

Document:-  
**A/CN.4/L.422**

**Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 4, 7, 8, 10, 11 and 12 - reproduced in A/CN.4/SR.2082 to SR.2085**

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

Extract from the Yearbook of the International Law Commission:-  
**1988, vol. I**

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tion by the State itself (*ibid.*, paras. 77-84, especially paras. 80 and 82). On the other hand, the primacy of international law in relations between States meant that a State could not plead its own municipal law in order not to honour its international obligations.

*The meeting rose at 1 p.m.*

## 2082nd MEETING

*Wednesday, 20 July 1988, at 10 a.m.*

**Chairman:** Mr. Leonardo DÍAZ GONZÁLEZ

**Present:** Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**State responsibility (concluded) (A/CN.4/414,<sup>1</sup> A/CN.4/416 and Add.1,<sup>2</sup> A/CN.4/L.420, sect.F.1)**

[Agenda item 2]

### *Parts 2 and 3 of the draft articles<sup>3</sup>*

PRELIMINARY REPORT OF THE SPECIAL RAPporteur  
(concluded)

1. Mr. ARANGIO-RUIZ (Special Rapporteur), continuing his introduction of his preliminary report (A/CN.4/416 and Add.1), reminded members that, at the end of the previous meeting, he had begun to discuss obstacles to restitution, in particular the legal obstacles arising from rules of internal or international law.

2. With regard to obstacles arising from internal law, since all States lived under a legal system, no restitutive operation could be carried out within a State without

some legal act or provision being made within that system. A State spoke to its agents and officials through the law, so that restitution could not be carried out *de facto*; it would always require some legal steps.

3. At the same time, the relationship between internal law and international law was quite different from that between the federal law of a federal State and the law of one of its component units. In the first place, the primacy of international law did not go so far as to invalidate any rule of the internal law of a State which stood in the way of that State's compliance with its international obligations. The content of a State's legal system could be adapted—for the purposes of compliance with international legal obligations—only by some legislative, judicial, administrative or constitutional action by the State itself (*ibid.*, paras. 77-84). On that point, the European Community offered an interesting example: the enactments of the Community had the force of law in the member States, but some action by each member State was necessary to introduce them into its own legal system.

4. The primacy of international law in relations between States meant that a State could not validly invoke an obstacle arising from its internal law as an excuse for non-compliance with an international obligation. That was undoubtedly true of any national legal rule or ruling—legislative, administrative, judicial or constitutional—which might be invoked as an impediment to restitution in kind. The rule to that effect was set out in paragraph 3 of the new draft article 7<sup>4</sup> he proposed. It was an obvious corollary of the principle embodied in article 4 of part 1 of the draft, which provided that "An act of a State may only be characterized as internationally wrongful by international law" and that "Such characterization cannot be affected by the characterization of the same act as lawful by internal law". That was tantamount to concluding that the obligation to make restitution could not be affected by any legal obstacle in the internal law of the author State. It was, indeed, incumbent on that State to remove any such legal obstacles, which were disregarded as such by international law. Any difficulty which the author State might have in removing internal legal obstacles should be assessed on its merits under international law, as a possible factual obstacle. His report accordingly dealt with internal legal obstacles under the rubric of excessive onerousness in a wide sense (*ibid.*, paras. 102 and 127).

5. In the case of international legal obstacles, the legal impediment was within the same legal system as that under which restitution was due, that was to say within international law itself. At first sight, that would seem to create a situation similar to that of an impediment to restitution arising under the private law of a country, from a rule of superior rank such as a constitutional rule. But the validity of the analogy was reduced very considerably by the high degree of relativity of international legal rules, situations and relationships.

6. As noted in the report (*ibid.*, para. 87) that analogy would apply in a situation in which restitution en-

<sup>1</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> 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 œuvre*) 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.

<sup>4</sup> See 2081st meeting, para. 36.

countered an obstacle in the rules of the Charter of the United Nations (Article 103) or in any conceivable peremptory norm of international law. Another example would be the obstacle represented by the contemporary doctrine which denied the right to restitution in the case of nationalization, a point also considered in the report (*ibid.*, para. 106). But the analogy would disappear where an obligation to provide restitution in favour of an injured State B was in conflict with a co-existing treaty obligation of the author State A towards a third State C. That was a typical example of the relativity of treaty rules and obligations in international law; the impossibility of complying with the international obligation could not be invoked by State A—at least not as a legal obstacle—against the injured State B. It would be for State A to choose whether to wrong State B or State C; and the choice to refuse restitution to the injured State B in order to comply with the obligation towards State C would obviously be a factual rather than a legal obstacle. That point was illustrated by the *Bryan-Chamorro Treaty* case (*ibid.*, paras. 76 and 83).

7. With regard to the real or alleged legal impossibility of restitution arising from international law, the previous Special Rapporteur, Mr. Riphagen, in his preliminary and second reports,<sup>5</sup> had raised the question of the relationship between the general rule placing the author State under the obligation to make restitution and the other general rule of international law which, in his opinion, protected every State from the violation of its domestic jurisdiction by claims of other States. The result, according to Mr. Riphagen, would be to allow the author State to replace restitution by pecuniary compensation whenever restitution implied an obligation for it in a sphere in which its internal law was competent to perform a normative function.

8. For his part, he could not accept the view that any argument against the generality of the obligation to make *restitutio in integrum* could be derived from the concept of domestic jurisdiction. That concept could not call in question the international obligation to make restitution in kind, any more than any other obligation under international law. Indeed, the very existence of an international obligation meant that compliance with it by a State could not possibly constitute an assault against the domestic jurisdiction of that State. It should be borne in mind that there was hardly any international rule compliance with which did not entail some repercussion on the internal law of the State bound by the rule. A belief that domestic jurisdiction and the principle of non-intervention could in any way interfere with the obligation to make restitution in kind—or any other form of reparation, or the discontinuance of a wrongful conduct—could only derive from confusion of the right of the injured State to obtain restitution or any other form of redress as a matter of substantive law with the right of a wrongfully “unsatisfied” injured State to take measures aimed at securing cessation and/or reparation. Respect for domestic jurisdiction was a condition

of the lawfulness of an *action* by a State or an international body. It was not, *per la contradizion che nol consente*,<sup>6</sup> a condition of the lawfulness of an international *legal rule* or *obligation* (*ibid.*, para. 89).

9. The inevitable conclusion seemed to be that an article on restitution in kind should exclude the possibility of any internal legal obstacle being considered *per se* (and as such) as a valid excuse for the author State to evade—wholly or in part—its obligation to make restitution. Any indications to the contrary in practice could easily be explained as the result of agreements between the parties which, while recognizing in a given case that obstacles deriving from the legal system of the author State constituted good reasons for converting restitution in kind into pecuniary compensation, did not contradict the general principle that restitution should be made. On the contrary, failure to recognize and codify that general principle would jeopardize not only the secondary obligation and the rule from which it was derived, but also the primary obligations and rules themselves. It was, of course, possible for the injured State to renounce restitution in kind and accept reparation by equivalent or referral of the decision to a third party. Impediments in internal law could come into consideration only as factual obstacles. As such, they could be taken into account, where appropriate, only under the exception of excessive onerousness, or perhaps of physical impossibility. It was clear, on the other hand, that not all internal legal obstacles would be such that their removal by the author State would amount to excessive onerousness or physical impossibility.

10. As to obstacles in international law, the only conceivable case in which they might represent a valid excuse for failure to make restitution was that in which the required measures of restitution would involve a breach of an obligation created by a higher norm of international law.

11. While failure to make restitution was thus rarely justifiable on legal grounds under national or international law, it could be justified—apart, of course, from the case of physical impossibility—by the excessive onerousness of the measures that would be required. As shown in the report (*ibid.*, paras. 99-103 and 126-127), the exception of excessive onerousness was an obvious corollary of the principle of proportionality between injury and reparation. The right of the injured State to obtain restitution was restricted in that it would not be entitled to refuse reparation by equivalent whenever the effort required of the author State to provide restitution would be disproportionate to the gravity of the violation or injury. That principle had some support in legal literature and should be adopted, in any case, as a matter of progressive development.

12. The main instance of excessive onerousness appeared to be that in which making restitution in kind would be incompatible with the political, economic and social system of the author State or with fundamental new choices concerning that system. It had to be clearly understood, however, that the obstacle would not be so

<sup>5</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 107, document A/CN.4/330; *Yearbook* . . . 1981, vol. II (Part One), p. 79, document A/CN.4/344.

<sup>6</sup> “Nor to repent, and will, at once consist, by contradiction absolute forbid”, Dante, *Inferno*, XXVII, 119-120 (trans. H. F. Cary, 1910).

much a question of legal impossibility as of a factually excessive burden for the author State to bear, as compared with the sacrifice which the substitution of reparation by equivalent might represent for the injured State.

13. Thus *restitutio in integrum* did not seem to be subject to any limitation other than material impossibility, international legal impossibility or excessive onerousness. If other forms of redress, such as reparation by equivalent, happened to take the place of restitution in the absence of any such obstacles, that would be a consequence not of other exceptions, but rather of the attitudes actually taken by the parties in each case. Those attitudes could manifest themselves either in such modes and terms as to constitute an agreement between injured and author States, or simply as the exercise of a right or faculty of choice by the injured State. What mattered in either case appeared to be the right or faculty of choice of the injured State. Of course, the author State might well offer reparation by equivalent as a substitute for *restitutio in integrum*, even in a case in which the latter was neither impossible nor excessively onerous; and the substitution would be fully admissible, provided that it was accepted by the injured State.

14. A substantial part of legal doctrine favoured the right of the injured State to choose between restitution and pecuniary compensation. As to practice, elements supporting the doctrine seemed to be present in the *Chorzów Factory* case (*ibid.*, para. 110). Germany had started with a claim to restitution, but had later claimed pecuniary compensation, stating that the factory "in its present condition, no longer corresponded to the factory as it was before the taking over in 1922". Restitution would thus have been of no interest to the claimant. Further practice was cited in his report (*ibid.*, para. 111). It was also true (*ibid.*, para. 112) that fears had sometimes been expressed that recognition of a right of choice of the injured State might open the door to abuses. That misgiving, though not without justification, was lessened by the consideration that the right of choice should be set aside where restitution would be excessively onerous for the wrongdoing State. The opposite could also occur, with the injured State claiming pecuniary compensation even where *restitutio in integrum* was possible. In that case, however, any excessive claim by the injured State could be effectively resisted on the basis of proportionality, equity and excessive onerousness.

15. It should be stressed, however, that the right of choice of the injured State would not be unlimited. Whenever restitution was due for a breach of a peremptory rule or, more generally, of a rule stating an *erga omnes* obligation, it could not be renounced by the injured State, which could not opt for pecuniary compensation. In such a situation, the law should place upon the author State the obligation to provide full restitution in kind. That matter would be better developed in the context of the particular legal consequences of crimes.

16. It was self-evident that impossibility or excessive onerousness could prevent restitution either in whole or in part. In practice, partial exclusion of restitution was more frequent than total exclusion. The portion of in-

jury not covered by restitution would have to be remedied by one or more other forms of reparation, in particular by pecuniary compensation.

17. The new draft article 7 contained two references to "a peremptory norm of general international law". Notwithstanding the problematic nature of the concept, he was inclined to share the view that there were rules of *jus cogens* in international law; some of the rules in the Charter of the United Nations could be regarded as having that character. It was very difficult, however, to draw up a list of rules of *jus cogens*. It was quite common not only for one group of members of the international community to regard a rule of international law as *jus cogens* while another group took the contrary view, but also for the same State or States to take one view at one time and an opposite view at another. Indeed, views on the exact content of *jus cogens* varied not only in point of time, but also from case to case.

18. All things considered, he had thought it his duty to introduce in draft article 7 the provision in paragraph 1 (b), which set out an exception to restitution in kind where such restitution would "involve a breach of an obligation arising from a peremptory norm of general international law". Clearly, it would be difficult to give examples. The comments of members of the Commission during future discussions would no doubt be helpful. A second reference to *jus cogens* was made in paragraph 4, which set out the right of choice of the injured State to claim pecuniary compensation as a substitute for restitution in kind. An exception to that right was stipulated where such substitution would "involve a breach of an obligation arising from a peremptory norm of general international law." On that provision too, he looked forward to receiving guidance from the Commission. On the whole, it seemed to him that the new draft article 7 left too many loopholes for the author State. Further discussion would perhaps help him to tighten its provisions.

19. Chapter I of his report contained a few suggestions concerning the proposed programme of work on parts 2 and 3 of the draft articles and a tentative summary outline of those parts (*ibid.*, para. 20). In the treatment of the topic, he proposed to keep roughly to the order followed by the previous Special Rapporteur, guided by the general outline of 1963. That meant the order in which the subject-matter had been dealt with in draft articles 6 to 16 of part 2 and draft articles 1 to 5 of part 3, as submitted by his predecessor and referred to the Drafting Committee.<sup>7</sup> He thought it essential, however, to depart from that order on three points, none of them revolutionary.

20. The first point was his proposal that there should be a more marked separation between wrongful acts characterized in part 1 as delicts, and wrongful acts characterized as crimes. The reasons for that change were purely methodological (*ibid.*, para. 12). Considering the relative novelty of the distinction, and the difficulty of identifying the features that should characterize the consequences of the international

<sup>7</sup> See footnote 3 above.

crimes of States, it was advisable to deal separately with the two sets of consequences. The legal consequences of delicts and those of crimes would thus form the subject of separate chapters. Since a first chapter of general principles might comprise articles 1 to 5 of part 2 already provisionally adopted by the Commission,<sup>9</sup> it should then be possible to envisage tentatively a chapter II of part 2 to deal with the consequences of delicts and a chapter III of part 2 to deal with the consequences of crimes.

21. The second point was his suggestion that, within each chapter, a distinction should be made between the substantive consequences of wrongful acts and what might be called the "procedural" or "instrumental" consequences. Cessation and the various forms of reparation fell within the substantive consequences, whereas the measures aimed at securing cessation and reparation, or at inflicting punishment, constituted procedural consequences. The work on the consequences of internationally wrongful acts would be less arduous if the two sets of consequences were dealt with separately for delicts as well as for crimes. The distinction was not, of course, an absolute one. It was not as clear-cut as the distinction in a national legal system between the substance of the law of tort and of criminal law, on the one hand, and the procedures of redress and punishment, on the other. The difference was nevertheless evident even in such an inorganic system as the law of nations. Both sets of consequences were, in any case, hard enough to determine and formulate, without mixing the intricacies of the one with those of the other. There again, he believed that it would be less difficult to deal with those two areas of the law in separate stages.

22. The third point related to the subject-matter covered by draft articles 1 to 5 of part 3. Those five draft articles covered two aspects of the "implementation" or *mise en œuvre* of international responsibility which appeared to him to be quite different. One was the conditions, in the form of obligations or *onera*, under which one or more injured States were lawfully entitled to resort to measures in order to secure cessation or reparation, or to inflict a penalty of any kind upon the wrongdoing State. The other aspect was the procedures that could, or should, be contemplated for the settlement of disputes relating, in the words of Article 36 of the Statute of the ICJ, to "the existence of any fact which, if established, would constitute a breach of an international obligation" (para. 2 (c)) or to "the nature or extent of the reparation to be made for the breach of an international obligation" (para. 2 (d)). It would be desirable for each of those aspects to be dealt with where it belonged *ratione materiae* or *ratione naturae*. Since the first aspect, namely the conditions to be complied with by an injured State for lawful resort to measures, fell within the realm of measures, it should be covered not in part 3 but in part 2 of the draft. Dispute-settlement procedures should instead be dealt with in part 3. Quite apart from any logical reason, such an arrangement was justified by the fact that at least some of the provisions on the settlement of disputes would presumably not be mandatory. On the other hand, the

conditions for lawfulness of measures were, in principle, mandatory *de lege lata*, or should be *de lege ferenda*.

23. According to the plan he had outlined, the new draft articles 6 and 7 of part 2 submitted in his preliminary report would be followed by provisions dealing with the consequences of internationally wrongful acts other than cessation and restitution in kind. For those provisions, and particularly for those relating to pecuniary compensation and satisfaction, he would draw on the materials on State practice and arbitral awards assembled at the University of Rome and by the Commission's secretariat, for whose assistance he was most grateful.

24. He trusted that the Commission would take up the topic of State responsibility early enough at the next session for a substantial debate to be held, so that he could benefit from the guidance of his colleagues.

25. The CHAIRMAN, thanking the Special Rapporteur for his introduction, said that, as had been agreed, there would be no debate on the preliminary report (A/CN.4/416 and Add.1) at the present session. He invited members to raise any questions on which they required clarification.

26. Mr. BARSEGOV, expressing his appreciation of the Special Rapporteur's comprehensive presentation of the topic, said that it would be extremely useful if his statement, as well as Mr. Ogiso's introduction of his preliminary report on jurisdictional immunities of States and their property, were reproduced in full, or at least as fully as possible, and circulated to members at the present session. It would also be helpful if all the materials relating to the preliminary report on State responsibility (A/CN.4/416 and Add.1) could be combined in a single document.

27. Mr. KALINKIN (Secretary to the Commission) said that it had been agreed, after discussion with the Rapporteur, that the introductory statements made by Mr. Arangio-Ruiz and Mr. Ogiso would be included in the Commission's report, but in an abridged form. The Commission's reports were an exception to the General Assembly rule that the reports of its subsidiary bodies should not exceed 32 pages, but it was not possible to include documents *in extenso*. The Secretariat would, however, have both statements typed and circulated to members in English before the end of the session.

28. The Secretariat was not permitted, under the rules in force, to reissue documents incorporating corrections. Corrected versions of the reports of special rapporteurs were published in the Commission's *Yearbook*.

29. Mr. BARSEGOV said he had not wished to suggest that the preliminary report as a whole should be reissued, although that would have been desirable. What he had in mind was a list of corrigenda in English, which could perhaps be prepared by the Secretariat. He appreciated that the Commission was bound by certain rules, but the two introductions in question were not just ordinary statements; they were more in the nature of documents of the Commission which members required for their work. That point should perhaps be taken into account in the future.

<sup>9</sup> *Ibid.*

30. Mr. ARANGIO-RUIZ (Special Rapporteur) agreed that the best solution would be to circulate the texts of the two statements to all members. It had certainly not been his intention to suggest that his own statement should be included verbatim in the Commission's report.

31. He accepted responsibility for many of the errors in his preliminary report, which were possibly due to pressure of time. He would take the matter up with the Secretary to the Commission to determine how best to deal with it. A more serious defect was that the footnotes to his report were grouped together at the end of the document, which was why he had circulated to members a list of those notes he regarded as essential for an understanding of the report. He found it hard to understand why a machine for the placement of footnotes, of the kind in common use at universities, for instance, was beyond the means—albeit limited—of the United Nations.

32. Mr. FRANCIS said that, in the light of the explanations given by the Secretary, the Commission might wish to give some consideration, at the present session, to the question of the length of its reports.

33. The CHAIRMAN said that, while he agreed on the importance of that question, the best place to discuss it would perhaps be in the Secretariat or at the General Assembly. In any event, there was not enough time to do so at the present session.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>9</sup> (continued)\* (A/CN.4/404,<sup>10</sup> A/CN.4/411,<sup>11</sup> A/CN.4/L.422)**

[Agenda item 5]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE**

**ARTICLES 4, 7, 8, 10, 11 AND 12**

34. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 4, 7, 8, 10, 11 and 12 as adopted by the Committee (A/CN.4/L.422).

35. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that, at its thirty-ninth session, in 1987, the Commission had provisionally adopted articles 1 and 2 of part I (Definition and characterization) and articles 3, 5 and 6 of part II (General principles) of chapter I (Introduction) of the draft code.<sup>12</sup> At the current session, the Drafting Committee had adopted the remaining articles of part II (arts. 4 and 7-11) referred to it by the Commission in 1987, with the exception of article 9 (Exceptions to the principle of responsibility).

\* Resumed from the 2061st meeting.

<sup>9</sup> 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.

<sup>10</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>11</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>12</sup> See *Yearbook . . . 1987*, vol. II (Part Two), chap. II, sect. C.

The Committee had also adopted article 12, the first provision in part I (Crimes against peace) of chapter II (Acts constituting crimes against the peace and security of mankind).

**ARTICLE 4 (Obligation to try or extradite)**

36. The text proposed by the Drafting Committee for article 4<sup>13</sup> read:

*Article 4. Obligation to try or extradite*

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article shall not prejudice the establishment and the jurisdiction of an international criminal court.

37. The purpose of article 4, which touched upon delicate questions of jurisdiction and extradition, was to eliminate any safe haven for an alleged offender. The Drafting Committee had considered at length whether to draft a detailed provision dealing with questions of jurisdiction and extradition, or a short and general article stating only the basic principle. It had come to the conclusion that it would be impossible to draft a detailed article that would satisfy all members. Moreover, as it had not been decided whether or not the code should provide for an international criminal court, questions of jurisdiction and extradition would have to be discussed on a provisional basis. The Committee had therefore decided to state the basic principle, leaving those questions aside for the time being. Article 4 had thus been drafted on the understanding that it dealt, in broad terms, with the general principles of jurisdiction and extradition, and that specific rules for the application of those principles would be drafted later, for inclusion in an appropriate part of the code. That understanding should be reflected in the commentary, which would then also serve as a reminder of the need to revert to the specific rules governing priorities in jurisdiction and extradition. Article 4 would have to be reviewed after those rules had been drafted.

38. Paragraph 1 was almost identical to that proposed by the Special Rapporteur, with some drafting changes. For example, the words "perpetrator of an offence" in the previous text had been replaced by "an individual alleged to have committed a crime": the Drafting Committee had thought that the word "perpetrator" implied that the accused had already been convicted of the crime, whereas the new wording more objectively described a person who had been charged with a crime. The Committee also considered that the new wording should be defined in an article on the use of terms, as in other instruments, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic

<sup>13</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, *ibid.*, pp. 9-10, footnote 19 and paras. 29-36.

Agents. Such a definition would indicate that the allegation should be supported by reasonable evidence and that it would not of itself suffice to bring the obligations under the article into play. The word “arrested” in the previous text had been replaced by “present”, which seemed preferable to the Drafting Committee, since arrest could not be deemed to be compulsory in all instances of a charge against a person that he had committed a crime against the peace and security of mankind.

39. Paragraph 2, which was new, provided for a plausible and not infrequent situation. The question that arose was which State in a series of States requesting extradition should have priority or, indeed, whether there should be any priority at all. One of the drawbacks of having a detailed list of categories of States setting out strict priorities for extradition was that there would have to be a measure of co-ordination between the priorities set in such a list and priorities in the matter of jurisdiction—a question that would have to be considered in the future. Pending a decision on the incorporation in the code of the principles of universal jurisdiction, of the jurisdiction of an international criminal court, or of a combination of both, such a list would be premature, since any one of those principles or a combination of them would affect the question of extradition. Besides, the question of priority in extradition would involve the Commission in an endless debate on whether the territoriality principle or the nationality principle should determine priority, or whether either of those principles should yield to the functional theory, whereby the State that could provide the best administration of justice for trial and punishment of the accused would have priority. An additional drawback to such a list was that many States would be reluctant to accept a strict rule on extradition which encroached on their discretion: for example, they would be reluctant to extradite an individual to a State where he might be subjected to torture.

40. Some members of the Drafting Committee had maintained that article 4 should express some preference for granting extradition to the State where the crime had been committed, in keeping with the Nürnberg Principles.<sup>14</sup> Others had been disinclined to accept any unqualified preference, but believed that the State where the crime had been committed should have some discretion. Under the resultant compromise reflected in paragraph 2, a State receiving several extradition requests would be obliged to give “special consideration” to the request of the State where crime had been committed. That did not indicate any rule of strict priority, but meant that a State faced with multiple extradition requests should consider the request of the State where the crime had been committed very seriously and should incline to the view that that State might, in the circumstances, be the most appropriate place for trial and punishment of the alleged offender.

41. Paragraph 3, which corresponded to paragraph 2 of the previous text, dealt with the unresolved question of jurisdiction under the code and served to stress that the jurisdictional basis of article 4, as drafted, would

not prevent the Commission from deciding in the future to establish an international criminal court.

42. Lastly, the title of the article, “Obligation to try or extradite”, was a translation of the previous Latin title, *Aut dedere aut judicare*.

43. Mr. ARANGIO-RUIZ said that paragraph 3 was not entirely satisfactory. It stated that the provisions of paragraphs 1 and 2 “shall not prejudice the establishment and the jurisdiction of an international criminal court”, but that very statement did so: by addressing the issue in negative terms, it precluded a positive approach. The Chairman of the Drafting Committee had said the provision meant that paragraphs 1 and 2 would not prevent the Commission from taking up the question of an international criminal court; but the words “shall not prejudice” really signified that the problem would be excluded from the Commission’s immediate concern and programme of work. The establishment of an international criminal court would, of course, be difficult, but work had already been done, in 1951 and 1953, on elaborating its statute, and the Commission should pursue that effort.

44. For those reasons, he thought that paragraph 3 should be deleted. If that was not acceptable it should be rephrased, or an explanation should be included in the commentary to the effect that the drafting of the statute of an international criminal court was entirely within the Commission’s competence and that, as a technical body, it was entitled to recommend the establishment of such a court.

45. Mr. BARBOZA pointed out that there was a discrepancy in the wording of articles 4 and 7 that should be corrected. Article 4, paragraph 2, spoke of “the State in whose territory the *crime* was committed”; article 7, paragraph 4 (a), referred to “the *acts* which were the subject of the judgment”; and article 7, paragraph 5, referred to a “previous conviction for the same *act*”.

46. Mr. McCAFFREY explained that he had participated in the Drafting Committee’s work on the draft code only in regard to article 4, and had a number of reservations that he wished to place on record.

47. No one could disagree with the article’s purpose, which was to ensure that there was no safe haven for an individual alleged to have committed a crime against the peace and security of mankind. His reservations related rather to the manner in which such an individual was to be sought out and brought to justice. He did not believe that universal jurisdiction would be any more acceptable to States than an international criminal court—in fact, it might be less so. Consequently, he was not sure that the Commission would be well advised to proceed with the drafting of an article on universal jurisdiction before having at least attempted to draft the statute of an international criminal court or a tribunal like the one suggested by Mr. Beesley at the previous session.<sup>15</sup>

48. Referring to the text of article 4, he confessed to being worried by the word “alleged” in paragraph 1,

<sup>14</sup> See 2053rd meeting, footnote 8.

<sup>15</sup> See 2059th meeting, footnote 13.

because it was not clear by whom the allegation would be made. If State A made an allegation, for example, did State B have to try the individual in question? The Chairman of the Drafting Committee had indicated that the term "alleged" would be defined, perhaps along the lines of the definitions in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. He hoped that that would indeed be done, and that the commentary would record the Commission's intention of producing such a definition.

49. With regard to paragraph 2, he thought that a list of priorities on a crime-by-crime basis was needed; in other words, the matter of jurisdiction should be individualized. It was very difficult to generalize in that area: for example, how would paragraph 2 apply to cases of alleged genocide or *apartheid*, where it would be undesirable to remand an individual to the State in which the crime had been committed, since it was the authorities of that State that had committed the crime?

50. Paragraph 3 gave no indication whether the competence of an international court—should one be established—would overlap with the competence of national courts exercising universal jurisdiction. He believed it should not, in the interests of preventing the chaos that might follow the establishment of universal jurisdiction. He therefore had reservations on paragraph 3.

51. As to drafting points, paragraph 3 should read "paragraphs 1 and 2 of this article do not prejudice," rather than "shall not prejudice". He agreed with Mr. Barboza's comment on paragraph 2, and suggested that any reference to a "crime" should be phrased "the State in whose territory the crime is alleged to have been committed", in symmetry with paragraph 1, which contained the phrase "an individual alleged to have committed a crime".

52. He would reserve his position on article 4 until the extent to which individual crimes were to be detailed in the code had been decided.

53. Mr. BARSEGOV said that, as a member of the Drafting Committee, he would naturally not express opposition to the compromise texts that had been worked out, and he did not intend to dispute anything said by the Chairman of the Drafting Committee. It was important, however, to bring into the open the nuances of the process by which the texts had been developed, so that the Commission's report to the General Assembly could present as full and balanced a picture as possible of the considerations underlying the adoption of those texts.

54. He therefore wished to make a number of comments on paragraph 2 of article 4. That paragraph was derived from an earlier text that had clearly established a hierarchy, in which the principle of territoriality had occupied the first place. The Chairman of the Drafting Committee had informed the Commission that the Committee believed there were many obstacles to drawing up a detailed list of categories of States setting out strict priorities for extradition. That was not entirely true, however. The fact that the members of the Drafting Committee had all agreed to a compromise

solution did not mean they all believed that a detailed list of priorities could not be drawn up. Certainly, there were difficulties arising from differing approaches and points of view, but he did not agree that there was any fundamental, intrinsic obstacle.

55. The Chairman of the Drafting Committee had rightly noted that there had been a number of serious differences of opinion on a whole range of important issues: whether the territoriality principle or the nationality principle should determine priorities for extradition; whether a State in whose territory a criminal was located should have the right to select the country to which he would be remanded; and whether priority should be given to a State which could provide a better administration of justice. The opinions expressed on those issues should be accurately and faithfully reflected in the Commission's report to the General Assembly: compromise solutions could be understood properly only when all the views to be reconciled were clearly evident.

56. He had raised the question of the definition of a "better administration of justice" in the Drafting Committee. In his view, the best administration of justice was one which made punishment inescapable; but other members had expressed concern about ensuring that an alleged offender would not be handed over to a country that might subject him to torture, for example. Torture was covered by existing international instruments, which provided for machinery to prevent it. Moreover, no State was competent to decide in what country an alleged perpetrator of a crime against the peace and security of mankind would have his legal rights guaranteed; in the aftermath of the Second World War, that policy had resulted in many war criminals going unpunished. He was in favour of ensuring the best possible administration of justice for crimes against peace and security, and believed that the future code must reduce possibilities of arbitrary action to a minimum and establish the most comprehensive régime possible, to be adopted by all States; in other words, it must clearly state priorities for extradition.

57. He did not entirely agree with the interpretation by the Chairman of the Drafting Committee that the expression "special consideration" meant that a State faced with multiple extradition requests should "very seriously" consider the request of the State where the crime had been committed, or with his conclusion that the text of paragraph 2 "did not indicate any rule of strict priority" (see para. 40 above). If that was the sort of limited interpretation to be given to paragraph 2, it might well prove unacceptable to many States when the code was proposed for adoption. He understood the provision to mean merely that, if there were no other, weightier basis for determining where a better and fuller administration of justice could be ensured, preference should be given to the State in whose territory the crime had been committed. Mr. McCaffrey had cited the examples of genocide and *apartheid* committed by Governments on their own territory; but such crimes were exceptions, and in any case were covered by the relevant international instruments. As exceptions, they should not be allowed to detract from the primacy of

the principle of territoriality, which was reflected in the Nürnberg Principles.<sup>16</sup>

58. The views he had expressed were not merely his own; they were shared by many members of the Drafting Committee and should be fully reflected in the Commission's report to the General Assembly.

59. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he supported the text of article 4 introduced by its Chairman, whose balanced statement had highlighted the various considerations underlying the Committee's decisions.

60. One basic principle that should be kept in mind concerning the concept of territoriality was that, if a crime had been committed within the territory of a State, that State should have jurisdiction. But the concept of territoriality of jurisdiction was evolving in the direction of a more flexible interpretation. According to several different courts, the principle of territorial jurisdiction did not exclude all reference to the effect of the crimes committed. While it was important that no criminal should have a safe haven, and that all criminals should be tried on the basis of the best possible evidence, justice must be rendered in the most effective way possible. Accordingly, when the territory of one State had been used only notionally to escape the jurisdiction of another, in whose territory the criminal acts had had a detrimental effect on security and public order, the principle of priority, as posited in paragraph 2, was deemed to refer to the territory of the State that had actually been affected.

61. Most members of the Drafting Committee had acknowledged that point, but in order to promote consensus and to streamline the final formulation, it had been decided not to reflect it in the draft article. He urged the Special Rapporteur to mention it in the commentary.

62. Mr. EIRIKSSON said that the revised text of draft article 4 submitted by the Special Rapporteur to the Drafting Committee had contained a list of priorities to be followed in the event of multiple requests for extradition. He was sorry that no such list was provided in the text adopted by the Drafting Committee, and shared the concern expressed on that point by Mr. Barsegov. While he had no strong feelings about what the order of priority should be, he remained convinced that the priorities should be clearly specified. Paragraph 2 as drafted did not, in his view, represent a compromise, and he would prefer it if no paragraph of that nature were included.

63. As to paragraph 3, he agreed with Mr. Arangio-Ruiz that the text would be appropriate only if, at the end of its work, the Commission had not succeeded in drafting provisions on the establishment of an international criminal court. He shared the views of those members of the Commission who thought that the attempt should be made. Pending its outcome, it would be appropriate to place paragraph 3 in square brackets and to explain the position in the commentary. If the at-

tempt proved successful, the square brackets around paragraph 1 of article 7 would, of course, be removed.

64. Prince AJIBOLA said that the Drafting Committee was to be commended for the excellent work it had done on the draft articles, which were a considerable improvement on the previous texts.

65. The question of an international criminal court was a very serious difficulty, basic to the whole project of the code, and it was against that background that paragraph 1 of article 4 had to be considered. That paragraph required any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind was present to "try or extradite him". But how was any State to try an individual for a crime of such a nature and magnitude with its own judicial machinery? If the problem of an international criminal court were settled, there would be no need to deal with the trial of the alleged criminal in article 4 and extradition would be the only remaining issue.

66. There again, the difficulties were very great. In many cases, the crimes concerned were committed with some element of State participation: genocide and *apartheid* were cases in point. If a crime of that nature had been committed, say, in State X, some of those who had committed it going later to State Y, and if State X then asked for those persons to be extradited to it, the situation would surely be at odds with the fundamental principle of law that no one should be the judge in his own cause. The whole problem of extradition was an extremely thorny one, and he believed that the Drafting Committee had done the best that could be hoped for at the present stage. The insertion of the word "either" between "shall" and "try" in paragraph 1 would tighten the text by making it clear that no other course of action was permissible.

67. He agreed with previous speakers that the term "crime" should be used throughout the draft. The provision in paragraph 2 was acceptable in itself, but in view of what he had just said about paragraph 1, it might be advisable to amplify the wording so as to ensure that extradition would not benefit criminals seeking a safe haven.

68. Lastly, he would prefer the words "shall not prejudice", in paragraph 3, to be replaced by "shall be without prejudice to", in order to achieve a slight—but in his view desirable—shift of emphasis.

69. Mr. BEESLEY said that, in drafting article 4, the Drafting Committee had clearly intended not to prejudice any future development or decision relating to the establishment of an international criminal court or of universal jurisdiction. Paragraph 1, as drafted, was clear and easy to understand, but he feared that it might also prove easy to apply in a manner not intended by the Drafting Committee or the Commission.

70. He agreed with much of what Prince Ajibola had said about the obligation to try or extradite. In his view, the obligation to try should be replaced by an obligation to detain or initiate criminal proceedings against the individual concerned, or to ensure that criminal proceedings were initiated against him. As paragraph 1 now

<sup>16</sup> See 2053rd meeting, footnote 8.

read, it seemed to be based on the presumption of the establishment of universal jurisdiction, which was not apparent from articles 1, 2 and 3; an intermediate step would seem to be necessary in order to close the hiatus. By giving further thought to the formulation of paragraph 1, the Commission would safeguard the whole process of drafting the code, which would be hopelessly compromised in the eyes of some Governments by the presumption that universal jurisdiction was to be established. The problem of extradition, too, though not insoluble in itself, would remain impossible to resolve so long as it was not known whether there was to be an international criminal court, universal jurisdiction, or a mixed tribunal.

71. The issue of territoriality did not appear to cause any major difficulty. It might, however, be preferable to use the term "jurisdiction" rather than "territory", so as to cover cases in which there was duality of jurisdiction, such as crimes committed on board ship in the territory of another State. He agreed with previous speakers that it was desirable to harmonize the terminology employed in the draft: the word "crime" should be used throughout the text or not at all. The question of priorities in the case of requests for extradition received from several States could be dealt with in the commentary.

72. He suggested that paragraph 3 be amended slightly to make it clear that the provisions of the preceding paragraphs were without prejudice not only to the establishment and jurisdiction of an international criminal court, but also to the whole question of jurisdiction or competence, including the question of venue.

73. He emphasized that the doubts he had expressed, which also applied to article 7, were not meant to imply any criticism of the Drafting Committee or its Chairman, who had done their best to reconcile deeply divided views.

74. Mr. OGISO said that the points he was about to make were intended mainly for the record; he had no intention of pressing them at the present stage.

75. First, while accepting the formulation of paragraph 2 of article 4 as adopted by the Drafting Committee, he would have preferred the word "due" to be used instead of "special" to qualify "consideration". That wording would, he thought, avoid a situation in which, for instance, a person alleged to have committed the crime of *apartheid* would be extradited to the State where *apartheid* was practised.

76. Secondly, he could accept the proposal made by several speakers that the words "was committed", in paragraph 2, should be replaced by "is alleged to have been committed".

77. Thirdly, he was prepared to accept article 4 in its present form if the Commission's report to the General Assembly included a recommendation that the Commission should be requested to study questions of jurisdiction in general, and the question of an international criminal jurisdiction in particular, at its next session.

78. Mr. PAWLAK said that, although he was a member of the Drafting Committee, he had unfortunately been unable to be present when article 4 had been adopted. He must therefore apologise to the Chairman of the Drafting Committee for the critical remarks he was about to make.

79. The general principles being drafted were intended to provide a basis on which the ideas set out could be developed in the future. Like Mr. Barsegov, Mr. Sreenivasa Rao and some other speakers, he thought the compromise formula adopted in paragraph 2 was very weak and failed to provide an adequate basis for preventing the criminal from finding a safe haven.

80. In considering that issue, it was essential to look back in history and recall that, as a result of inadequate provisions and practices, many war criminals had escaped to safe havens after the Second World War. Fortunately, at the beginning of the process of prosecution of war criminals, a number of them—including the infamous commandant of Auschwitz, Hans Frank—had been sent to the country where they had committed their crimes and had been adequately punished. For the sake of the peace and security of mankind, as well as of the progressive development of international law, the Commission should, at the very least, not depart from the principles accepted at Nürnberg and Tokyo. He therefore suggested that the word "special" in paragraph 2 be replaced by "priority".

*The meeting rose at 1.05 p.m.*

## 2083rd MEETING

*Thursday, 21 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*later:* Mr. Bernhard GRAEFRATH

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, 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. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.422)**

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

## [Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(continued)ARTICLE 4 (Obligation to try or extradite)<sup>4</sup> (concluded)

1. Mr. ARANGIO-RUIZ said that the present wording of paragraph 3 of article 4 launched into space, so to speak, the idea of establishing an international criminal court. The idea could be brought back down to earth by the following wording:

“3. The provisions of paragraphs 1 and 2 of this article shall not prejudice the determination of the competence of an international criminal court once it is established.”

That would in no way alter the meaning of the article, particularly in regard to the hypothesis of universal jurisdiction, which was implicit in paragraphs 1 and 2.

2. Mr. CALERO RODRIGUES said that he had some reservations regarding the form of paragraph 1, but generally speaking the substance met with his approval. The point had been made that no individual alleged to have committed a crime against the peace and security of mankind should have safe haven from prosecution under the pretext that a country had no jurisdiction in the matter. That principle was correct and deserved to be stated in a provision of the draft. Application of the principle, however, posed various problems, first in terms of jurisdiction, and then in terms of extradition.

3. As far as jurisdiction was concerned, the difficult choice was between an international criminal court and universal jurisdiction. If established, an international criminal court would in a sense operate by delegation of the international community. The question of jurisdiction therefore opened up a very broad range of problems. Presumably, the question would be settled elsewhere in the code and it was perhaps pointless to mention it in article 4.

4. With regard to extradition, an individual alleged to have committed a crime would naturally have to be brought before an international court, in which case the term “extradition” was not suitable, or before the competent national courts. There again, it should be specified which State could exercise jurisdiction, and under which conditions, and what the effects of such jurisdiction would be on that of other States—not forgetting the case of joint jurisdiction—and a system of communication between States should be set up. An extradition régime would also need to be established, by specifying, for example, that in the absence of an express treaty between the States concerned, the code itself would serve as the basis for the procedure. Clearly, the problems of extradition were all too numerous. Other less wide-ranging instruments consisted of 10 to 12 articles on the matter and the code could not be expected to settle all the problems in one single provision.

5. The complexity of the situation was such that it would be wise to follow the direction indicated by Mr. Beesley at the previous meeting. Article 4 should simply

lay down the principle of the obligation to try or extradite, on which everyone was agreed and which was aimed essentially at preventing a criminal from escaping from justice. The best course would be to delete paragraph 2, which simply raised problems it did not resolve, and to avoid questions of jurisdiction. The Commission should not, however, believe that it had resolved the problems in passing and therefore feel that it was not bound to elaborate a number of much more precise articles on the matter.

6. Paragraph 3 merely stated a truism: in fact, no provision of the draft code prejudged the establishment of an international criminal court. That did not mean that the other solution, namely universal jurisdiction, was resolved. Even in that case, a State might well be unable to exercise jurisdiction because, quite simply, the person in question was outside its territory.

7. The present discussion also caused some concern in regard to methodology. The Drafting Committee did indeed have to find compromise solutions, but it should not impede the work of the Commission itself. Yet the Committee was spending practically all its time on questions of substance, and the drafting work was being done in plenary, as had been the case at the previous meeting. That explained why the Drafting Committee had arrived at such disappointing results on the present topic.

8. Mr. FRANCIS said that paragraph 2 of article 4 was not sufficiently precise. The crimes in question could, although they had been committed by one and the same person, consist of various acts, perpetrated in various countries. In that case, the system of universal jurisdiction, the essential object of the main article and the instrument of enforcement of the code, would be difficult to put into practice, quite apart from the fact that it would be very costly. It should therefore be kept for exceptional cases.

9. Mr. Beesley (2082nd meeting) had raised an important point with regard to paragraph 1, which said that an individual “alleged to have committed” a crime had to be tried. That was going rather far and overlooked the earlier stages, such as police information and, more particularly, a preliminary enquiry. The authors of a number of conventions had not been mistaken in that regard. For example, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* spoke only of persons “charged” with a crime (art. V), and not individuals “alleged to have committed” a crime. Nor did the words “individual alleged” appear in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, or in the 1977 European Convention on the Suppression of Terrorism.<sup>5</sup> Accordingly, if the phrase “individual alleged to have committed a crime” were maintained, paragraph 1 would have to be amended by replacing the words “shall try” by “shall prosecute”.

10. Mr. GRAEFRATH said that some countries did not want the establishment of an international court with jurisdiction for crimes against the peace and secur-

<sup>4</sup> For the text, see 2082nd meeting, para. 36.

<sup>5</sup> See 2057th meeting, footnote 11.

ity of mankind. Moreover, at its thirty-fifth session, in 1983, the Commission had asked the General Assembly to indicate whether it should prepare the statute of a competent international criminal jurisdiction for individuals and had reiterated its request at its thirty-ninth session.<sup>6</sup> Since it had received no reply, the Commission should consider that the question of the jurisdiction of a possible international court and its relations with national criminal jurisdictions remained open.

11. The principle laid down in article 4 was by no means new. It was enunciated not only in the instruments cited by Mr. Francis, but also in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,<sup>7</sup> the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>8</sup> and the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>9</sup> In other words, its validity did not depend on establishing a hypothetical international court. Unfortunately, however, article 4 was not clear-cut about the ways and means of applying the principle. Various intermediate steps had been proposed in the Drafting Committee, more particularly to ensure custody of the criminal, and the Committee had even discussed the order of priority for those steps. Several members of the Committee had been ready in that regard to expand the provisions of article 4 in the light of existing conventions. However, some difficulties had emerged, for instance with regard to the principle of territoriality in paragraph 2, a principle which, it had been said, could not apply to the crime of *apartheid*.

12. He was none the less ready to endorse article 4 in its present form, on the understanding that it would be amplified by subsequent articles. The text had the twofold merit of providing a basis, however narrow, for pursuing the Commission's work, and of not closing the door on an international criminal court, for those who appeared to want such a court.

13. Mr. BENNOUNA said that paragraph 3 would quite obviously disappear, for it merely indicated that the Commission would later consider the possibility of establishing an international criminal court. The best course would be to place the paragraph in square brackets, as suggested by Mr. Eiriksson (2082nd meeting), with an explanation in the commentary that that did not mean that there had been any difference of opinion among members of the Commission.

14. The Chairman of the Drafting Committee had given a perfect picture of the lively discussion in the Committee. Article 4 was indeed difficult in that it assumed problems were resolved when they were not, for example the problem of jurisdiction. The Drafting Committee had preferred not to settle everything immediately, on the understanding that it would revert to matters that were still pending. That was a wise decision, because on further reflection the new proposals the Special Rapporteur would be making at the next ses-

sion, and above all a thorough analysis of the various crimes covered, would definitely make it possible to obtain a better grasp of the ins and outs of the principle the article endeavoured to enunciate.

15. It had already been said that the provision on extradition should be less ambiguous, but it would be premature to try to move further at the present time. Article 4 posed basic problems involving the very concept of crimes against mankind, from the standpoint of universality, of the collective interests of States, of international action to punish such crimes, and so on. For those reasons, he shared Mr. Graefrath's view that article 4 should be provisionally adopted as it stood, that all reservations should be recorded, and that the matter should be taken up again at the next session in the light of the replies by the Special Rapporteur.

16. Mr. ARANGIO-RUIZ said that, after hearing the statement by Mr. Calero Rodrigues, he was convinced that it would be better to delete paragraph 2 and to retain paragraph 1, which enunciated the principle of universal jurisdiction, as well as paragraph 3, possibly in an amended form, for it reserved the question of establishing an international criminal court. The problems of jurisdiction and extradition would be settled in detail in another part of the code.

17. As Mr. Graefrath had pointed out, the question whether the preparation of the statute of an international criminal court formed part of the Commission's mandate had twice been put to the General Assembly, which had not answered. Accordingly, the Assembly intended to leave the matter in the Commission's hands. In his opinion, the preparation of such a statute was an essential element in the drafting of the code. For that very reason he had proposed his amendment to paragraph 3 (para. 1 above), which would reserve the question of establishing an international court without prejudice to the code entering into force. The Commission could at least indicate to the General Assembly that it deemed it advisable to take up the question.

18. Mr. Eiriksson's idea (2082nd meeting) of placing paragraph 3 in square brackets would simply give the impression that some members of the Commission were in any event opposed to the establishment of an international court.

19. Mr. KOROMA said he agreed with the arguments adduced in favour of article 4. It was of little import whether, individually, members approved or did not approve of the idea of a draft code, since the Commission had been instructed by the General Assembly to prepare one: everyone must now do his best to produce the best possible text. Plainly, article 4 could not satisfy everyone, since it was the outcome of a compromise. Its inadequacies could at least not be ascribed to any negligence by the Drafting Committee, which had spent nearly two weeks on the article. The Commission, now that all members had been able to state their views and express their reservations, which the Special Rapporteur would take into account in reviewing the text for second reading, should adopt the text proposed by the Drafting Committee, possibly with the drafting change suggested by Mr. McCaffrey (2082nd meeting, para. 51), namely

<sup>6</sup> See *Yearbook . . . 1987*, vol. II (Part Two), p. 17, para. 67 (c).

<sup>7</sup> United Nations, *Treaty Series*, vol. 860, p. 105.

<sup>8</sup> *Ibid.*, vol. 974, p. 177.

<sup>9</sup> See 2054th meeting, footnote 7.

to replace the words “shall not” by “do not” in paragraph 3. Other amendments—and he himself intended to make some proposals—could be considered on second reading.

20. Paragraph 3 should not be placed in square brackets, because in the practice of the Commission they were a sign of disagreement among members. It would be better to mark the paragraph with an asterisk and add a footnote by the Special Rapporteur explaining that, for the time being, the Commission was setting aside the question of an international criminal court. Since, as already pointed out, the General Assembly had said nothing in that regard and the Commission was better placed than the Assembly to envisage all the consequences of choosing between an international court and universal jurisdiction, the Commission should, at its next session perhaps, take a decision on the matter and make a recommendation, instead of putting the ball back in the General Assembly’s court.

21. Mr. McCaffrey noted that Mr. Francis’s objections to the obligation “to try” were similar to the ideas expressed by Mr. Beesley (2082nd meeting). In that regard, under the terms of a number of conventions, including the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (arts. 6 and 7) and the International Convention against the Taking of Hostages<sup>10</sup> (arts. 6 and 8), the States parties took the necessary steps to ensure the presence of the alleged offender “for the purpose of prosecution or extradition”, and if the person was not extradited, they submitted the case to their “competent authorities for the purpose of prosecution, through proceedings in accordance with [internal] laws”.

22. He had reserved his position on the whole of draft article 4 and, since it seemed to be agreed that more detailed provisions on jurisdiction and extradition would be prepared later, he would suggest that the words “in accordance with the provisions of the present Code” be added at the end of paragraph 1, with an explanation in the commentary that detailed provisions would figure in another part of the code.

23. Mr. BEESLEY said he supported that proposal. Moreover, the Commission should, in his opinion, fall back on that method whenever necessary, for it would avoid extensive debate.

24. On the other hand, the amendment to paragraph 2 proposed by Mr. McCaffrey (2082nd meeting, para. 51), namely to replace the end of the paragraph by the words “in whose territory the crime is alleged to have been committed” was perhaps not adequate, for such a presumption would relate only to the territory and not to the crime. Even if it involved repetition, it would be better to say “the alleged crime”.

25. He was not opposed to the amendment to paragraph 3 proposed by Mr. Arangio-Ruiz, but simply thought that it did not go far enough. The solution he himself advocated was to leave all options open. If that solution was not acceptable, the Commission could in-

form the General Assembly that, failing instructions to the contrary, the Commission took universal jurisdiction as its working premise.

26. Mr. Sreenivasa RAO said that the Commission was reopening the debate on questions already discussed at length in the Drafting Committee. As Mr. Koroma had said, the Commission should adopt the wording proposed, for at the present stage any amendments would raise insoluble difficulties. The arguments on all sides would be found in the summary records of the Commission’s meetings, along with the proposed amendments. The Special Rapporteur would be able to take them into account and, in the commentary, draw the General Assembly’s attention to the major problems that arose, particularly the problem of the establishment of an international criminal court.

27. The ultimate criterion for the draft code was still its acceptability to States. Hence the General Assembly should give the Commission the requisite guidelines to continue its work. The greater the number of controversial elements introduced into the draft, the more difficult it would be for the draft to command acceptance by States: some had always been opposed to it. It was from that standpoint that the members of the Drafting Committee had striven, regardless of personal convictions, to reach agreement on a text. The proposed text of article 4, which represented the lowest common denominator of the various opinions, was necessarily imperfect. It was, nevertheless, the best the Commission could produce and it should now be adopted if the Commission wished to discharge the task assigned to it. He was therefore opposed to any change in the text, whether it was to place some provisions in square brackets or to amend paragraph 3, which in no sense prejudged the position of members of the Commission.

28. It had been suggested that the obligation to try or to extradite should be replaced by an obligation to prosecute or to extradite, in view of certain treaties and provisions of municipal law. In that regard, Prince Ajibola’s comments (2082nd meeting) should be enough to convince the Commission to keep to the present wording, since States might well choose not to try an individual. He also supported Prince Ajibola’s suggestion (*ibid.*, para. 66) to insert the word “either” between the words “shall” and “try” in paragraph 1. The realities of inter-State relations should not be ignored. All too often, nowadays, a State requested to extradite an individual suspected of committing a crime refused to do so. It then took refuge in the fact that it was not obliged to try but simply to prosecute the person in question and the suspect was released on the grounds that it had not been possible to bring sufficient charges against him. The State demanding extradition could then do nothing at all, except pay back in kind when the time came.

29. Clearly, there was no question of compelling States to try an individual without following the usual procedures, but nothing in article 4 prevented those procedures from being observed. If the punishment of persons committing crimes against humanity was not to be an entirely political matter, a text laying down the obligation to try was indispensable. For that reason, article 4, with the amendment proposed by Prince Ajibola, should be adopted.

<sup>10</sup> See 2061st meeting, footnote 6.

30. Cases of more than one request for extradition posed quite thorny problems and, there again, the text proposed by the Drafting Committee for paragraph 2 should be adopted.

31. Mr. AL-BAHARNA said that, in view of the explanations given by the Chairman of the Drafting Committee, he was in favour of article 4 in its present form, as was Mr. Sreenivasa Rao, whose comments he endorsed. The basic principle was obviously that of territorial jurisdiction, but it was essential to make an exception in the case of such odious crimes as those covered by the draft code, and to adopt the system of universal jurisdiction. Paragraph 2 was perhaps not perfect, but it did follow on logically from paragraph 1. In his opinion, it should be adopted on first reading in its present form.

32. He approved of the amendment proposed by Prince Ajibola (2082nd meeting, para. 66), but was against the idea of placing paragraph 3 in square brackets. Indeed, it was to be hoped that the Commission would decide to recommend to the General Assembly the establishment of an international criminal court. He had no objection to Mr. Arangio-Ruiz's proposal for paragraph 3 (para. 1 above), but the time was not right to consider it and the best thing would be for the paragraph to be adopted without change.

33. Having attended the meetings of the Drafting Committee as an observer, he found that members of the Commission took up in detail some arguments they had already advanced at length in the Committee. In such circumstances, would it not be better for the drafting work to be done directly in plenary? The suggestion was not as preposterous as it might seem, if one bore in mind the example of the Third United Nations Conference on the Law of the Sea, at which all the Members of the United Nations had taken part in the drafting of the Convention, which was on a particularly delicate matter.

34. Mr. EIRIKSSON said that he, too, supported Mr. McCaffrey's proposal (para. 22 above) to add the words "in accordance with the provisions of the present Code" at the end of paragraph 1. They seemed essential if the article was to be acceptable.

35. Paragraph 2 would be better placed in another part of the draft.

36. He was anxious to clear up any misunderstanding about his proposal (2082nd meeting, para. 63) to place paragraph 3 in square brackets. He had thought that the commentary could explain that the provision would be maintained only if the Commission failed to agree on the establishment of an international criminal court. If his proposal was not acceptable, there was another possibility, one that Mr. Koroma had brought to mind. Paragraph 3 could be transferred to the commentary, with an indication that the Commission had not yet received clear guidelines on whether to draft provisions on the establishment of an international criminal court, and that, if it had still not elaborated such provisions by the end of its work on the topic, it would incorporate paragraph 3 in article 4 in its present form, but supplemented, in accordance with the proposal made by

Mr. Beesley at the previous session,<sup>11</sup> by the words "or other combined court".

37. Mr. FRANCIS withdrew his proposal concerning the word "try" in paragraph 1 (para. 9 above) and said that he supported Mr. McCaffrey's suggestion (para. 22 above). Since article 4 was in the part of the draft entitled "General principles", it would have sufficed to lay down the obligation to prosecute. The obligation to try had no place in that part of the draft, for it was a matter of jurisdiction. The same was true of paragraph 2. The principle of extradition was already enunciated in paragraph 1.

38. Prince AJIBOLA said that, in the absence of clear instructions from the General Assembly, the Commission had three options: it could confine itself solely to territorial jurisdiction and submit an incomplete set of draft articles to the General Assembly; it could recommend the establishment of an international criminal court; or it could propose either territorial jurisdiction or the establishment of an international criminal court, as preferred. The problems posed by the issues of trial and extradition lay in the vagueness of the Commission's mandate. For example, it would be extremely difficult to ask a national court to try crimes against the peace and security of mankind, since they did not have the legal means to do so. Above all else, the Commission should find out which direction its work was to take. Its task would then be made much easier.

39. The CHAIRMAN, speaking as a member of the Commission, said that the discussion made him even more convinced that the Commission should not refer articles to the Drafting Committee without making a clear-cut decision on the substance.

40. Mr. REUTER, emphasizing that the present discussion called in question not the article under consideration or even the validity of the draft as a whole, but the Commission's reputation and its working methods, paid tribute to the Chairman of the Drafting Committee and the Special Rapporteur for the work they had done. Moreover, an inadequate text was better than no text at all. He urged that article 4 be adopted in its present form.

41. The CHAIRMAN, speaking as a member of the Commission, said that, in principle, he accepted article 4 in the form proposed by the Drafting Committee, not because the text as such was satisfactory but because it represented a compromise solution. Admittedly, the article did raise a number of issues. For example, as Mr. Francis had pointed out, would it not be better to replace the word "try", in paragraph 1, by "prosecute", so as to preserve the principle of the presumption of innocence?

42. With regard to the amendment to paragraph 3 proposed by Mr. Arangio-Ruiz (para. 1 above), he would suggest, but not insist, that it might be better to replace the words "once it is established" by "if one is established". The establishment of an international criminal court was still a hypothetical matter, since the General Assembly had not yet answered the Commis-

<sup>11</sup> See 2059th meeting, footnote 13.

sion's request for clarification and the Commission itself had not taken any decision.

*Mr. Graefrath (First Vice-Chairman) took the Chair.*

43. Mr. THIAM (Special Rapporteur) said that, in his opinion, the Commission should remain true to its tradition and refrain from reopening the debate on texts which were proposed by the Drafting Committee after painstaking work and which the Commission itself had discussed at length beforehand. At the present stage, proposals should be made only on matters of form.

44. The underlying reason for paragraph 1 of article 4 was that the 1954 draft code had simply been a catalogue, an enumeration, of crimes, with no machinery for implementation. Clearly, the Commission's work on the present draft must not be futile: it was essential to be able to implement the code, even in the absence of an international criminal court, although the possibility of such a court was not to be ruled out. Furthermore, a similar provision was found in many instruments, more particularly the 1977 European Convention on the Suppression of Terrorism,<sup>12</sup> the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance,<sup>13</sup> the International Convention against the Taking of Hostages<sup>14</sup> and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Hence paragraph 1 contained nothing new and should be kept as it was. As for adding the phrase "in accordance with the provisions of the present Code", he intended to explain in the commentary that the basic principle laid down in paragraph 1 existed independently of the code, and he would also set out the modalities of implementation in another part of the draft.

45. Mr. Francis's suggestion to replace the word "try", in paragraph 1, by "prosecute" was simply a question of differences between legal systems. In many legal systems it was possible to prosecute (*poursuivre*) without trying (*juger*), but impossible to try without prosecuting. The two concepts were separate. Hence, in the French text at least, the word *juger* would have to be used.

46. As far as paragraph 2 was concerned, originally he had not submitted any such text, but at the request of some members he had later proposed an article containing a list of jurisdictions classed in order of preference. In the absence of agreement on the list or the order, the Drafting Committee had simply indicated that priority should be given to the principle of territoriality, at least in some cases. It was for that reason that paragraph 1 enunciated the *aut dedere aut judicare* principle, and paragraph 2 the principle of territorial jurisdiction. All would be explained in other provisions of the draft. Accordingly, paragraph 2 could be adopted as it stood. The establishment of a list of jurisdictions or an order of preference was a question that could be examined later, if necessary.

47. As to paragraph 3, he too would like an international criminal court to be established, but account must be taken of realities. It was even his intention to submit a draft statute for an international criminal court. Paragraph 3 should not be placed in square brackets, nor should it be altered. The commentary would, if necessary, explain the reasons that warranted the establishment of an international court.

48. Naturally, the commentary would reflect the various proposals made, concerning both form and substance.

49. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said the discussion clearly showed that article 4 was truly a consensus text and that it reconciled various schools of thought. The debate also revealed the need to incorporate in the draft at a later stage a part on implementation of the general principles of the code, particularly with regard to jurisdiction and extradition.

50. The proposal to insert the word "either" before the words "try or extradite" in paragraph 1 was acceptable, since the basic idea was that an individual charged with a crime against the peace and security of mankind should not be in a position to escape justice. Mr. McCaffrey's proposal (para. 22 above), supported by Mr. Beesley and Mr. Eiriksson, to add the words "in accordance with the provisions of the present Code" at the end of the paragraph was also in keeping with the spirit of the provision, but it did not really seem necessary to alter the text. The commentary could say that it was a general principle which would be spelled out in greater detail and thereby made effective elsewhere. Another proposal had been to place the word "try" in square brackets. The meaning of that word should be taken as *sui generis* and not as referring to any legal system in particular. It would therefore be better to retain the word, on the understanding that its meaning was broad and covered the notion of "prosecution" in the case of countries that drew a distinction between "trying" and "prosecuting".

51. With regard to the two proposals concerning paragraph 2, the best course would be to state in the commentary that some members supported the proposal to delete the paragraph, whereas the majority wished to retain the provision at the present stage. The drawback of the other proposal, made by Mr. McCaffrey (2082nd meeting, para. 51), namely to replace the end of the paragraph by the words "in whose territory the crime is alleged to have been committed", was that it emphasized the territorial side of the matter, as Mr. Beesley had pointed out. It would be noted that article 8, paragraph 1, of the International Convention against the Taking of Hostages spoke of the "alleged offender", but went on to say that the "State Party . . . shall . . . be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". It therefore seemed superfluous to specify in paragraph 2 of draft article 4 that sentence had not been handed down and that the matter was still at the stage where charges were brought.

52. The word "do", instead of "shall", was acceptable in paragraph 3, since the provision was a factual

<sup>12</sup> See 2057th meeting, footnote 11.

<sup>13</sup> OAS, *Treaty Series*, No. 37 (1971), p. 6.

<sup>14</sup> See 2061st meeting, footnote 6.

proposition and not a legal command. On the other hand, the paragraph would be weaker if placed in square brackets, as Mr. Arangio-Ruiz, Mr. Koroma and Mr. Sreenivasa Rao had already said. The proposal to replace the words "shall not prejudice" by "are without prejudice to" could be mentioned in the commentary, without reopening the debate at the present stage. The advantage of the text in its present form was that the question was left pending. Lastly, a proposal had been made to add an asterisk to indicate that the paragraph would be deleted once the question of the establishment of an international criminal court was settled. It would be better to give that explanation in the commentary, since it could be a source of confusion to fall back on unusual methods. In short, paragraph 3 should be retained in its present form, the only change being to replace the word "shall" by "do".

53. Mr. McCaffrey said that he reserved his position, but was not opposed to the Commission adopting article 4.

54. Mr. Eiriksson said that he looked forward with interest to the explanations to be given in the commentary to paragraphs 1 and 3. The Commission had already used footnotes in its report in 1987: paragraph 3 should be accompanied by a footnote stating that the paragraph would not appear in the draft if the Commission prepared the statute of an international criminal court.

55. Mr. Tomuschat (Chairman of the Drafting Committee) said that he would prefer it if only the commentary was used.

56. The Chairman suggested that a footnote should be used only if the commentary proved inadequate.

57. Mr. Eiriksson said that he would like the reservation he had just expressed recorded in a footnote, which could be deleted if the commentary was adequate.

58. Mr. Francis explained that his objections were not to the substance, but only to the form, of article 4. With regard to the words "try" and "prosecute", the Special Rapporteur had been right to cite article 8 of the International Convention against the Taking of Hostages: at the drafting stage, the Commission should keep closely to the texts of conventions that had been adopted in the United Nations system and were in force. He proposed that draft article 4 should be adopted after making more stringent changes in form to take account of the fundamental reservations expressed.

59. Mr. Arangio-Ruiz suggested that the Commission should state in its report to the General Assembly and in the commentary to article 4 that, without prejudice to the principle of universal jurisdiction enunciated in paragraph 1, it would not consider that it was exceeding its mandate by preparing the statute of an international criminal court and that it would not be wrong in placing such an interpretation on the General Assembly's silence regarding the Commission's questions on that point.

60. The Chairman said that those explanations would be given in the report to the General Assembly and in the summary record of the meeting.

61. Mr. Beesley said that, although he did have some reservations regarding article 4, he would not object to it being adopted, in view of the quite broad interpretation placed on the term "try". Moreover, he interpreted the statements by the Special Rapporteur and the Chairman of the Drafting Committee as a guarantee that the principles in question would be applied in the rest of the code, in accordance with the provisions already adopted.

62. The Chairman proposed that the Commission should provisionally adopt article 4, on the understanding, first, that the words "try or extradite", in paragraph 1, would be replaced by "either try or extradite"; secondly, that the word "shall", in paragraph 3, would be replaced by "do"; thirdly, that the commentary and the summary record of the meeting would record the reservations regarding both substance and form made in the course of the discussion; and fourthly, that paragraph 3 would be accompanied by a footnote along the lines indicated, but that the footnote would be deleted if the commentary were deemed adequate.

*It was so agreed.*

*Article 4 was adopted.*

#### ARTICLE 7 (*Non bis in idem*)

63. Mr. Tomuschat (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 7,<sup>15</sup> which read:

##### *Article 7. Non bis in idem*

[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the acts which were the subject of a trial and judgment as an ordinary crime correspond to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, a State may try and punish an individual:

(a) if the acts which were the subject of the judgment of the foreign court took place in its own territory;

(b) if that State has been the main victim of the crime.

5. Where an individual is convicted of a crime under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

<sup>15</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), p. 10, footnote 25 and paras. 37-39.

64. Since the *non bis in idem* principle was recognized in practically all legislations for all categories of offences, the Drafting Committee had seen no need in the present context to deal with the implementation of the principle at the national level, particularly as article 14, paragraph 7, of the International Covenant on Civil and Political Rights established a widely accepted international standard in that respect. Accordingly, that aspect was not covered in the text of draft article 7.

65. Paragraph 1 dealt with the effects of the *non bis in idem* principle in relation to judgments rendered at the international level. Under the paragraph, the principle would apply without exception: in other words, a person having been convicted or acquitted by an international court for a crime under the code would not be liable to be tried again by any court for the same crime. The paragraph was, of course, predicated on the existence of international judicial machinery. It had therefore been placed in square brackets to indicate that the Commission would have to revert to it once a decision was reached on that question. It should be noted in that connection that the expression "international criminal court" left open the possibility of a number of such courts, functioning at the regional level or dealing with specific categories of crimes under the code. The word "acquitted" applied only to decisions on the substance of a case: dismissal of a charge on procedural grounds would not qualify as an acquittal under paragraph 1.

66. In drafting paragraphs 2, 3 and 4, the Drafting Committee had been guided chiefly by two considerations. The first was that the reasons underlying the recognition of the *non bis in idem* principle in most internal legal systems militated in favour of introducing it into the international legal system. The second was that, according to the prevailing view both in the Commission and in the General Assembly, general international law did not impose an obligation on States to recognize the validity of a judgment delivered by a foreign State on criminal matters. As a result, the Committee, while making in paragraph 2 an attempt at progressive development of the law, had in subsequent paragraphs identified exceptions to the *non bis in idem* principle that were necessary if article 7, and the code as a whole, were to have any chance of being accepted by States.

67. Paragraph 2 dealt with the operation of the *non bis in idem* principle as between several legal systems. Like the text originally proposed by the Special Rapporteur for paragraph 1, paragraph 2 drew on article 14, paragraph 7, of the International Covenant on Civil and Political Rights, subject to a number of adjustments required by the present context. The opening words indicated the limits within which the principle applied in the framework of the code; the concept of an "offence" had been reformulated for the purposes of the code; and the reference to "the law and penal procedure of a State" had been replaced—again to meet the requirements of the context—by the words "a national court". The concluding proviso explained that the operation of the *non bis in idem* principle as between several legal systems was conditional upon actual enforcement of any punishment imposed.

68. Paragraph 3 dealt with the first kind of exception to the *non bis in idem* principle, namely situations in which an act qualified as an ordinary crime in a given State corresponded to one of the crimes characterized in the code. A classic example was that of acts initially characterized as murder, but later corresponding to the definition of genocide. In such a situation, the individual concerned would be liable to be tried again by a national court or, as the case might be, by an international criminal court. The expression "may be tried" meant that the provision did not involve an obligation. The square brackets around the words "by an international criminal court or" did not reflect any disagreement in the Drafting Committee, but merely indicated the tentative character of that aspect of the text. As the opening words showed, paragraph 3 was intended to apply only within the general limits fixed in paragraph 2. Lastly, paragraph 3 was without prejudice to the principle of non-retroactivity enunciated in draft article 8.

69. Paragraph 4 covered a second type of exception, the idea being that a State in whose territory a crime against the peace and security of mankind was committed or which was the main victim of such a crime had a special interest in the punishment of the perpetrator. The paragraph therefore provided that the *non bis in idem* principle did not prevent the State in which the crime was committed or the victim State from bringing criminal proceedings on the basis of acts which had already been the subject of a judgment by a foreign court.

70. Some members of the Drafting Committee had been of the view that, at the present stage, paragraph 4 should have been placed in square brackets, for the possibility of adding a draft article on priority of jurisdiction among States had not been ruled out. In their opinion, the question might conceivably be settled as part of the treatment of the *non bis in idem* principle, which would necessitate a second look at paragraph 4. However, the majority view in the Committee was that, whatever system the code might establish in the matter of priority of jurisdiction, the principle of territoriality, which was universally recognized, would undoubtedly be one of the essential features.

71. Paragraph 5 embodied a principle which was contained in a number of recent regional conventions and was applied in many legislations in the form of a rule whereby periods spent in confinement awaiting trial were deducted from the sentence ultimately imposed. The rule formulated in the paragraph was intended to apply to judgments by both national and international courts.

72. Further to comments made by Mr. Barboza (2082nd meeting) regarding inconsistencies in terminology, such as the use of the word "crime" in article 4, paragraph 2, and of "act" in various paragraphs of article 7, he explained that the term "act" was an objective concept, namely something a person had done, whereas the term "crime" implied a legal characterization. Until the person concerned was convicted, it was preferable to speak of an "act" so as to leave room for the presumption of innocence. The only inconsistency was that the word "act" was used sometimes in the singular and sometimes in the plural.

73. Mr. THIAM (Special Rapporteur) suggested that, in the French text of paragraph 5, the word *acte* should be replaced by *fait*, which could designate either an act or an omission.

74. Prince AJIBOLA proposed that the expression "liable to be", in paragraph 1, should be deleted, and the word "act", in paragraphs 2 and 3, replaced by "alleged crime". In addition, in paragraph 2, the words "and sentenced" should be inserted after "convicted" and the words "has been enforced or" should be deleted. In paragraph 4, the words "and punish" should be deleted and the word "valid" should be inserted before "judgment". Lastly, the second part of paragraph 5 should be amended to read: "shall deduct any period of detention pending trial . . .". He would explain the reasons for those proposals later.

*The meeting rose at 1 p.m.*

## 2084th MEETING

*Thursday, 21 July 1988, at 3.05 p.m.*

*Chairman:* Mr. Bernhard GRAEFRATH

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, 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. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.422)

[Agenda item 5]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

##### ARTICLE 7 (*Non bis in idem*)<sup>4</sup> (*continued*)

1. Mr. McCaffrey said that he endorsed the principle of article 7, but wished to comment on specific

points. The title, *Non bis in idem*, conveyed a legal concept that was widely recognized but would not be readily understood in many countries, including his own, where the term "double jeopardy" was normally used.

2. Paragraph 1 was extremely important, as it provided for an exception to the remainder of the article: if someone had been convicted or acquitted by an international criminal court, he could not be tried again, even under the conditions specified in paragraphs 3 and 4. But paragraph 1 did not specify what constituted an international criminal court. Presumably, therefore, a small group of States could decide to call itself an international criminal court for the purpose of exonerating a particular individual. As the Commission certainly did not intend to allow fake trials, it might wish to specify in the commentary that the international criminal court it had in mind was one that was accepted by the international community or by the parties to the code.

3. He agreed that it was too early to deal with the subject addressed by paragraph 4, namely jurisdiction and priorities. The sort of exception to the *non bis in idem* principle for which it provided might open the door to abuse, especially in the highly volatile circumstances surrounding an alleged crime against the peace and security of mankind. He would therefore reserve his position on paragraph 4, pending further refinement of the draft.

4. Mr. BARBOZA said that he accepted the explanation given by the Chairman of the Drafting Committee (2083rd meeting) for the use of the word "acts" in article 7, paragraph 4 (*a*), and had noted the Special Rapporteur's statement (*ibid.*) that, in the French text of paragraph 5, the word *acte* would be replaced by *fait*. He was still uncomfortable, however, with the wording of paragraph 2. To say that "no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted" made no sense. An individual was convicted or acquitted not in respect of an act, but of an act characterized as a crime under the relevant legislation. Of course, a given act could be characterized differently in different national laws and in the draft code. But the wording of paragraph 2 should be amended in the interests of clarity: he would suggest that, in French, the word *fait* be replaced by *fait réputé un crime*, and that, in English, the word "act" be replaced by "act considered a crime".

5. He could not understand why paragraph 1 of article 7 had been placed in square brackets but paragraph 3 of article 4 had not: he would appreciate an explanation.

6. Mr. TOMUSCHAT (Chairman of the Drafting Committee) explained that the title of article 7 had been chosen on the advice of the English-speaking members of the Drafting Committee, but he saw no reason why it should not be changed if that would make it more easily understandable: he would welcome suggestions. The Spanish title, *Cosa juzgada*, had been chosen precisely because the use of the Latin phrase had been deemed inappropriate.

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>4</sup> For the text, see 2083rd meeting, para. 63.

7. In response to the numerous questions raised by Prince Ajibola (2083rd meeting), he would simply point out that the Drafting Committee had chosen to follow the wording of article 14, paragraph 7, of the International Covenant on Civil and Political Rights in order to keep the number of new formulations to a minimum, and that the rule set out in paragraph 5 of draft article 7 was based on the provisions of several recent treaties.
8. As to Mr. McCaffrey's concern that a number of States might claim to form an international criminal court in order to exonerate a particular individual, it should be explained in the commentary that an international criminal court within the meaning of article 7 was not one that had been constituted in an arbitrary manner.
9. The reason why square brackets had been placed around paragraph 1 was that it *presupposed* the establishment of an international criminal court: paragraph 3 of article 4 merely indicated that other provisions were *without prejudice* to the establishment of such a court.
10. With regard to Mr. Barboza's drafting suggestion for paragraph 2, he really did not see any flaw in the present English text. It was perfectly reasonable for an individual to be tried for an act: the act actually constituted the material object of the prosecution. There might be a problem with the French text, however.
11. A number of drafting inconsistencies could be attributed to the fact that the Commission was working on the basis of a dual hypothesis: the establishment of universal jurisdiction and of an international criminal court. As neither of those issues had yet been resolved, the Commission was bound to have difficulties in merging two working assumptions in a single, readable text.
12. As to the amendment to paragraph 4 submitted informally by Mr. Eiriksson, he did not see that it presented any advantage over the text proposed by the Drafting Committee. He believed that the only drafting change that should be made to article 7 was the replacement of the words "acts which were" by "act which was" in paragraphs 3 and 4 (a).
13. The CHAIRMAN, speaking as a member of the Commission, said that he had understood Mr. Eiriksson's amendment to be aimed at concordance between paragraph 4, which said that "a State may try and punish an individual", and paragraph 3, which said that "an individual may be tried and punished".
14. Mr. THIAM (Special Rapporteur) said that that had also been his interpretation of the purpose of Mr. Eiriksson's amendment.
15. As to Mr. Barboza's objection to the use of the term *fait* in paragraph 2, he agreed in principle; but there would be cases—in article 12 on aggression for example—where the term *crime* could not be used and *fait* would be preferable, since it would be for the judge to decide whether the act was a criminal act or not.
16. Mr. AL-BAHARNA suggested that an attempt should be made to provide an alternative title in English, even if only in parentheses.
17. Paragraph 2 could be greatly improved, and made symmetrical with paragraph 1, by deleting the confusing and superfluous phrase "provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced": the preceding phrase, "finally convicted or acquitted", already implied that punishment had been imposed and had been enforced or was in the process of being enforced.
18. Mr. BARBOZA said that he still could not accept the present wording of paragraph 2. To say that a person had been convicted or acquitted "in respect of an act" did not make legal sense: people were convicted of crimes, not acts, and that applied equally to the word *fait* in the French text and the word *hecho* in the Spanish text.
19. Mr. McCAFFREY said that he agreed. As to the title of the article, he had not proposed any amendment, but had only made the point that the expression *non bis in idem* would not be understood in his country. If the title was acceptable to the Drafting Committee, however, he was prepared to accept it.
20. He inquired why the word "again" had been omitted after the words "tried or punished" in paragraph 1, although it appeared in article 14, paragraph 7, of the International Covenant on Civil and Political Rights. He did not think the word was indispensable in the context, but only wondered whether the omission was intentional.
21. The CHAIRMAN explained that the word "again" had indeed appeared in the original text of draft article 7, but had been deleted at the suggestion of the English-speaking members of the Drafting Committee, who had considered it unnecessary.
22. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Eiriksson's amendment to paragraph 4, which was intended to bring the language into line with that of paragraph 3, was acceptable subject to the insertion of the words "for a crime under this Code" after the word "punished".
23. Replying to Mr. Al-Baharna's comment concerning the proviso at the end of paragraph 2, he said that the proviso had been included because a formal conviction and sentence without the firm intention to punish were not considered to be enough: a test of seriousness was required, and enforcement provided such a test. The wording of the proviso, as he had explained in his introductory remarks (2083rd meeting), was modelled on a recent convention adopted by the 12 States members of EEC. On the point made by Mr. Barboza and endorsed by Mr. McCaffrey, he personally could see no flaw in the wording of paragraph 2, although he admittedly was not a criminal lawyer.
24. Prince AJIBOLA said that he was opposed to the use of any term other than "crime" in the draft code. The expression "alleged crime" could be employed if necessary, but any other term would weaken the text and cause confusion. He also questioned the references to trial: it would be more logical to speak of prosecution.
25. The CHAIRMAN said that the language used was modelled on that of the International Covenant on Civil

and Political Rights, an instrument which had been ratified by 87 States. An appropriate explanation would be provided in the commentary. The point raised by Mr. Barboza with regard to paragraph 2 would be duly included in the summary record of the meeting and could be taken up again on second reading.

26. Mr. MAHIOU, replying to a point raised by Prince AJIBOLA, suggested that the text of paragraph 5 might be made more explicit by including a reference to the exceptions to the *non bis in idem* principle provided for in paragraphs 3 and 4.

27. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he had some misgivings about that proposal, since the rule laid down in paragraph 5 should apply to an international criminal court as well. Perhaps, therefore, the paragraph should be retained as it stood.

28. Mr. McCAFFREY, referring to paragraph 2, suggested that, to take account of Mr. Barboza's point that a person was convicted or acquitted not of an act, but of a crime, the word "for", in the phrase "for a crime under this Code", should be replaced by "on the basis of", and the words "of a crime" should be added before "by a national court". He would not press for that amendment if it was not acceptable, but would like it to be recorded in the summary record.

29. Mr. THIAM (Special Rapporteur) said that he could not accept that amendment if it was intended to apply to the French text of paragraph 2 as well.

30. Mr. AL-BAHARNA said that he, too, would prefer paragraph 2 to stay as it was. The addition of the words "of a crime", as suggested by Mr. McCaffrey, would be repetitive, since the paragraph already contained the phrase "tried or punished for a crime", and it was implicit in the word "acquitted" that the person acquitted had been acquitted of a crime. Besides, if the amendment were adopted, a similar change would have to be made to paragraph 1, where the same words were used.

31. Prince AJIBOLA said that he would like the Special Rapporteur to re-examine the wording of paragraph 5 and to consider adding the words "paragraphs 3 and 4 of" before "this Code", to establish the necessary link between paragraph 5 and the matters to which it was directed. Paragraph 1 made the unequivocal statement that no one could be tried or punished for a crime under the code for which he had already been finally convicted or acquitted by an international criminal court, and indeed the very essence of the *non bis in idem* principle was that no one could be punished twice for the same crime. Hence paragraph 5, as drafted, did not seem very logical.

32. Mr. THIAM (Special Rapporteur) said the idea behind the text was that the *non bis in idem* rule could not be invoked before an international criminal court, but only before a national court. The former could retry a person if it deemed it necessary or if the case was referred to it. The word "deduct" in paragraph 5 presupposed that there had been another trial. To meet Prince Ajibola's point, therefore, the words "passing judgment for a second time" could perhaps be added after "the court".

ment for a second time" could perhaps be added after "the court".

33. Mr. MAHIOU said that, although he had said he would not press for his amendment, in the light of the discussion he thought it would meet the objections raised by Prince Ajibola, and would not prevent the international criminal court from passing judgment, since the jurisdiction of such a court was recognized in paragraph 3 of article 7.

34. The CHAIRMAN suggested that the Commission should adjourn briefly to allow informal consultations to take place.

*The meeting was adjourned at 4.30 p.m. and resumed at 5 p.m.*

35. Mr. THIAM (Special Rapporteur) said that, in the light of the consultations he had held with the Chairman and the Chairman of the Drafting Committee, he suggested that paragraph 5 of draft article 7 should be reworded to read:

"Where an individual is convicted of a crime against the peace and security of mankind, any court trying such an individual a second time under this Code shall, in passing sentence, deduct any penalty imposed and implemented as a result of a previous conviction for the same act."

36. Mr. RAZAFINDRALAMBO suggested that the words *saisi une deuxième fois*, in the French text, should be replaced by *saisi en deuxième lieu*.

37. Prince AJIBOLA suggested that the words "any court trying such an individual a second time under this Code" in the new text should be replaced by "any court subsequently trying such an individual under this Code".

38. Mr. THIAM (Special Rapporteur) said that, to bring the French text into line with that amendment, and also to take account of Mr. Razafindralambo's proposed amendment, the words *saisi une deuxième fois* could be replaced by *statuant en deuxième lieu*.

39. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he found none of the proposals entirely satisfactory. The best solution, therefore, would be for a new text of paragraph 5 to be drafted for consideration by the Commission at its next meeting.

40. Mr. BARSEGOV appealed to members to agree to article 7 in principle and not to get bogged down in the trivia of drafting.

41. Mr. AL-BAHARNA suggested that, to avoid any further discussion on article 7, the Commission should adopt the article, subject to consideration of a revised text of paragraph 5 at the next meeting.

42. Mr. EIRIKSSON said that he would prefer not to adopt article 7 at the present stage, since his understanding of the effect of paragraph 2 differed from that of the Chairman, the Chairman of the Drafting Committee and the Special Rapporteur, and he would like to revert to the paragraph at the next meeting.

43. The CHAIRMAN suggested that the Commission should adjourn its discussion on article 7, on the understanding that it would have a revised text before it at the next meeting.

*It was so agreed.*

#### ARTICLE 8 (Non-retroactivity)

44. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 8,<sup>5</sup> which read:

##### *Article 8. Non-retroactivity*

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

45. Article 8 as proposed by the Special Rapporteur had consisted of two paragraphs. Paragraph 1 had met with general approval, but paragraph 2 had given rise to divergent views in plenary. The Drafting Committee had tried to overcome the difficulty by redrafting paragraph 1 in such a way as to render paragraph 2 unnecessary. It had come to the conclusion, however, that it was preferable to retain the present structure of the article.

46. Paragraph 1 laid down the fundamental principle of criminal law, *nullum crimen sine lege*. The Drafting Committee had decided that, in defining the scope of the paragraph *ratione materiae* as well as *ratione temporis*, the point of reference should be the code itself, rather than crimes against the peace and security of mankind. It had therefore deleted the phrase “which . . . did not constitute an offence against the peace and security of mankind”, in the previous text, and inserted instead the words “under this Code”. It had also replaced the reference to the time of commission of the crime by a reference to the time of entry into force of the code. The phrase “No person may” had been replaced by “No one shall”, which was the expression used in the corresponding provisions of various international instruments, including article 11, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. The Drafting Committee had replaced, in both paragraph 1 and paragraph 2, the words “act or omission” by the word “act”, on the understanding that, at a later stage, a provision would be included to indicate that the word “act” covered both acts and omissions. Should that approach be approved by the Commission, a corresponding change would have to be made in articles 2 and 3, provisionally adopted at the previous session.<sup>6</sup>

47. With regard to paragraph 2, the Drafting Committee had been guided by two essential considerations. On the one hand, it had wished to ensure that article 8 would not operate as a bar to the prosecution of crimes committed prior to the entry into force of the code but punishable at the time of their commission on a basis other than that of the code. On the other hand, the Committee had been concerned that paragraph 2 should not give a free licence for the prosecution of acts whose criminal nature did not rest on a solid legal basis. The Drafting Committee had considered that the phrase “criminal according to the general principles of law recognized by the community of nations”, in the previous text, lacked the precision necessary in a penal instrument. It had therefore replaced that phrase by the words “criminal in accordance with international law or domestic law applicable in conformity with international law”. The first part of that phrase was self-explanatory; the second part was intended to cover the many instances in which States, prior to the entry into force of the code, had already made one of the acts dealt with therein punishable as a crime against the peace and security of mankind under their national legislation. That possibility was safeguarded under the proposed new text, subject, however, to the national legislation in question being in conformity with international law.

48. Finally, in the English text of paragraph 2, the words “shall prejudice” had been replaced by “shall preclude”, which more accurately translated the French *s'oppose*.

49. Mr. AL-BAHARNA said that he would like to have an explanation of the reference in paragraph 1 to acts committed before the “entry into force” of the code. In national legal systems, legislative enactments entered into force as from their publication in the official gazette, or as from a time specified in the legislation itself. The code, however, would become an international convention whose entry into force would depend on a certain number of ratifications being filed with the depositary. Problems could thus arise with regard to crimes committed on the date on which the last required ratification was received, or just before. He would welcome an explanation from the Chairman of the Drafting Committee.

50. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the problem was a complex one and it was easier to ask questions about it than to answer them. It was true that the entry into force of international instruments depended on the depositary receiving the requisite number of ratifications. It had to be remembered, however, that for each State party, the treaty would be binding only as from the date of its acceptance by that State. The fact that the date of entry into force of the instrument would not be the same for all the parties raised very difficult problems. Members of the Commission might have different views on the legal force of the future code with respect to the various States parties. Some would hold that the rule *res inter alios acta* applied. His own view was that, under the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, there would be different dates of entry into force for different States parties. The Commission could not possibly solve those difficult problems at the present juncture.

<sup>5</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 10-11, footnote 16 and paras. 40-43.

<sup>6</sup> *Ibid.*, p. 14.

51. It should be remembered, however, that many of the provisions of the code would be translated into national criminal codes, in which case no problem would arise regarding entry into force. States would be free to prosecute for any of the acts covered by the code under their national legal systems.

52. The CHAIRMAN said that the Commission was not dealing at the present stage with the question of the entry into force of the code.

53. Mr. McCAFFREY drew attention to a point regarding article 8, paragraph 1, which was similar to that raised by Mr. Barboza with regard to article 7, paragraph 2. He thought the formula "convicted under this Code for acts committed . . ." should read "convicted under this Code of a crime based on acts committed . . .". He would not propose any change of wording at the present stage, but wished the point to be taken up later.

54. Prince AJIBOLA suggested that the concluding phrase of paragraph 2 of article 8, "or domestic law applicable in conformity with international law", could be conveniently deleted. There was no need for the code to validate the domestic law of a country. The State concerned could prosecute the crime whether that passage was included or not.

55. Mr. THIAM (Special Rapporteur) said that the provisions of article 8 drew attention to the need for a State, in prosecuting an offender, to observe certain principles of international law.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) stressed that most of the crimes included in the draft code were already punishable under national criminal codes. For example, most national codes made provision for the punishment of war crimes. The rule in paragraph 1 of article 8 should not be interpreted as a bar to prosecution in national courts before the code entered into force.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 8.

*Article 8 was adopted.*

#### ARTICLE 10 (Responsibility of the superior)

58. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10,<sup>7</sup> which read:

##### *Article 10. Responsibility of the superior*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

59. Article 10 was modelled on article 86, paragraph 2, of Additional Protocol I<sup>8</sup> to the 1949 Geneva Conventions. Its purpose was to hold a superior responsible for acts by his subordinate. Since it was clear that there was no intention to depart from article 86 of Additional Protocol I, certain linguistic changes had been made to the previous text of article 10 to bring it closer to that article. For example, the word "possessed" before "information" had been changed to "had" and the word "practically" before "feasible" had been deleted.

60. Two points of substance had, however, been discussed in the Drafting Committee. It would be observed that there were two distinct requirements in article 10 for holding a superior responsible. The first was knowledge of a crime being committed, or going to be committed, by a subordinate. That requirement had two elements: the information itself and the fact that it would lead to such a conclusion. The words "if they knew or had information enabling them to conclude" were intended to convey those two aspects of the knowledge requirement. The words "enabling them to conclude" did not exactly correspond to the wording of article 86, paragraph 2, of Additional Protocol I. The reason was that the French and English texts of that paragraph differed slightly: the French text read *leur permettant de conclure*, while the English text read "should have enabled them to conclude". Thus the English text appeared to extend the scope of that indirect kind of responsibility much further than the French. The Drafting Committee had decided to follow the French text, on the understanding that the commentary to article 10 would explain that there had been no intention to depart from the connotation attributed to article 86, paragraph 2, of Additional Protocol I. The commentary would also indicate that the requirement of knowledge meant that the information received by the superior must be sufficient to support the conclusion that the subordinate was committing or was going to commit a crime; there was no need for the superior actually to have drawn such a conclusion. If he had not taken the trouble to read the reports containing the information, or if he had read them but had not drawn the appropriate conclusion although the information contained all the elements necessary to indicate the punishable nature of the act, the superior would not be relieved of criminal responsibility.

61. The second requirement for holding a superior responsible was his power to stop the subordinate committing the crime. The Drafting Committee had again encountered ambiguities relating to that requirement. It was not clear whether the notion of power was limited to physical power, such as practical means or feasible measures to stop the commission of the crime, or also included the legal power or competence of the superior to restrain his subordinate. The Drafting Committee had considered that the article should set out both criteria: the superior must have legal competence to stop the subordinate committing the crime and, in addition, the practical means of doing so. The words "feasible measures within their power" were intended

<sup>7</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, *ibid.*, p. 12, footnote 36 and paras. 56-57.

<sup>8</sup> See 2054th meeting, footnote 9.

to emphasize that both criteria must be met; those words were also used in article 86, paragraph 2, of Additional Protocol I. The Drafting Committee had considered that it should be explained in the commentary that power had two facets: a factual one and a legal one.

62. The title of article 10 had not been changed.

63. Mr. McCAFFREY congratulated the Special Rapporteur and the Drafting Committee on an excellent article, which dealt felicitously with many difficult points.

64. He noted that the expression "criminal responsibility" was used, although article 10 did not identify the nature of that responsibility. Was it responsibility under the code or under national law? Perhaps it would be better to replace the words "criminal responsibility" by "responsibility under this Code", which would be consistent with article 3, provisionally adopted by the Commission at its thirty-ninth session.<sup>9</sup>

65. Mr. EIRIKSSON supported that suggestion.

66. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the point had not been discussed in the Drafting Committee. There would be no change of substance if the words "criminal responsibility" were replaced by "responsibility under this Code".

67. The CHAIRMAN pointed out that article 10 did not deal with any other kind of responsibility, so that the expression "criminal responsibility" was clear. He suggested that the text should remain as it stood.

*It was so agreed.*

*Article 10 was adopted.*

ARTICLE 11 (Official position and criminal responsibility)

68. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11,<sup>10</sup> which read:

*Article 11. Official position and criminal responsibility*

**The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.**

69. Article 11 was designed to draw attention to the fact that the official position of an individual who committed a crime under the code could not relieve him of criminal responsibility. Even in cases where the individual had the highest official position, such as head of State or Government, he would remain criminally responsible.

<sup>9</sup> See footnote 6 above.

<sup>10</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), p. 12, footnote 38 and paras. 58-61.

70. Article 11 was based on Principle III of the Nürnberg Principles.<sup>11</sup> It would be noted that the word "perpetrator", in the previous text, had been replaced by "individual", in line with the wording of article 3, as provisionally adopted by the Commission.<sup>12</sup> In the French text, the word *auteur* had been maintained, since it corresponded with the French text of article 3 and with the new English wording of article 11. To remove any ambiguity, it would be explained in the commentary that *auteur* was a broad term which included the individual who committed a crime, co-conspirators and accomplices, etc., and was not limited only to the original author of the crime.

71. It would be noted that article 11 was drafted in the present tense, whereas Principle III of the Nürnberg Principles was drafted in the past tense. The Drafting Committee had taken the view that, since article 11 addressed many situations likely to arise in the future—unlike the Nürnberg Principles, which looked essentially to the past—it should be drafted in the present tense.

72. Two principles were expressed in article 11. The first was that the official position of a person accused of a crime under the code did not remove him from the scope of application of the code, even if his position was head of State or Government. Hence there would be no immunity from the application of the code due to the position of the accused. The second principle was that a plea by the accused that he had acted in the performance of his official functions would not exonerate him from criminal responsibility. That was really the very essence of the code: to pierce the veil of the State and prosecute those who were materially responsible for crimes committed on behalf of the State as an abstract entity. The words "the fact that he is a head of State or Government", in the previous text, had been amended to read: "the fact that he acts as head of State or Government", so as to underline that the code focused on the time of commission of a crime.

73. The Drafting Committee had agreed that the commentary should elaborate on the two principles expressed in article 11 and on its purpose, so as to leave no ambiguities that might lead to misinterpretation.

74. The title of the article had been amended so as to correspond more closely to its content.

75. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 11.

*Article 11 was adopted.*

76. The CHAIRMAN said that it would not be advisable for article 12 to be introduced at that point, since the Commission would not have time to discuss it, and members should have the introduction fresh in their minds when they did so. He suggested that the little time remaining at the present meeting should be used by an

<sup>11</sup> See 2053rd meeting, footnote 8.

<sup>12</sup> See footnote 6 above.

informal group to prepare a redraft of paragraph 5 of article 7 for submission to the Commission at the next meeting.

*It was so agreed.*

*The meeting rose at 5.55 p.m.*

## 2085th MEETING

*Friday, 22 July 1988, at 10 a.m.*

*Chairman:* Mr. Bernhard GRAEFRATH

*later:* Mr. Ahmed MAHIU

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (concluded)** (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.422)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(concluded)

ARTICLE 7 (*Non bis in idem*)<sup>4</sup> (concluded)

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that a decision on paragraph 5 of article 7 had been left over from the previous meeting. An informal working group had redrafted that paragraph in French and, subject to possible stylistic changes, the English text would read:

“5. In the case of a new conviction under this Code, any court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.”

The main elements of the previous text had been retained, but the emphasis was now placed on the fact that the rule would apply in cases of new convictions.

2. Prince AJIBOLA suggested the alternative wording:

“5. In the case of a new conviction under paragraphs 3 and 4 of this article, any court, in

passing sentence, shall take into consideration any term of imprisonment already served as a result of a previous conviction for the same crime.”

He had deliberately used the term “crime” instead of “act” because, once there was a conviction, the word “act” was no longer appropriate. He had also changed the unnecessarily lengthy formula “penalty already imposed and implemented” to “term of imprisonment already served” and introduced a reference to paragraphs 3 and 4 of article 7. Paragraph 5 applied to those paragraphs alone and not to the whole of article 7.

3. Mr. BEESLEY, referring to the amendment proposed earlier for paragraph 4 (a), asked whether the new formula “a national court of another State” was intended to be analogous to the expression “foreign court”.

4. He would also like to know whether it was clear that the last part of the new text of paragraph 5 (para. 1 above) referred to a previous conviction by a national court and not by a court acting in the capacity of a court applying the code.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he was opposed to Prince Ajibola’s suggestion to introduce in paragraph 5 a reference to paragraphs 3 and 4, because it would make the provision much too narrow. Paragraphs 3 and 4 described the jurisdiction of national courts as an exception to the *non bis in idem* principle and not the possible jurisdiction of an international criminal court—a matter which had been left entirely open.

6. The suggestion to replace the words “shall deduct” by “shall take into consideration” had been discussed at length, but the Drafting Committee had considered that the former were necessary in order to have a strict and rigid rule. The alternative wording proposed by Prince Ajibola (para. 2 above) left too much room for flexibility.

7. The proposal to incorporate a reference to a “term of imprisonment” would involve an important change of substance. The form of language adopted by the Drafting Committee encompassed any kind of penalty, including fines and such sanctions as expulsion from a country, although the main thrust of paragraph 5 did, of course, relate to terms of imprisonment. He himself had an open mind on the matter, but it was for the Commission to decide.

8. With regard to the possible replacement of the word “act” by “crime”, it was important to cover situations in which an individual was convicted of some offence which later proved to be an act characterized as a crime against the peace and security of mankind and was prosecuted and convicted a second time. The rule set out in paragraph 5 should apply in all instances in which an individual was being tried a second time. In the draft code, any reference to “crime” would normally mean a crime against the peace and security of mankind. If the word “crime” were used, paragraph 5 would no longer encompass the situation mentioned in paragraph 3.

9. As for the questions raised by Mr. Beesley, the issue as to whether or not a court trying an individual for a crime against the peace and security of mankind was

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>4</sup> For the text, see 2083rd meeting, para. 63.

acting as an agent of the international community was rather academic. Functionally, the court could be regarded as acting as an agent of the international community, and he sympathized with that interpretation; but the point was doctrinal and did not affect the wording of paragraph 5. The reference to a “foreign court” in paragraph 4 (a) meant the court which had handed down the first judgment; thereafter there was a second trial by a national court of another State. He had no doubts regarding the adequacy and clarity of the language used in paragraph 4 (a).

10. Mr. THIAM (Special Rapporteur) said that, on the subject of the “foreign court”, precise explanations would be given in the commentary in order to avoid any misunderstanding.

11. The CHAIRMAN said that it would perhaps be clearer if paragraph 4 simply stated:

“Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court for a crime under this Code:

“(a) if the act which was the subject of the judgment by a court of another State took place on the territory of that State.

“ . . . ”

12. Mr. BEESLEY said that that formulation was very close to what he himself had had in mind.

13. Mr. FRANCIS suggested that the words “passing sentence”, in paragraph 5, should be replaced by “any penalty imposed”. It would indeed be better not to use the expression “shall deduct”, and paragraph 5 should be reworded to read:

“In the case of a new conviction under this Code, any penalty imposed by the court shall be abated to the extent of any penalty already imposed and implemented as a result of a previous conviction for the same act.”

14. Mr. CALERO RODRIGUES said that none of the suggestions he had heard appeared to improve the text. As it stood, paragraph 5 provided clear guidance to any court that would have to pass judgment a second time for the same act.

15. Mr. McCAFFREY pointed out that the expression “new conviction” was unsuitable, since it was not a legal term. It was necessary to find a better expression and “subsequent conviction”, although less inadequate, was still imperfect.

16. Prince AJIBOLA said that the expression “subsequent conviction” was the most adequate.

17. Mr. BARBOZA said that, in the Spanish text, the expression *cualquier tribunal* was not appropriate and he suggested replacing it by *el tribunal*.

18. Mr. TOMUSCHAT (Chairman of the Drafting Committee) suggested that the Commission should adopt the following revised text for paragraph 5 of article 7:

“In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.”

*It was so agreed.*

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 proposed by the Drafting Committee, as amended.

*Article 7 was adopted.*

20. Mr. FRANCIS said he wished to place on record his view that paragraph 5 of article 7 should have read as he had proposed earlier.

21. Mr. EIRIKSSON said that, following the adoption of article 7, he wished to revert to the question he had asked at the previous meeting about the impact of paragraph 2 on possible subsequent action by an international criminal court. He had been assured that it was the Drafting Committee’s intention that, if an international criminal court were established with some national jurisdictions under a combined system, the international court would not be barred from taking up a case again when a national court had finally convicted or acquitted an individual of a crime, even in cases other than those envisaged in paragraphs 3 and 4 of article 7. That point was not clear from the wording. If that was indeed the intention and an international criminal court were established, the restrictions set by paragraph 2 on a second trial would apply only to a second trial in a national court. Hence there would be no need for the reference in paragraph 3 to an international criminal court, for that court could always take up a case even in the event of a final acquittal by a national court.

22. The CHAIRMAN said that that was the understanding of the Special Rapporteur and the Drafting Committee, even if the actual wording was not absolutely clear.

#### ARTICLE 12 (Aggression)

23. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12,<sup>3</sup> which read:

#### CHAPTER II ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

##### PART I. CRIMES AGAINST PEACE

##### *Article 12. Aggression*

1. Any individual to whom acts constituting aggression are attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

<sup>3</sup> Article 12 corresponds to paragraph 1 of the revised draft article 11 submitted by the Special Rapporteur and considered at the present session (2053rd to 2061st meetings).

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

24. Article 12 was the first article in chapter II of the draft code, which contained the catalogue of crimes against the peace and security of mankind, and part I of which dealt with crimes against peace. The Drafting Committee had borne in mind the wish expressed by many members of the Commission that each crime should form the subject of a separate article, and thus article 12 related solely to aggression. The Committee had also been mindful of the view of several members that a linkage should be established between the act of a State and action by an individual entailing the criminal responsibility of physical persons under the code. It had therefore included at the beginning of article 12 a paragraph 1 which, although it did not provide a definitive solution to the problem, signalled the need to deal with it at some future stage in relation not only to aggression, but probably also to other crimes under the code. The paragraph was tentative and would be reviewed when sufficient progress had been made on the definition of crimes.

25. The text of article 12, although it drew extensively on the 1974 Definition of Aggression,<sup>6</sup> omitted any

<sup>6</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

direct reference to it, thereby taking into account the opinion of some members that mention of a non-binding instrument intended to serve as guidance for a political organ, namely the Security Council, would be out of place in a criminal code to be implemented by the courts. Using the Definition of Aggression as a basis for its work, the Drafting Committee had taken into account that the Definition, in accordance with article 8 thereof, was an indivisible whole. Most of its elements had therefore been retained in the text now submitted to the Commission.

26. Paragraph 2 was identical to article 1 of the Definition of Aggression, except for the words "as set out in this Definition" and the explanatory note, which the Drafting Committee had deleted as being unnecessary in the context of the code. Paragraph 3 reproduced article 2 of the Definition.

27. The introductory clause of paragraph 4 began with the words "In particular", which had been placed in square brackets to indicate a basic divergence of views. Some members objected to the words because they considered it unacceptable to confer on national courts the power to expand the list of acts constituting aggression. Other members wished to preserve the freedom of the judge to qualify as aggression acts not included in the list, such as an air blockade.

28. The list of acts in subparagraphs (a) to (g) was identical to that contained in article 3 of the Definition of Aggression. The Drafting Committee had, however, inserted an additional subparagraph, subparagraph (h), which took into account the power of the Security Council under Article 39 of the Charter of the United Nations—a power which was referred to in article 4 of the Definition of Aggression—to determine that other acts constituted aggression under the provisions of the Charter. That power of the Security Council had not been questioned by any member of the Drafting Committee.

29. Paragraph 5 had been placed in square brackets to indicate a second divergence of views within the Drafting Committee. It should be stressed that the scope of the paragraph was limited to national courts and that the question of the relationship between the Security Council and an international criminal court was reserved. Furthermore, the phrase "Any determination . . . as to the existence of an act of aggression" was intended to encompass both positive and negative determinations, a point that would be elaborated on in the commentary. In support of paragraph 5, some members had argued that determinations by the Security Council under Chapter VII of the Charter were binding on States Members of the United Nations and therefore on their courts. Advocating the deletion of the paragraph, other members had maintained that to tie the implementation of the code to the functioning of the Security Council would make the code meaningless.

30. Paragraphs 6 and 7 reproduced articles 6 and 7 of the Definition of Aggression with no substantive change.

31. On the whole, disagreement had persisted with regard to only one important issue, namely the distribution of powers as between the Security Council and

national courts called upon to implement the code, disagreement that was reflected by two passages being placed in square brackets. Otherwise, the Drafting Committee had been unanimous in the view that the Definition of Aggression should be followed as closely as possible, and had reproduced it faithfully, except for the explanatory note and those elements which were relevant to inter-State relations alone.

32. Lastly, paragraph 1, constituting the introductory part of article 12, had been adopted provisionally by the Drafting Committee, on the understanding that it would be revised later when a general article was drafted to indicate clearly under what conditions an individual could be held responsible for a crime which, in the first instance, was an internationally wrongful act committed by a State. Any individual responsible for an act of aggression committed by a State was liable to be tried and punished for a crime against peace. There was a linkage between aggression, which was a wrongful act in relations between States, and the role of those individuals within an aggressor State to whom responsibility was to be attributed.

*Mr. Mahiou, Second Vice-Chairman, took the Chair.*

33. The CHAIRMAN suggested that, in view of the length of article 12, it should be considered paragraph by paragraph.

#### Paragraph 1

34. Mr. EIRIKSSON said that paragraph 1 was unnecessary and perhaps even dangerous. It contained nothing that was not already in article 1 of the Definition of Aggression, and stated simply that a crime defined in part I of chapter II had been committed. Besides, paragraph 1 of article 3 (Responsibility and punishment), provisionally adopted at the previous session,<sup>1</sup> clearly stated: "Any individual who commits a crime against the peace and security of mankind is responsible for such crime . . ." He accordingly proposed that paragraph 1 of draft article 12 be deleted as redundant, although the general thought could, of course, be included in the commentary.

35. Prince AJIBOLA said that the words "for a crime against peace" were not sufficient. They should be expanded to read: "for a crime against the peace and security of mankind". In some cases, a group of people was stronger than a State and the actions of such groups should be covered.

36. Mr. BEESLEY said it had been explained that paragraph 1 was a kind of holding paragraph, pending agreement on the crimes to be covered by the code. For his part, he supported the inclusion of the paragraph, which was important because of the message it contained.

37. Mr. BENNOUNA said that he agreed with Mr. Beesley. Paragraph 1 was necessary, despite the provision in article 3 quoted by Mr. Eiriksson. A link had to be established between the individuals responsible and the crimes against peace covered by the code. The problem arose also in respect of crimes other than aggression, for example intervention, which was a crime of the State.

38. The provision in paragraph 1 lay at the heart of the topic. The code was intended to deal with crimes of considerable importance committed in inter-State relations and individuals were to be held responsible for those crimes. Hence the concept of attribution contained in paragraph 1, which spoke of an individual to whom acts constituting aggression were "attributed under this Code". True, article 12 was provisional because it would have to be reviewed and also because another place might have to be found for it as the introductory provision to chapter II. Again, it would have to be supplemented. The concept of attribution must be clarified so as to indicate how the crime was attributed and which individuals would be involved. In the Drafting Committee, several notions had been suggested—the individuals who ordered a crime, those who organized it, and so on—but it was still too early to codify those notions. Attention would also have to be paid later to certain related concepts, such as those of complicity and attempted crime, which indirectly concerned paragraph 1. For the time being, however, the paragraph made it possible to establish a link between the code and the State crimes covered by the Definition of Aggression.

39. Paragraph 1 rightly spoke of "a crime against peace" and not a crime against the peace and security of mankind. Article 12 was concerned solely with crimes against peace, an approach that was the only way to make it clear that the article fully reproduced the provisions of the 1974 Definition of Aggression without at the same time mentioning that Definition. It had to be made plain to the General Assembly that the objective of the code was different from that of the 1974 Definition, in other words to attribute responsibility to individuals and not to States.

40. Mr. FRANCIS said that he agreed with Mr. Eiriksson. In its present form, paragraph 1 had no place in article 12. In the general debate (2059th meeting), he had stressed that the Commission should bring up to date the basic principles derived from the judgment of the Nürnberg Tribunal, namely that crimes under international law were committed not by abstract entities but by individuals, and that only by punishing those individuals could the rules of international law be enforced. He had gone on to suggest that article 19 of part 1 of the draft articles on State responsibility<sup>2</sup> made it quite clear that criminality could be attributed to States, a point that was rightly made in paragraph 2 of draft article 12.

41. He had further suggested that two things were needed in the code. The first was a principle reversing the Nürnberg principle that States could not commit crimes. One aspect, however, of the Nürnberg principles had not changed: States could not be tried for crimes attributed to them. Accordingly, he had suggested that the code should amend the first principle derived from the Nürnberg judgment. The second step would then be, in the substantive body of the code, for example in article 11, to attribute to individuals crimes that were committed by States but initiated by individuals. In article 12, what was required was not an outright attribution to individuals of the crime of aggression: that point was already covered by article 3. A paragraph

<sup>1</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

<sup>2</sup> See 2053rd meeting, footnote 17.

should be inserted immediately after paragraph 2 of article 12 attributing to individuals not crimes as such, but acts constituting crimes by States. Hence paragraph 1 would have to take another form. For those reasons, he fully supported Mr. Eiriksson's comments and intended to make a formal proposal on the subject at the next session.

42. Mr. McCaffrey said that he had great doubts regarding paragraph 1 and agreed with Mr. Eiriksson, Mr. Francis and Mr. Bennouna in many respects.

43. Mr. Beesley had been right to say that some provision was necessary as a link with the Definition of Aggression, namely a provision to demonstrate how that Definition could be applicable to individuals. Paragraph 1 of draft article 12 was, however, too vague to be properly placed in a criminal code. The language used was also rather confusing. The phrase "Any individual to whom . . . are attributed" gave the impression that the acts were being performed by someone else. The language was reminiscent of article 10 (Responsibility of the superior) of the draft code and suggested some kind of agency relationship under which one person's acts were attributed to another because of some legal relationship. That was not the position at all in article 12.

44. A much more precise formulation was to be found in Principle VI of the Nürnberg Principles,<sup>9</sup> subparagraph (a) of which stated:

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression . . . ;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

That provision constituted a much more specific way of describing how an individual could commit an act of aggression. It was troubling that the acts of an abstract entity could be attributed to an individual without any conduct on his part. Even more troubling was the vagueness of draft article 12, paragraph 1, which should be placed between square brackets so as to indicate that the Commission was trying to tie in the Definition of Aggression with an act by an individual. As now drafted, paragraph 1 was unacceptable. He was not at all certain of its intent and could not understand why the term "attributed" had been used at all. It was a confusing collection of words and was a step backwards by comparison with the Commission's formulation of the Nürnberg Principles in 1950.

45. Mr. EIRIKSSON said that he agreed with Mr. Bennouna's remarks on the idea behind paragraph 1, but considered that the form of language employed did not achieve the intended purpose. He strongly supported the suggestion to place the paragraph in square brackets so as to indicate that the Special Rapporteur would deal with the matter in detail later, and he hoped that the commentary would reflect the discussion fully.

46. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that it had been the general understanding of all members of the Drafting Committee that

the formulation in paragraph 1 was provisional and that an article was needed to specify in detail the types of acts which rendered an individual responsible for aggression. After all, aggression was committed by States and the question arose as to how to attribute it to individuals. It had been agreed that a specific article, covering all crimes against peace, was necessary. Of course, for that purpose the Commission would draw on the Nürnberg Principles, which referred to the "planning, preparation, initiation or waging of a war of aggression". It had none the less been agreed that the matter had to be examined very carefully; the Drafting Committee had not had time to prepare an article on the subject at the present session. For the time being, however, it had to be stated that a link existed between the act committed by a State and the individual responsible for aggression.

47. The CHAIRMAN thanked the Chairman of the Drafting Committee for his explanation, which showed that the disagreement related not to the idea embodied in paragraph 1 but to the way of formulating it.

48. Mr. CALERO RODRIGUES said that he agreed with the explanations given by the Chairman of the Drafting Committee and could accept paragraph 1 on an interim basis. Generally speaking, part I of chapter II of the draft code could only define the crimes. It was not necessary in every article to include an introduction affirming that the act in question constituted a crime. The Drafting Committee had agreed to have a general introduction to part I, but it had not been possible to formulate such an introduction and the Committee had fallen back on the provisional formula embodied in paragraph 1 of article 12. Article 3, referred to earlier (para. 34 above), began with the words: "Any individual who commits a crime against the peace and security of mankind". The part of the draft now under consideration, however, dealt with crimes like aggression, which could be committed only by States but were attributed to individuals as leaders or organizers. The problem was one of participation.

49. Admittedly, the terms of paragraph 1 were vague, and greater precision would be needed. Indeed, in the future a general article along the following lines would have to be inserted:

"The articles in the present part define the crimes against peace for which an individual may be held responsible and liable to punishment when he has instigated, ordered, authorized or taken a leading part in the planning or commission of the act which characterizes the crime."

For the time being, something was required as an introduction and paragraph 1 was the best that could be done. For his part, he found nothing unacceptable in it. The commentary to article 12 should explain that the paragraph was very provisional in character.

50. Mr. BARSEGOV said that he fully shared the views of the Drafting Committee and the arguments put forward by its Chairman as well as by Mr. Bennouna and Mr. Calero Rodrigues. Paragraph 1 had been the subject of lengthy and careful consideration by the Committee, which had decided that, at the present stage, it was not possible to do without it. It was fully realized that its provisions would later have to be sup-

<sup>9</sup> *Ibid.*, footnote 8.

plemented and, in addition, made applicable to other crimes as well. Without paragraph 1, it would be difficult for the General Assembly to understand the remainder of article 12. In any case, there was nothing controversial in the terms of the paragraph. The Committee had considered placing it in square brackets, but the idea had been abandoned because the Sixth Committee would no doubt have found it very strange to see a self-evident statement placed in square brackets. In any event, the provisional nature of the introductory statement in paragraph 1 would be stressed in the commentary.

51. Mr. GRAEFRATH said that he agreed with the Chairman of the Drafting Committee and Mr. Calero-Rodriguez and urged that paragraph 1 should be left as it stood.

52. Mr. FRANCIS pointed out that the greater part of article 12 was not in dispute at all, since it was drawn from the 1974 Definition of Aggression.

53. Mr. THIAM (Special Rapporteur) said that, except for the fact that two passages had been placed in square brackets, article 12 simply reproduced the Definition of Aggression.

54. Mr. McCAFFREY said that article 3 of the draft code covered the case of an individual who had committed a crime against the peace and security of mankind. Article 12, however, envisaged not the crime of an individual but the crime of the State committing aggression. The individual carried out the planning or preparation—not the actual crime—of aggression, which was committed by the State itself. Accordingly, paragraph 1 of article 12 would be much clearer if it were couched in the following terms: “Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable . . .”, because it was the responsibility, not the act itself, that was attributed to the individual. In its present form, paragraph 1 made no sense at all.

55. Mr. THIAM (Special Rapporteur) said that the Drafting Committee had rejected that proposal by Mr. McCaffrey because all the English-speaking members had been opposed to using the term “responsibility”. If the debate were reopened on that point, there would be no end to it. He recalled that, in the Drafting Committee, Mr. Bennouna had proposed another formula to avoid using the term “responsibility”.

56. Mr. BENNOUNA said that the point of concern not only to himself, but also to some other members of the Drafting Committee, was that responsibility could be attributed solely by a court. So long as a court had not ruled on the question, it was not possible to speak of attribution of responsibility. The planning or conduct of certain acts, on the other hand, could be attributed to an individual. It would then be for the court to decide on the question of responsibility. That idea was not very far removed from the one expressed by Mr. McCaffrey. The phrase “liable to be tried and punished” was even more striking in French (*passible de poursuite et de jugement*), for the judicial decision came after the attribution of responsibility.

57. Mr. Sreenivasa RAO said that he was in favour of paragraph 1 as it stood, in view of the explanations

given by the Chairman of the Drafting Committee and by other speakers. At the same time, he found Mr. McCaffrey’s proposal acceptable.

58. “Responsibility” was used as a general term in the present context and the phrase “tried and punished” covered the question of determining guilt. Accordingly, he had no objection to the term “responsibility”. Paragraph 1 could be adopted as a compromise, subject to an adequate explanation in the commentary and to the understanding that the provision would be reviewed on second reading.

59. The CHAIRMAN said that if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 1 as amended by Mr. McCaffrey (para. 54 above).

*It was so agreed.*

*Paragraph 1 was adopted.*

60. Mr. EIRIKSSON said that the change of wording had not made him any more satisfied with paragraph 1.

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

Paragraph 4

61. Mr. BARSEGOV said that he had no objection to paragraph 4. However, the fact that the opening words, “In particular”, had been placed in square brackets reflected the differences of view in the Drafting Committee. Some members had deemed it necessary to uphold the right of the court freely to characterize as acts of aggression acts that were not covered by the list contained in the definition of aggression. He felt strongly that a criminal court was not empowered to determine that whole categories of acts could be considered as aggression. It was called upon to decide on the issue of the criminal responsibility of an individual in accordance with the law: it had no power to create legal rules for application in inter-State relations. It was true that the list of acts of aggression set forth in subparagraphs (a) to (g) was not absolutely exhaustive, but only the Security Council could supplement the list, as indicated in subparagraph (h). As far as a criminal court was concerned, however, the list in subparagraphs (a) to (g) had to be considered exhaustive.

62. He failed to see how a criminal court—even an international criminal court—could expand the 1974 Definition of Aggression<sup>10</sup> adopted after so many years of effort in the General Assembly. The court had the duty to apply legal rules but must not attempt to create them, particularly in such a sensitive area of inter-State relations as the issue of the definition of aggression. That point had to be taken into account at an early stage so as not to undermine the very idea of an international criminal court.

63. No court, whether international or national, could perform the functions of the Security Council. In that connection, the differences in the Drafting Committee regarding the inclusion of paragraph 5, reading: “Any determination by the Security Council as to the ex-

<sup>10</sup> See footnote 6 above.

istence of an act of aggression is binding on national courts", were logically connected with those relating to the words "In particular" in paragraph 4.

64. Mr. McCaffrey said he agreed with Mr. Barsegov and believed that the list should be an exhaustive one as far as the court was concerned. Therefore, he was not at all certain that the language used in article 3 of the Definition of Aggression<sup>11</sup> was sufficiently precise. All it said was: "Any of the following acts . . .", wording which did not make the list exclusive. He had no proposal to make, but would have preferred paragraph 4 of draft article 12 to begin simply with the words: "The following acts . . .", eliminating the words "any of" and, *a fortiori*, the words "In particular" in square brackets.

65. The remainder of the introductory clause of paragraph 4 differed from the corresponding provision of the Definition of Aggression, namely article 3, which contained the words "subject to and in accordance with the provisions of article 2". That article 2 corresponded to paragraph 3 of draft article 12. He was somewhat mystified by the words "due regard being paid to paragraphs 2 and 3 of this article", which had been introduced in paragraph 4 to replace the words "subject to and in accordance with the provisions of article 2" contained in the Definition of Aggression. The proposed language did not provide firm enough guidance for a court seized of proceedings under the code. The proposed wording would seem to mean that paragraphs 2 and 3 of article 12 would control subsequent provisions, such as those contained in paragraph 4; but that point was not clear and should be made more precise.

66. Mr. RAZAFINDRALAMBO said that he endorsed the remarks made by Mr. Barsegov and Mr. McCaffrey. He was strongly opposed to any suggestion to give any court, whether international or national, the right to establish that acts not already included in the list set forth in paragraph 4 constituted acts of aggression. Such an idea was an application of the unacceptable method of creating crimes by analogy, on the basis of similarity with those specifically sanctioned by criminal law.

67. Mr. FRANCIS said that his views were substantially the same as those expressed by the three previous speakers. The definition of aggression in article 12 should be identical to that adopted by the General Assembly in 1974. He was in favour of article 12 to the extent that it reflected completely the 1974 Definition and he was opposed to any departure from that established text.

68. Mr. REUTER said that he shared the views of Mr. Barsegov and Mr. McCaffrey regarding the words "In particular". Naturally there was a connection with subparagraph (h) of paragraph 4 and also with paragraph 5. The commentary to article 12 should state that nothing in the article affected the powers of the ICJ concerning questions of aggression. The matter was of practical importance because there were cases pending before the ICJ on the question of aggression. The Commission could not deal with that question now, but it was essential for the commentary to include a reference

to the problem, since it would not be dealt with in the article itself.

69. Mr. EIRIKSSON said that his opinion on the relationship between the code and possible action by the Security Council depended on the Commission's approach in adopting article 12, more particularly in connection with the role of an international tribunal. His initial reaction, however, was that paragraph 2 sufficed as a definition of aggression. Accordingly, both paragraph 3 and paragraph 4 were unnecessary, unless any of the acts mentioned in paragraph 4 (a) to (g) could conceivably be considered as anything other than acts of aggression, which he did not believe to be the case. The inclusion of the words "In particular" in square brackets made his sentiment even stronger on that question. The same applied to the presence of subparagraph (h), on the possibility of the Security Council expanding the categories of acts in a list which was merely illustrative.

70. Mr. BEESLEY said that he associated himself with those members who had expressed strong reservations regarding the inclusion of the words "In particular".

71. Mr. BENNOUNA said that the reason for introducing the words "In particular" was that the question of the possible jurisdiction of the courts had not yet been clarified. There was still some discussion as to the impact of Security Council action under the Charter of the United Nations, particularly where the Council did not arrive at a decision. It was an important matter, because an act mentioned in paragraph 4 of article 12 might not be sufficiently serious to warrant a court—or indeed the Security Council itself—deciding that an act of aggression had been committed. However, paragraph 4 would be appropriate in affording the court some leeway to interpret the list without actually adding anything to it. A margin of interpretation had to be allowed for the general definition set forth in paragraph 2. With that approach, article 12 could be retained as it stood, on the understanding that the commentary would clarify its content, especially the question of the relationship with the Security Council.

72. Mr. ROUCOUNAS said that the Chairman of the Drafting Committee had been right to point to the provisional character of the Commission's work on article 12, in view of the fact that the questions of jurisdiction and of the establishment of an international criminal court had not yet been settled. The Commission should not give the impression that it wished to open the door to the possibility for national courts to expand the list of acts of aggression on the basis of the words "In particular". For that reason, those words should be deleted, bearing in mind that the question of aggression might ultimately fall within the jurisdiction of an international criminal court.

73. Mr. CALERO RODRIGUES said that the words "In particular" should be retained in order to give some leeway to the courts in the interpretation of what constituted aggression. The list of acts contained in paragraph 4 was not really exhaustive, for according to subparagraph (h) the Security Council could add to it. Actually, if the list was to be exhaustive, the definition of aggression would not be necessary. Since paragraph 1

<sup>11</sup> *Ibid.*

stated that any individual responsible for acts constituting aggression was liable to be tried and punished, the court should be given an opportunity to see if aggression existed on the basis of acts other than those included in the list. After all, the list had been prepared for the purpose of giving concrete shape to the concept of aggression defined in paragraph 2. Hence the possibility of the court finding that some other acts also constituted aggression should not be ruled out.

74. Much had been said about national courts, but no decision had yet been taken on a possible international criminal court, which should not be bound exclusively by the list in paragraph 4. In a given case, such a court might well find that other acts constituted aggression. That was the position he, together with some other members, had expressed in the Drafting Committee, and it was his reason for favouring retention of the words "In particular". Opinions were divided, however, and he could agree to placing the words in square brackets, on the understanding that his views would be placed on record.

75. Mr. AL-BAHARNA said that paragraph 4 should be retained as it stood, with the opening words "In particular".

76. Mr. SEPÚLVEDA GUTIÉRREZ said that he wholeheartedly endorsed the views expressed by Mr. Calero Rodrigues.

77. Mr. SHI said that the list of crimes in paragraph 4 should be exclusive. No court, whether national or international, should have the power to extend it. However, opinions diverged and he could agree to placing the words "In particular" in square brackets, leaving the matter to be decided at a later stage.

78. Mr. KOROMA said that the presentation of article 12 by the Chairman of the Drafting Committee met with his approval, except in so far as paragraph 4 (*h*) was concerned. The primacy of the Security Council for the maintenance of international peace and security was unquestioned. However, some members of the Commission held that the Security Council dealt with aggression as it affected States, whereas article 12 dealt with crimes committed by individuals. To introduce the role of the Security Council as was done in paragraph 4 (*h*) would tend to negate the Commission's efforts to prevent individual acts of aggression. For that reason, paragraph 4 (*h*) should be deleted.

79. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 4, on the understanding that the differing opinions on the words "In particular", as well as Mr. Koroma's views on subparagraph (*h*), would be placed on record.

*It was so agreed.*

*Paragraph 4 was adopted.*

Paragraph 5

80. Mr. BARSEGOV said that he could not object to placing paragraph 5 in square brackets as a temporary compromise solution, due to the substantial differences of opinion, although he personally would have preferred to delete the brackets now. However, he could

not agree to any suggestion to delete the paragraph, since, if that were done, it would appear as though Security Council decisions were binding on States but not on their criminal courts.

81. The Chairman of the Drafting Committee had advanced the view that to tie the implementation of the relevant provisions of the code to the functioning of the Security Council would make the code meaningless. The idea put forward was that the Security Council was not always effective and that national courts might not be able to try cases of aggression because of the Security Council's inability to reach a decision. That view was tantamount to denying the binding force on national courts of any resolution of the Security Council. In connection with paragraph 4, it had been suggested that an international or national court could be empowered to create legal rules as to the determination of acts constituting aggression. In connection with paragraph 5, it was now being suggested that national or international courts should be given the right not to take into consideration the decisions of the Security Council. Such an approach would not only constitute a fundamental departure from the 1974 Definition of Aggression, it could even amount to a revision of the Charter of the United Nations.

82. Mr. BENNOUNA said he believed that there would be no substantial opposition to paragraph 5 without the square brackets. Mr. Barsegov's remarks reflected the present state of the law. When the Security Council took action on the basis of Chapter VII of the Charter and made a determination as to the existence of an act of aggression under Article 39, its decision was binding on all States and therefore on the organs of those States, including the courts. It was simply a question of restating a principle of law stemming from the Charter, and it was difficult to see how that restatement could be disputed.

83. In his opinion, the opposition to paragraph 5 could be ascribed to a different cause: it was based on the idea that, if the Security Council did not arrive at a determination as to the existence or non-existence of an act of aggression, something that was fairly common, the court should then have some leeway in reaching a decision. The point was to avoid a situation in which no decision was made because the Security Council failed to reach a determination. Actually, in the absence of a determination on aggression, the court could freely exercise its full jurisdiction. It might be of interest if the Chairman ascertained informally how many members were opposed to paragraph 5 and how many wished to place it in square brackets.

84. Mr. McCAFFREY said that, without paragraph 5, the whole of article 12 would be unacceptable. The Commission was not merely duplicating a definition of aggression made within the United Nations: it was elaborating a code that would be applied by the courts. Although it was not yet certain which courts would apply the code, there was a distinct possibility that it would be the national courts. In view of that possibility, a provision along the lines of paragraph 5 was essential, and obviously he could not agree to the idea of placing it in square brackets.

85. The main point had been made by Mr. Bennouna. There was nothing in paragraph 5 that would in any way inhibit national courts in the absence of a determination by the Security Council. The paragraph was artfully drafted so as to give the courts freedom except in cases where the Security Council had taken action. In view of Article 25 of the Charter, it was unthinkable that a national court could act inconsistently with a Security Council determination, in other words that it could find aggression where the Security Council had found none, or vice versa.

86. Mr. CALERO RODRIGUES said he, too, thought that paragraph 5 should be retained. He could accept the square brackets around it because there were differences of opinion, but he believed that a Security Council determination must be binding on any court that applied the code.

87. Prince AJIBOLA said that paragraph 4 (*h*) dealt adequately with the question of what should be left to the decision of the Security Council.

88. Nobody doubted the binding character of Security Council decisions. However, any court worthy of the name had two tasks, the first being to conduct a fair trial, and the second to decide on the facts placed before it. If the court had to abide by any Security Council determination and could not look into the facts of the case, it was in danger of becoming a mere rubber stamp. Hence he was apprehensive about the consequences of paragraph 5, which was unnecessary and should be deleted. If not, it should at least be placed between square brackets.

89. Paragraph 4 itself stood in need of a number of drafting improvements, for the present wording was quite inelegant. The introductory clause should be reworded along the following lines: "With regard to paragraphs 2 and 3, any of the following acts, regardless of a declaration of war, constitutes an act of aggression:"

90. Mr. FRANCIS said that he had no objection to paragraph 5 without the square brackets. There could be no doubt that the courts applying the code would be bound by a determination by the Security Council. Nevertheless, since paragraph 5 was connected with the competence of the courts, it should be placed after paragraph 7. Alternatively, it could form a separate article, as could paragraph 1.

91. Mr. BEESLEY said that paragraph 5 could be considered redundant simply because it stated a rule of law pursuant to the Charter of the United Nations. Nevertheless, in order to avoid any doubts, he shared the view that the paragraph should be retained and that the square brackets should be removed in due course. It would be noted that paragraph 5 referred only to national courts: he did not wish to raise at the present stage the question of what the situation would be with respect to an international criminal court.

92. The reference in paragraph 5 to "Any determination . . . as to the existence . . ." and the explanations given by the Chairman of the Drafting Committee showed that the provision covered both positive and negative findings. Later, the Commission would have to tackle the matter of whether a national court, or an

international court, would be free to hear a case concerning an allegation of aggression where no finding whatsoever had been made by the Security Council. It was an issue of sufficient importance to be placed squarely before States in the Sixth Committee of the General Assembly and perhaps eventually in questions put to Governments.

93. Mr. Sreenivasa RAO said that paragraph 5 was an important element of article 12. It did not solve many problems, but it stated an obvious point of law of the Charter, namely that Security Council decisions were binding on all Member States. Indeed, in the case of the Definition of Aggression, even non-member States were supposed to co-operate in connection with such decisions. Paragraph 5 dealt with the power and competence, as between the Security Council and the national courts, to judge the matters and the evidence relating to certain crimes. The supremacy of Security Council decisions was unquestionable, but so too, in national systems, was the supremacy, impartiality and objectivity of the courts. Those two positions were easily reconciled. The Security Council determined an act of aggression only with respect to a State and did not go into the question of who committed it or the guilt of individuals. In other words, there could be a Security Council determination that a particular country had committed aggression and it would then be for the courts, in accordance with paragraph 5, to find the individuals who could be held responsible. The impartiality of the courts was safeguarded, for they could look at the evidence and even find the individual not guilty.

94. Other issues were not covered by paragraph 5, and hence it should remain in square brackets, pending further reflection on those issues. One of them was what a national court should do in the absence of a determination on the question of aggression. Another was that of ascertaining the impact court actions would have on any later determination by the Security Council. For example, a court might rule that there was no aggression and discharge the individual brought before it; subsequently, the Security Council might find that aggression had in fact been committed.

95. Mr. AL-BAHARNA pointed out that the text of paragraph 5 was not to be found in the 1974 Definition of Aggression. In the Sixth Committee of the General Assembly, he had observed differences of view on whether to include such a provision, as well as on whether to place it between square brackets. The problem differed to some extent from that concerning paragraph 4 (*h*). In his opinion, paragraph 5 should remain in square brackets.

96. Mr. PAWLAK said that he strongly supported the inclusion of paragraph 5, bearing in mind the fundamental importance of the international legal order established by the Charter, the provisions of which must be binding on States and on their courts, as well as on any international courts that were established. He was opposed to the use of square brackets; but since there was no other way of obviating the differences of opinion, he was prepared to accept the brackets as a device whereby the paragraph could be adopted by the Commission.

97. Mr. YANKOV said that paragraph 5 dealt with an important issue having political and legal implications, for it stated that a Security Council determination as to the existence of an act of aggression was binding on national courts. Article 25 of the Charter of the United Nations was relevant in that connection, as was Article 39, on the competence of the Security Council. Paragraph 5 commanded his full support, since it constituted in a sense the development of United Nations law. The square brackets were unnecessary, for adequate explanations would be given in the commentary and members' views would be set out in the summary records. If, however, the majority wished to retain the square brackets, he would be prepared to accept such a course for the purpose of indicating that there had been differences of opinion.

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 5 with the square brackets.

*It was so agreed.*

*Paragraph 5 was adopted.*

Paragraphs 6 and 7

*Paragraphs 6 and 7 were adopted.*

*Article 12 was adopted.*

99. Mr. BARSEGOV said that the text of article 12 did not contain any reference to the binding force of relevant General Assembly resolutions. The reason was that some members of the Commission were opposed to such a reference. In the course of the debate, the view had been expressed that General Assembly resolutions must be regarded as political texts from a political body, so that it was inappropriate to speak of them in a criminal code, which constituted a legal text.

100. He did not share the view that the 1974 Definition of Aggression was a purely political text devoid of legal content. Such a view would mean that any determination by the Security Council, and any steps it took on the basis of that Definition, would be without legal meaning. It would also open the door to justifying the refusal to observe Security Council decisions on the grounds that they were based on a purely political text and not on a legal instrument.

101. Prince AJIBOLA noted that paragraph 2 of article 12 used the expression "Charter of the United Nations" in full, and said that the same form should be used in all the other paragraphs that referred to the Charter.

*The meeting rose at 1.10 p.m.*

## 2086th MEETING

*Monday, 25 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna,

Mr. Calero Rodrigues, Mr. Eriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter III.

**CHAPTER III. *The law of the non-navigational uses of international watercourses*** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

#### A. Introduction (A/CN.4/L.425)

Paragraphs 1 to 15

2. Mr. YANKOV said that, rather than repeat the background to the topic every year, it might be more rational simply to give a brief summary. A detailed history of the work could be provided when consideration of the topic was completed. That was true for all the Commission's reports and he would therefore revert to the matter during consideration of the part of the draft report on the Commission's working methods and documentation.

*Paragraphs 1 to 15 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session (A/CN.4/L.425)

Paragraphs 16 to 25

*Paragraphs 16 to 25 were adopted.*

Paragraph 26

3. Mr. RAZAFINDRALAMBO asked why the Commission's discussion on article 15 was summarized in only one paragraph, whereas much greater space was given to the consideration of the other articles, on pollution.

4. Mr. McCAFFREY (Special Rapporteur) said that it was the Commission's practice not to include a summary of the discussion on draft articles adopted in the course of the session, probably because the commentaries to the articles performed the same function. It was true, however, that paragraph 26 could be expanded a little, for example by adding a sentence indicating that the text of article 15 had been provisionally adopted at the present session on the recommendation of the Drafting Committee and that it now constituted articles 10 and 20.

*It was so agreed.*

*Paragraph 26, as amended, was adopted.*

Paragraphs 27 to 31

*Paragraphs 27 to 31 were adopted.*