experts in international criminal law.

3. With regard to substantive questions, it was clear from the discussion that, if the Commission was to make progress, it had to avoid dogmatism. It must attempt, on the basis of national criminal systems, to find the means that would enable a court that was to be created or an existing court to apply the future code harmoniously without the fundamental principle of justice being affected by any differences as to law and procedure. In that regard, the Commission must venture into new fields and approach the problem with an open mind. It seemed ready to do so.

4. Given the evolution in thinking with regard to national criminal law and to international criminal law in so far as it existed, it would be advisable to consider the reasons for that evolution. The fact that a particular act was criminalized in some national jurisdictions and not in others, or was subsequently criminalized in a jurisdiction in which it previously had not been, suggested that its eventual characterization as an offence reflected principles of public policy. For example, some jurisdictions criminalized one or both of the acts of complicity and conspiracy. Those acts had no *actus reus, per se*, and were often attributed the *actus reus* of the underlying offence. It might be, therefore, that they were characterized as criminal where deterrence was warranted for reasons of public policy. That seemed to be the case with the offence of conspiracy in Canada. In other cases, the criminalization of complicity or conspiracy might be the only means of addressing effectively the underlying offence.

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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 ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 2150th meeting, para. 14.

5. Perhaps the evolution of international criminal law might also be said to be based on emerging concepts of international public policy. Thus the 1954 draft code and the Nürnberg Principles[6] should be regarded as valuable precedents, but the Commission should feel free to re-examine such precedents, as well as the series of other issues under consideration under the present topic. That should be done with a view not only to the codification, but also to the progressive development of international criminal law so as to contribute to the Charter system of international peace and security, which was the Commission's fundamental objective under the topic. It would be desirable to apply that test to each crime covered in the draft code and also to the institutions and modalities needed for implementation. In the latter connection, he remained convinced that any national court would have difficulty in applying the code unless it included representatives of other legal systems, which would also make it possible gradually to develop a common standard, harmonizing differences between legal systems.

6. To illustrate the complexity of the issues under consideration, he referred to certain sections of the Canadian Criminal Code, parts of which were also quoted in the Special Rapporteur's eighth report (A/CN.4/430 and Add.1).

7. For example, paragraph (1) of section 21 of that Code, which dealt with parties to offences, included a provision to the effect that everyone who aided or abetted the commission of an offence was a party to that offence. It was arguable that something akin to a legal fiction might thus be created, since an act was attributed to the accused which he had not himself committed. Similarly, paragraph (2) of section 21 provided that, once a common criminal intention had been formed between individuals, each became a party to any related offence committed by any one of them. Section 22 provided that a person who counselled another to commit an offence became a party to that offence, while section 422 provided that, if the offence was not committed, a person who counselled the commission of an offence would be guilty of counselling. Lastly, section 23 dealt with accessories after the fact.

8. It would, of course, be presumptuous to make a detailed analysis of the Canadian Criminal Code as a possible model to be followed. It might, however, be appropriate to consider how that Code might, together with other sources, assist the Commission in reconciling the principles of differing legal systems in developing a harmonized system of substantive and procedural international criminal jurisprudence.

9. The Special Rapporteur had raised a number of questions without always proposing an answer. That was a wise course, since a means of reconciling the differing legal systems in force had yet to be found. The Commission should therefore endeavour to take not only the best of what those systems had to offer, but also those precedents which might provide common ground. If there were none, the Commission might have to be bold and introduce innovations. That was a task not only for the Drafting Committee, but also for the plenary Commission.

10. He reserved the right to revert later to the related and equally important question of the possible establishment of an international criminal court, which had his support in principle.

11. Mr. AL-BAHARNA said that, before analysing the draft articles which had been submitted, he would first make a few general observations concerning the methodology and approach adopted by the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1).

12. With regard to methodology, he agreed with the Special Rapporteur that complicity, as a crime, should be included in the part of the draft code dealing with the definition of crimes rather than in the part dealing with general principles, since an accomplice incurred the same criminal responsibility as the principal. The same applied to conspiracy and attempt, although the latter should be examined in the context of each crime or group of crimes under the code, inasmuch as it could be applied only to a limited extent given the nature of the crimes involved.

13. With regard to approach, the Special Rapporteur seemed to have been influenced by the provisions in the penal codes of some countries more than of others in arriving at an international norm with respect to complicity, conspiracy and attempt. That approach was, in his view, open to objection in that it was eclectic and, in any event, was predicated on an analogy with internal law. He would have much preferred an approach based on multilateral treaty practice. There were international conventions on genocide, narcotic drugs, hijacking and war crimes, which incorporated provisions on complicity, conspiracy and attempt and which would provide a far more useful basis for work on the draft code.

14. Turning to the draft articles submitted by the Special Rapporteur, he said that he would confine himself at the present stage to comments of a conceptual and substantive nature.

15. Draft article 15 made complicity a crime. Since international crimes were for the most part group crimes involving a variety of actors who had been assigned different roles, it was logical to hold responsible all the actors connected with the crime in question, whether the person was an originator of the crime or an executant. There might, however, be circumstances in which a person became involved in an unlawful or prohibited act without the necessary intention or knowledge. Was it proper to hold such a person responsible? It would be remembered that, after the Second World War, only the major war criminals had been arraigned before the Nürnberg and Tokyo Tribunals. He realized that distinguishing between the principal and the accessory was no easier in international crimes than in national crimes. None the less, a distinction had to be made between the various degrees of complicity in order to attribute culpability, failing which the result might be an illusory law. The very nature of the crime of complicity called for a more detailed examination of that aspect of the question. Paragraph 1 of draft arti-

[6] See 2151st meeting, footnote 11.

cle 15 did not, in his view, address the problem and did not make it clear what was meant by the word "accomplice". Paragraph 2 no doubt explained the scope of the concept of complicity, but referred to its application in time, since it related to accessory acts committed before and after the principal offence. That was an entirely different matter. He was, of course, in agreement with the underlying notion that complicity should encompass all accessory acts, whether prior or subsequent to the commission of the principal offence. Care should, however, be taken to establish a nexus between the principal offence and subsequent accessory acts. Accordingly, he considered that draft article 15 should include a definition of the concept of "accomplice" and that the degrees of complicity required in order to hold the accomplice responsible should be specified.

16. Draft article 16 provided that conspiracy was a crime against the peace and security of mankind. In the 1954 draft code, the Commission had extended the concept of conspiracy to cover all crimes against the peace and security of mankind. The Special Rapporteur seemed to have some reservations with regard to that approach, for, in his report, he observed that it "represented a considerable extension" (*ibid.*, para. 50). It was not clear, however, from his comments whether his reservations related to the crimes themselves or to the question of individual and collective responsibility. Whatever the answer, the subject of conspiracy had to be examined more thoroughly—if necessary, in the context of each crime or group of crimes—and its limits clearly laid down. Consideration could thus be given to including a definition of "conspiracy" in the body of the article, with an indication of the scope of the liability. It was true that the Special Rapporteur had noted (*ibid.*, para. 41) that conspiracy involved two elements, the first being agreement and the second the physical acts whereby the crime was carried out. In his opinion, however, that indication belonged in the body of the article. As to whether or not conspiracy should encompass all the crimes covered in the code, he had an open mind. However, on the question whether responsibility for the crime should be collective or merely individual, he would prefer the concept of collective responsibility, which would be far more effective in controlling the crimes covered by the code. As in the case of complicity, however, care should be taken to establish that every participant in the crime had the necessary *mens rea.* In the event, he preferred the first alternative of paragraph 2 of draft article 16.

17. The Special Rapporteur noted in his report that "In its broadest sense, the concept of criminal participation encompasses not only the traditional concept of complicity, but also that of conspiracy" (*ibid.*, para. 26) and that "although complicity and conspiracy are two separate concepts, they are very similar and sometimes overlap" (*ibid.*, para. 62). Those comments prompted the question whether it was really necessary to have two different articles on complicity and conspiracy. Treaty practice in the matter was not consistent. Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, dealt with complicity and conspiracy individually, whereas others, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dealt with them synonymously. While he held no strong views on either of those two approaches, he considered that it would be possible to avoid the overlapping to which the Special Rapporteur had referred if draft articles 15 and 16 were combined in a single article entitled "Participation in the crime".

18. With regard to draft article 17, he considered that the inclusion of attempt in the draft code was fraught with difficulty. First of all, an internationally acceptable definition of "attempt" had to be found. Secondly, the question whether the concept of attempt should apply to all the crimes covered in the code or only to some of them had to be decided. Unfortunately, "attempt" was not defined in the 1954 draft code or in the conventions that had given attempt the same status as the crime in question. The concept of attempt was, however, well defined in criminal law. Generally, it contained the following elements: (*a*) an intent to commit the crime in question; (*b*) an overt act towards its commission; (*c*) failure to commit the crime; (*d*) the apparent possibility of committing it. In his view, all those elements should be included in the definition of "attempt" in draft article 17.

19. He agreed with the Special Rapporteur that the concept of attempt was applicable to most crimes against humanity, such as genocide and *apartheid.* It would therefore not be difficult to provide, in the case of those crimes, that attempt constituted a crime. The same did not, however, apply to crimes against peace, such as aggression and intervention, because, as the Special Rapporteur indicated (*ibid.*, para. 66), it was impossible to determine exactly the point at which aggression or intervention began or failed.

20. So far as the two draft articles on international drug trafficking as a crime against peace and as a crime against humanity, respectively, were concerned, he had some reservations about the Special Rapporteur's approach. He recognized that international drug trafficking constituted a grave threat at present, but did that warrant its characterization as a crime against peace and as a crime against humanity? It might suffice to characterize it solely as a crime against humanity. He also had reservations about the Special Rapporteur's approach with regard to the definition of the crime of international illicit traffic in narcotic drugs. Article 3 of the 1988 United Nations Convention defined "offences" and "sanctions" in such a way as to cover every conceivable act connected with drug trafficking. By contrast, draft article X submitted by the Special Rapporteur included only a part of that definition. The financial aspects covered by the Convention, for example, were not included. That lacuna should be remedied, and he suggested that, for the purposes of the draft code, the definition of international drug trafficking should be based on the 1988 United Nations Convention.

21. With those reservations, he wished to thank the Special Rapporteur for his instructive and stimulating report. He reserved the right to speak later on the question of the possible establishment of an international criminal court.

22. Mr. THIAM (Special Rapporteur) said he was surprised that almost none of the members of the Commission had yet referred to the question of the statute of an international criminal court, dealt with in part III of his eighth report. At the previous session, he had been asked to submit a draft as early as possible, as if the matter had been urgent. Since time was passing, perhaps the Commission should consider changing its programme of work.

23. The CHAIRMAN said that members could analyse any aspect of the report, including part III, at any point during consideration of the agenda item, so long as it had not been completed.

24. Mr. PAWLAK, referring to part I of the eighth report (A/CN.4/430 and Add.1), relating to complicity, conspiracy and attempt, said that he could understand the Special Rapporteur's reasoning, but failed to share some of his conclusions. For him (Mr. Pawlak), complicity, conspiracy and attempt were nothing more or less than forms of committing a crime. That approach was clearly evident in most European penal codes, including that of Poland, and it surely ought to be taken into account in the draft code.

25. Being forms of the commission of crimes, complicity, conspiracy and attempt should be regarded as a separate part of the code. In that new part, it would be advisable to incorporate a definition of the perpetrator from the point of view of international law, if the Commission could agree on one. Such a definition, which could be based on Mr. Ushakov's ideas,[7] might, as several members of the Commission had pointed out, clear up many aspects of forms of committing crimes through so-called related offences and would thus make the Commission's task easier.

26. It was true that international crimes differed from most crimes defined in national penal codes, but the differences were often only a matter of the degree of seriousness of the punishable act. That was why it would not be appropriate, as a principle, to create separate crimes of complicity, attempt, etc. for each international crime under the code: some exceptions could, of course, be made, for example in the case of conspiracy. It would be preferable to include, at the beginning of chapter II of the draft code, a short set of articles defining all forms of the commission of crimes under the code. Those provisions could begin, for example, with preparation and go on to conspiracy, association, attempt, etc., and thereafter to a definition of all forms of participation by the co-perpetrators, whether originators, direct perpetrators or leaders who directed the commission of the crime without directly participating in its execution. After all forms of participation by co-perpetrators had been exhausted, it would be possible to refer to accomplices. Complicity, as he had already stated, was only one form of the commission of a crime. That would become clearer when a definition of the principal perpetrator of the crime had been provided.

27. In his report (*ibid.*, para. 19), the Special Rapporteur referred to "the existence of grey areas, areas of uncertainty" in the sphere of complicity. It was true that from a study of the laws of many States it could be concluded that there was a lack of uniformity. The Commission should, however, not concern itself with extreme cases; rather, it should try to define, as broadly as possible, accountability for the commission of crimes under the code. The role of the code was not only to punish, but also to educate and to deter. Acts of complicity, instigation, preparation, aiding, inspiring, ordering, directing, etc. were only forms of crimes and should be punished in the same way as the crime itself, obviously according to the degree of participation in the execution of the crime. In that regard, he was in favour of the principle of individual responsibility, not collective responsibility.

28. Turning to part II of the report, on international illicit traffic in narcotic drugs, he said that the Commission should simply declare such traffic to be a crime against humanity and concentrate on the effects of such a definition. A single article should suffice. The objective was to punish major drug traffickers and dealers, leaving it to national courts to deal with petty trafficking and other activities that were part of illicit traffic in narcotic drugs.

29. Mr. ILLUECA recalled that the reason the Commission had originally been entrusted with the task of preparing the draft code was that, after a major world conflict, the international community had wanted certain crimes and the corresponding penalties to be defined and a set of appropriate legal rules drafted. The Commission had had to find legal solutions which would avoid the criticism levelled against the Nürnberg and Tokyo Tribunals, namely that they had not based themselves on existing international law; that charges had been brought which had not been in accordance with the principle of legality; and that the penalties imposed had been contrary to the principle *nulla poena sine lege*.

30. The methodological points made by the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1, para. 6) should not be overlooked, but the content and scope of draft articles 15, 16 and 17 showed that matters of form and of substance were so closely intermingled that it was physically impossible, in terms of methodology, to situate the constituent elements of the punishable act in relation to its physical and moral perpetrator or perpetrators and the punishment to which they were liable.

31. It was obviously not the Commission's task to prepare a draft code based on common law or the Roman-law systems; nor was it to draft a code based on rules intended for the settlement of conflicts of laws or jurisdiction by national courts. Under General Assembly resolutions 177 (II) of 21 November 1947 and 36/106 of 10 December 1981, the Commission was required, in elaborating the draft code, to indicate the place to be accorded to the Nürnberg Principles, taking duly into account the results of the progressive development of international law.

32. In his report (*ibid.*, paras. 19 and 26), the Special Rapporteur spoke of the difficulties ("grey areas, areas of uncertainty") of defining the actors involved in com-

[7] *Ibid.*, footnotes 8 and 9.

plicity. The problems to which he referred were related to two basic theories of international criminal law, namely that of the *iter criminis*—the way in which the crime came into existence—and that of criminal participation, relating to co-culpability or, in other words, to the *societas sceleris* of Italian law.

33. Complicity, conspiracy and attempt occupied a special place in terms of the ways in which a crime came into existence, since there was only one crime, but many perpetrators. The commission of a crime obviously extended over both the planning and the execution stages. The objective manifestations of a criminal plan were thus, first, attempt, which presupposed a commencement of execution; secondly, failure, which presupposed that the act had been executed but that, because of circumstances independent of the perpetrator's will, the desired results had not been achieved (in that connection, he noted that what the Special Rapporteur said *(ibid.*, para. 67) on the concept of attempt should also apply to failure: failed homicide, which was relevant to the code in, for example, the case of genocide, *apartheid* or aggression, was a criminal act, examples of which were to be found in history, particularly that of Latin America); and, thirdly, the consummation of the crime, the culmination of the process which completed execution. Proposal, conspiracy (dealt with in draft article 16) and provocation or instigation should, however, be added to attempt, failure and consummation as forms of the commission of a crime.

34. In his report, the Special Rapporteur noted two tendencies, one which detached *post factum* participation from complicity and another which associated the two. He therefore concluded that he could not "propose a single rule without denying the coexistence of these two tendencies" *(ibid.*, para. 37). The solution he proposed in draft article 15 should accordingly be incorporated in the draft code, since it provided the best means of defining the involvement of each participant in the criminal act and the responsibility and the penalty which he incurred.

35. Many national penal codes drew a distinction between perpetrator, accomplice and concealer. The latter was in dispute among experts in criminal law, but it was safe to accept the view of the Seventh International Congress of Penal Law *(ibid.*, para. 36) that acts of subsequent assistance not resulting from a prior agreement, such as concealment, should be punished as special offences.

36. The contemporary criminal-law theory of criminal participation reflected two main approaches: the traditional one, as represented by the unitary or monist theory, which maintained the oneness of the crime as against the plurality of its perpetrators; and the pluralist theory, according to which each participant was a part of the common act constituting the crime committed. In the view of some eminent criminal lawyers, if several persons agreed to commit a crime or if there was a principal act from which the participant derived his qualification, the accessory nature of participation became manifest. The participant's conduct could be qualified as criminal only "conditionally", since it depended on the conduct of the principal perpetrator.

37. As a result of the Special Rapporteur's work, the Commission was in a position to prepare a draft code which would pave the way for the exercise of international criminal jurisdiction. The code would rank as a uniform and exhaustive body of universally accepted rules in harmony with the world's different legal systems. Its implementation would obviously require the establishment of an international criminal court which would, with the support of the necessary administrative machinery, have exclusive competence to try the crimes covered by the code. The present international climate was characterized by détente, peace, friendship and co-operation and that no doubt explained why the General Assembly had, on 4 December 1989, adopted by consensus its historic resolution 44/39 on the establishment of an international criminal court with jurisdiction over persons engaged in illicit trafficking in narcotic drugs and other transnational criminal activities.

38. In conclusion, he expressed the view that draft articles 15, 16 and 17 on complicity, conspiracy and attempt should be included in the part of the draft code devoted to general principles. He reserved the right to speak again on part III of the eighth report, dealing with the statute of an international criminal court.

39. Mr. MAHIOU said that the qualities of brevity and conciseness which were a characteristic feature of the Special Rapporteur's reports had at first made him fear that the eighth report (A/CN.4/430 and Add.1) did not contain enough elements to enable the Commission to study the so-called "related" offences. Actually, the report had to be read in the light of part III of the Special Rapporteur's fourth report[8], in which he had made a detailed analysis of "other offences". For his own part, he would confine his comments to a few important points on which members of the Commission had been requested to state their positions clearly.

40. With regard to method, as considered from the standpoint of the substantive consequences, he noted that several members had raised the question whether it was desirable to formulate a general rule on the concepts of complicity, conspiracy and attempt, in other words to apply the deductive method in order to derive from it the consequences for each of the crimes, or whether it was preferable to deal with each of those concepts in direct connection with each crime so as to take account of the particular characteristics of each act by following the inductive method. It had also been asked whether a separate part of the draft code should be devoted to those related offences, or whether they should be included in an existing part, such as the one on general principles.

41. Those questions raised the substantive problem of the exact characterization of each of those offences. Were they autonomous offences or purely related offences? For example, if conspiracy were regarded as

[8] *Yearbook . . . 1986*, vol. II (Part One), pp. 63 *et seq.*, document A/CN.4/398.

an autonomous offence, it would be punishable as such even in the absence of a commencement of execution. The comparisons used by the Special Rapporteur to enlighten the Commission showed clearly what the position was: the mere fact of belonging to an association of criminals was punishable, whether or not an offence had actually been committed, and commencement of execution was merely an aggravating circumstance which had the effect of making a heavier penalty applicable to the convicted person. If, on the other hand, conspiracy was regarded as a form of criminal participation and was only a related offence, the position would be different. For such participation to be punishable, it had to be connected with the principal offence. It was in the light of those consequences that the Commission had to consider the nature of the offences in question.

42. In that connection, the Special Rapporteur recalled the interpretation by the Nürnberg Tribunal of article 6 of its Charter,[9] which drew a distinction between three categories of crimes: crimes against peace (para. (*a*)), war crimes (para. (*b*)) and crimes against humanity (para. (*c*)). Although conspiracy was expressly mentioned only in paragraph (*a*), it could be assumed that, since it was referred to at the end of article 6, the concept of conspiracy applied to all three categories of crimes. At the time, the aim had been to punish severely those who had prepared, organized or directed criminal acts without having to investigate the principal offence. In the end, however, the Tribunal had interpreted article 6 restrictively and considered that the concept of conspiracy applied only to crimes against peace. As far as those crimes were concerned, it had been regarded as an autonomous offence, the idea being to punish crimes committed by rulers, namely crimes against peace, which were mainly acts of aggression, and to try those responsible as principal perpetrators and not merely as accomplices. The concept of collective responsibility had begun to take shape on that occasion, since article 6 of the Nürnberg Charter had been based on solidarity between those who had directed and organized those different crimes, some of which had been directly committed by other persons. It was obviously essential to study the concept of collective responsibility carefully and identify on a case-by-case basis the exact conditions in which it would come into play. The concept of conspiracy could thus have its place among crimes against the peace and security of mankind as an autonomous offence, provided that the necessary precautions were taken and due account was taken of certain elements, such as intention, which had the effect of limiting it.

43. In more general terms, related offences presented a dilemma: either it was considered that the draft code covered the most serious crimes and that, on that basis, it was essential to punish not only the perpetrators, but also all those involved as a result of complicity, conspiracy or attempt, the penalty applicable to them being commensurate with the degree of their involvement; or it was considered that, in the case of serious crimes, it was essential to have strict enforcement of the law and to seek to punish only those who were really guilty of specific, individual acts. There might, however, be an intermediate position.

44. With regard to complicity, he believed that it was possible to have a single article that would be applicable to all of the crimes covered by the draft code, whereas other members of the Commission considered that there could be a restrictive approach to complicity in respect of certain crimes, such as war crimes, and a broader approach for others, such as crimes against peace and crimes against humanity. He had, however, heard no really convincing argument in favour of that distinction. Perhaps the fact that there were conventions on war crimes containing detailed provisions and identifying the various offences might make it easier to characterize the crimes and, hence, complicity, thus militating in favour of a restrictive approach to complicity in the case of that category of crimes. Even in that case, however, the Hague and Geneva Conventions could be imprecise, no matter how detailed they might be. That might therefore not be a sound enough basis to support a restrictive approach in one case and a broad approach in another. He was, moreover, not sure whether the inclusion of the crime of conspiracy might not be making the Commission adopt a restrictive approach to complicity: since the concept of conspiracy made it possible to punish leaders and organizers, was there any justification for broadening the concept of complicity in order to cover certain persons who were responsible? In any event, draft article 15 had to be worded in greater detail in order to identify more clearly the acts of complicity which should be punishable under the code.

45. Attempt was an example of an act closely connected with the crime planned. It therefore had to be analysed in relation to the various crimes and be punished in accordance with the circumstances. If the attempted crime had not been committed because of circumstances independent of the will of the perpetrator, attempt had to be punishable.

46. With regard to illicit traffic in narcotic drugs, the first problem which arose, as in the case of war crimes, was that of determining whether any illicit act relating to narcotic drugs was covered by the draft code. His view was that the element of seriousness, however different it might be from the one to be taken into account in the case of the other categories of crimes, had to apply for the purpose of justifying the inclusion of a crime in the code. It was therefore necessary to identify the parameters which made it possible to say that a particular illegal activity was covered only by internal law and that, at some point, it was outside that context and became subject to international repression. Accordingly, some importance had to be attached to that element of extraneousness in order to include illicit traffic in narcotic drugs among the acts punishable under the code as crimes against peace. Viewed from that angle, however, paragraph 2 of draft article X was inadequate. Moreover, the comments by the Special Rapporteur in paragraph 69 of his report did not correspond exactly to that article, which was very broad in scope and therefore did not exclude isolated acts. It was thus necessary to stress the extraneous nature of the act

[9] See 2150th meeting, footnote 9.

referred to in paragraph 1 of the article, as well as the consequences it might have for international relations. It was the link with international relations that made a particular act involving narcotic drugs a crime against peace. Paragraph 2 of article X might specify the acts which constituted crimes and were therefore punishable.

47. Some members of the Commission had questioned whether illicit traffic in narcotic drugs as a crime against humanity should be dealt with in a separate article. In his view, it was preferable to have two articles, particularly since the Commission was dealing with crimes against peace, crimes against humanity and war crimes in separate parts of chapter II of the draft code. If illicit traffic in narcotic drugs was to be characterized as a crime against peace, that had to be made clear in the relevant part of chapter II, as must also be done if it was to be characterized as a crime against humanity. As a crime against peace, illicit traffic in narcotic drugs had, from the point of view of the State, both an internal and an international aspect. It was because it affected the stability of the State or because it jeopardized international relations that it could be described as a crime against peace. Those parameters had to be included in the draft article which defined illicit traffic in narcotic drugs as a crime against peace. In the case of a crime against humanity, however, that internal or international element relating to the State was superfluous. Domestic illicit traffic which had grave consequences for the population could, as a result of those consequences and in some respects, be equated with a form of genocide. It did not directly affect international peace or the stability of a Government, but it did harm broad sectors of the population: the point was thus to preserve the concept of humanity as such. In such a case, there was a close link with internal law, so that the consequences in the matter of penalties had to be divided between domestic courts and the envisaged international criminal court—and that was a particularly delicate matter.

48. Lastly, he recalled that the Special Rapporteur had been invited on a number of occasions to define the principal perpetrator in order to make it possible subsequently to identify the various categories of participants in a crime. He personally did not favour that approach, because criminal law usually did not define the perpetrators so much as the offences. It was on the basis of the offences that the perpetrators were identified so that they could be punished according to the degree of their participation. On that point, the Commission must not be too ambitious: some concepts could not be defined with all the necessary precision. Quite often, in internal law, it was the judge who assessed the role played by each of the accused and there was no reason why it should be any different at the international level. The Commission had to prepare some guidelines, but it was for the judge in each particular case to determine the responsibility of each person involved. Once the list of principal offences had been agreed on, the Commission could add a list of related offences which it would try to make as detailed as possible, although it could never be exhaustive.

49. Mr. RAZAFINDRALAMBO said that, since previous speakers had dealt with virtually all the questions raised by the Special Rapporteur in connection with the concepts of complicity, conspiracy and attempt, he would confine himself to some brief comments on the topic. He understood the Special Rapporteur's concern not to reopen the debate which had taken place during the consideration of his fourth report at the thirty-eighth session, in 1986, but, rather, to learn what the members of the Commission thought about the definitions he had proposed for the three concepts. However, several members of the Commission had not taken part in the debate at the thirty-eighth session. Furthermore, the refinements which the Special Rapporteur had made in the definitions of the concepts in question could hardly give rise to any differences of opinion, for they merely reflected widely recognized principles of general criminal law. That was why any fruitful discussion that was to take place must focus in particular on the role to be assigned to the three concepts. The Commission must determine whether it could incorporate them unchanged in international criminal law.

50. With regard to complicity, everyone knew that, in general criminal law, the concept was based on the principles of derived criminal nature (*emprunt de criminalité*) and derived punishable nature (*emprunt de pénalité*). Under the first principle, complicity was determined by the existence of a principal criminal act. A number of consequences flowed therefrom. *Inter alia*, an accomplice could be convicted only if the perpetrator of the principal act was himself convicted: pardon of the principal act eliminated the criminal nature of the complicity. Under the second principle, namely the principle of derived punishable nature, the act of complicity and the principal act were punished in the same way and, according to the advocates of the theory of absolute derived punishable nature, the principal perpetrator and his accomplice must even suffer the same actual penalty.

51. In the traditional system, complicity was therefore usually defined in terms of the principal action, and a special provision, most often contained in the part of penal codes stating general principles, was devoted to the concept of principal perpetrator or presumed principal perpetrator. That was quite normal.

52. However, the Commission had to draft a code of crimes against the peace and security of mankind, in other words an instrument of international law. As in the past, whenever the Commission had had to consider the possibility of transferring rules and principles of internal law to international law, it must proceed very cautiously and think about the way in which the concept of complicity should be transposed to the code, even if the definition and content of the concept were roughly the same in all domestic penal codes. It was necessary to decide, *inter alia*, whether the principles of derived criminal nature and derived punishable nature applied to the concept of complicity in a crime against the peace and security of mankind. If they did, then the concept of complicity should be defined in the general part of the code, as should perhaps the concept of principal perpetrator.

53. Before reaching a decision on that issue, however, it was important to analyse international conventional and judicial practice. As the Special Rapporteur pointed out in his eighth report (A/CN.4/430 and Add.1, para. 13), the Charters of the International Military Tribunals referred, in the same articles and without distinction, to "leaders, organizers, instigators and accomplices" (art. 6 *in fine* of the Charter of the Nürnberg Tribunal and art. 5 (*c*) of the Charter of the Tokyo Tribunal), no distinction being made between perpetrators and accomplices. The view that there was no relationship of subordination between the accomplice and the principal perpetrator had been embodied in the Nürnberg Principles,[10] as well as in the 1954 draft code, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1979 International Convention against the Taking of Hostages. However, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries adopted by the General Assembly on 4 December 1989 seemed to be an exception.

54. Mr. Mahiou had clearly described the legal consequences of the solution of dealing on an equal footing with the principal act and the act of complicity and making the latter an autonomous offence.

55. As had just been seen, international practice clearly took the line of separating the act of complicity from the principal act and a similar trend had emerged in internal law, where recognition of the criminal nature of the act of complicity was not dependent on conviction of the principal perpetrator or even on his identification. It was understandable in the circumstances that the Special Rapporteur should have chosen to deal with complicity as a separate offence. He had, however, been aware of the difficulties which the Commission would inevitably encounter if it tried to define the concept of accomplice by setting it against the concept of perpetrator and had rightly proposed disregarding the traditional perpetrator/accomplice "dichotomy" and opting for the broader concept of participant, which covered both principal perpetrators and accomplices. The Commission should examine that solution closely and consider the possibility of drafting a general provision on criminal participation covering organizers, instigators, perpetrators and accomplices. Such a provision would be placed among the general principles and would apply in principle to all the crimes covered by the code, it being understood that it would be for the international criminal judge to assess in each specific case the exact role of the various participants.

56. Unlike some members of the Commission, he did not think it would be useful at the present stage to review the different crimes against the peace and security of mankind in order to determine whether the theory of complicity could be applied to them.

57. Draft article 16 contained two paragraphs on what the Special Rapporteur called the two degrees of conspiracy. In fact, only paragraph 1 actually dealt with conspiracy characterized by participation in a common plan or by an agreement between the participants. Paragraph 2 referred not to conspiracy, but to the offence corresponding in French penal terminology to a criminal act (*attentat*), namely an executed conspiracy. A criminal act against the security of the State, for example, constituted a quite separate crime in French criminal law. It ought to be possible to incorporate the provision on conspiracy itself without difficulty in the general part of the draft code.

58. The provision contained in paragraph 2 dealt, in the first alternative, with collective responsibility and, in the second alternative, with individual responsibility. If the Commission opted for the principle of individual responsibility, paragraph 2 became superfluous, for the draft code already contained a provision on individual responsibility. If, on the other hand, it adopted the first alternative, which, in accordance with the notion of criminal participation, dealt with all the participants in the commission of a crime in the same way, then the text of paragraph 2 ought in all logic to be placed among the general principles, following the provision concerning participation.

59. Draft article 17, on attempt, prompted the same comments as the provisions on complicity. Since once again it was difficult to review all the crimes covered by the code in order to determine whether the notion of attempt could be applied to them, it would be unwise to decree out of hand that attempt was possible with respect to all crimes against the peace and security of mankind. If the Commission merely included in the general part of the code the traditional definition of attempt, it would then be for the judge to determine in each specific case whether or not the notion of attempt was applicable.

60. With regard to part II of the eighth report, he said that he approved in principle of the idea of including drug trafficking among the crimes covered by the code. It would be preferable, in his view, to characterize the offence as a crime against humanity rather than as a crime against peace. However, the Special Rapporteur should rework the text of draft article Y so as to cover only organized large-scale traffic constituting a true international conspiracy.

61. Mr. SOLARI TUDELA, commenting first on the concepts of complicity and conspiracy, said that the simplest thing would be to have one and the same provision for the two concepts under the heading of criminal participation, as the Special Rapporteur himself had indeed envisaged in his eighth report (A/CN.4/430 and Add.1, para. 26). That approach would also have the advantage of serving as a common denominator for the different legal systems, which did not always distinguish between conspiracy and complicity. In that connection, it should be remembered that, if the code incorporated a definition of the perpetrator of the crime covering not only the physical perpetrator, but also the "originator" and the indirect perpetrator, the provisions on complicity and conspiracy would become superfluous.

62. Furthermore, he doubted whether all forms of complicity and, in particular, accessory acts subsequent

[10] See 2151st meeting, footnote 11.

to the principal offence constituted sufficiently serious offences for them to be regarded as crimes against humanity and therefore to be treated as criminal acts under the code. The same was true of attempt: it did not seem to be of sufficient gravity to be regarded as a crime against humanity. There was a danger in characterizing those offences as crimes against humanity: the concept of extreme gravity which must be inherent in the acts treated as crimes under the code risked becoming somewhat vague in the public mind.

63. The wording of draft article X, on illicit traffic in narcotic drugs, should be amended to make it quite clear that the article applied only to organized large-scale traffic.

64. It would also be a good idea to add to the list of crimes covered by the code a new form of crime—narco-terrorism. At its forty-sixth session, the Commission on Human Rights had adopted resolution 1990/75 entitled "Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights", in which it expressed its deep concern at the crimes and atrocities committed in many countries by irregular armed groups and drug traffickers and its alarm at the evidence of growing links between them. There were now grounds for thinking that the terrorist movements rife a few years previously in Europe had had links with drug traffickers at one time. The same was currently true in several countries of Latin America where that new form of crime constituted a real threat to society. What was involved was therefore not only a crime against humanity, but also a crime against peace which must definitely be treated as a crime in the code.

65. The CHAIRMAN, speaking as a member of the Commission, noted first of all that, in parts I and II of his eighth report (A/CN.4/430 and Add.1), the Special Rapporteur raised extremely controversial issues. Complicity, conspiracy and attempt were internal-law concepts whose content varied from one legal system to another. Before including them in an international instrument, it was necessary, if the instrument was to be universally accepted, to carry out a difficult task of unification and harmonization. Even if an international criminal court was to be established in the near future, the crimes covered by the code would no doubt be tried most often by national courts.

66. Unfortunately, draft articles 15, 16 and 17 as currently worded were not fully acceptable.

67. He had no objection if the code treated complicity and conspiracy as crimes, but he wondered whether it was a good idea to list attempt among the crimes against the peace and security of mankind. Indeed, the Special Rapporteur himself seemed to have some doubts on that point, admitting in his report (*ibid.*, para. 66) that the theory of attempt could be applied only to a limited extent in the area of the crimes under consideration. Yet a reading of draft article 17 gave the impression, in contrast to that comment, that it was dealing with a theory of general application.

68. As to methodology, he thought that the provisions on complicity, conspiracy and attempt should be placed in the part of the code dealing with general principles, since those were not crimes specific to crimes against the peace and security of mankind. They were in fact offences committed most often in connection with criminal acts such as murder, theft, etc. Indeed, it was perhaps for that reason that, in the penal codes of various countries, including his own, the provisions on those concepts appeared in the part devoted to general principles.

69. He was glad that the Special Rapporteur had submitted provisions on illicit traffic in narcotic drugs. Coming from a people which had been the first victim of a traffic in narcotic drugs organized by the imperialists, he was intimately convinced that, by characterizing that offence as a crime against the peace and security of mankind, the international community would be taking a landmark decision in the history of the world. As for the draft articles submitted on the subject, he recognized that illicit traffic in narcotic drugs constituted both a crime against peace and a crime against humanity, but he could not see the need to have two separate articles.

70. Lastly, as the Special Rapporteur himself had indicated, in order to be treated as a crime under the code the traffic in question must be extremely serious; it thus had to be massive and carried out on a large scale by associations or private groups or by public officials. Unfortunately, that point did not emerge from a reading of draft article X.

The meeting rose at 12.50 p.m.

2154th MEETING

Wednesday, 9 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] *(continued)* (A/CN.4/419 and Add.1,[2] A/CN.4/429 and Add.1-4,[3] A/CN.4/430 and Add.1,[4] A/CN.4/L.443, sect. B)

[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 . . . 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

[4] *Ibid.*