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A/CN.4/SR.2408

Summary record of the 2408th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1995, vol. I

2408th MEETING

Friday, 30 June 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind (*continued*)* (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,[1] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[2]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Drafting Committee on second reading, which read:

[Part one

CHAPTER 1. ...]

Article 1.[3] *Scope and application of the present Code*

1. The present Code applies to the crimes against the peace and security of mankind set forth in Part Two.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

[CHAPTER 2. ...]

[Article 2]

[Redrafted and appears as paragraph 2 to article 1.]

Article 3[4]

[Article 4]

[Deleted]

Article 5. Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5 bis.[5] *Establishment of jurisdiction*

Each State party shall take such measures as may be necessary to establish its jurisdiction over crimes against the peace and security of mankind.

Article 6. Obligation to extradite or prosecute

The State in the territory of which an individual alleged to have committed a crime against the peace and security of mankind is found shall either extradite that individual or refer the case to its competent authorities for the purpose of prosecution.

Article 6 bis. *Extradition of alleged offenders*

1. To the extent that the crimes set out in articles ... are not extraditable offences in any extradition treaty existing between States parties, they shall be deemed to be included as such therein. States parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States parties which have established their jurisdiction in accordance with article 5 *bis*.

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* Resumed from the 2387th meeting.

[1] Reproduced in *Yearbook ... 1995*, vol. II (Part One).

[2] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94-97.

[3] The Drafting Committee agreed that the question of the characteristics of the crimes under the Code should be examined at a later stage.

[4] The Drafting Committee agreed to revert to article 3 at a later stage.

[5] The question of jurisdiction will be reviewed, once the substantive articles on crimes are finalized, with a view to examining the possibility of exclusive international jurisdiction in the case of specific crimes including aggression.

Article 7 [6]

Article 8. Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(*a*) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(*b*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*c*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*d*) To be tried without undue delay;

(*e*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(*f*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(*g*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*h*) Not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Article 9. Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind for which he has already been finally convicted or acquitted by an international criminal court.

2. Subject to paragraphs 3, 4 and 5, no one shall be tried for a crime against the peace and security of mankind in respect of an act for which he has already been finally convicted or acquitted by a national court.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried by an international criminal court for a crime against the peace and security of mankind if:

(*a*) The act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in the present Code; or

(*b*) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried by a national court of another State for a crime against the peace and security of mankind if:

(*a*) The act which was the subject of the previous judgement took place in the territory of that State; or

(*b*) That State has been the main victim of the crime.

5. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10. Non-retroactivity

1. No one shall be convicted under the present 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 national law.

[6] The Drafting Committee agreed to revert to article 7 at a later stage.

Article 11. Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, [but may be considered in mitigation of punishment if justice so requires].[7]

Article 12. 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 reason to know, 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 necessary measures within their power to prevent or repress the crime.

Article 13. Official position and 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.

Article 14[8]

[Part two

...][9]

Article 15. Aggression

[1. An individual who, as leader or organizer, commits an act of aggression shall be punished under the present Code.]

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

...[10]

Article 19. Genocide

[1. An individual who commits an act of genocide shall be punished under the present Code.][11]

[7] The issue addressed in the bracketed phrase will be examined in the context of an article to be drafted on mitigating or aggravating circumstances.

[8] The Drafting Committee agreed to revert to article 14 at a later stage.

[9] The Drafting Committee will re-examine paragraph 1 of each of the articles of part two with a view to determining the possibility of adopting uniform language and in the light of the decision it will reach in relation to article 3.

[10] Article 16 (Threat of aggression) was not referred to the Drafting Committee. Articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) were referred to the Drafting Committee on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and, at its discretion, deal with all or part of the elements of articles 17 (Intervention) and 18 (Colonial domination and other forms of alien domination), as well as 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism).

[11] See footnote 7 above.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

3. The following acts shall also be punishable:

(*a*) Conspiracy to commit genocide;

(*b*) Direct and public incitement to commit genocide;

(*c*) Attempt to commit genocide;

(*d*) Complicity in genocide.[12]

2. Mr. YANKOV (Chairman of the Drafting Committee) said that, before presenting the Drafting Committee's report (A/CN.4/L.506), he wished to draw attention to the French version of article 12, where the phrase "*ou avaient des raisons de savoir*" was not felicitous and would be replaced by a more appropriate wording.

3. The Drafting Committee had devoted 17 meetings from 3 May to 21 June to the topic. He wished first to express his wholehearted thanks to the members of the Drafting Committee for their hard work and spirit of cooperation, and to the Special Rapporteur, Mr. Thiam, for his support and constructive attitude. He was specially grateful to Mr. Villagrán Kramer for acting as Chairman of the Drafting Committee during his own short absence from Geneva and also wished to convey his appreciation to members of the secretariat for their valuable assistance and exemplary devotion.

4. The topic had a history almost as long as the Commission itself. At its thirty-sixth session, the General Assembly had, in resolution 36/106, invited the Commission to resume its work, which had been initiated 30 years earlier, in 1951. The topic as it stood now had been included in the agenda of the Commission's thirty-fourth session, in 1982, at which time the Commission had appointed Mr. Thiam as Special Rapporteur for the topic. In General Assembly resolution 42/151, the title had been altered to speak of "crimes" rather than "offences" against the peace and security of mankind. In recalling those facts, he wished to emphasize that the exercise on which the Commission was engaged was more than the second reading of a set of draft articles; it was an important stage in a process which had a long-standing presence on the active agenda of the Commission.

5. The Drafting Committee's report was of a tentative character, for the Committee had not had enough time to complete the whole set of draft articles. At the stage of second reading, the Committee's work was normally of a "fine-tuning" character. In the present instance, however, the Committee had been faced with a much more substantive task because of a variety of factors. First, it should be remembered that, when adopting the draft on first reading,[13] the Commission had deliberately deferred some important issues to the stage of second reading. As indicated in the Commission's report on its forty-third session,[14] those issues had included the question of applicable penalties and the question of whether attempt should be punishable in the case of all crimes or only some of them. Secondly, the commentaries adopted at the forty-third session indicated that on a number of issues the views of members had been divided; those divergences had, of course, resurfaced at the stage of second reading. Thirdly, the mandate given to the Drafting Committee by the Commission in plenary at the present session had implied major changes in the scope of the draft and the structure of a number of articles. It would be recalled in that connection that at its 2387th meeting, the Commission had decided to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report (A/CN.4/466) and of the comments and proposals made in the debate, on the understanding—and he wished to emphasize the point—that, in formulating those articles, the Drafting Committee would bear in mind, and at its discretion, deal with all or part of the elements of the following articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). As a result of those three factors, the Drafting Committee had been faced with a burdensome task which could not be completed at the present session. Even those articles which the Committee had adopted and for which it was presenting a text to the plenary might have to be reviewed once the second reading of part two will have been completed. Some of the articles in question, such as the article on apartheid, could be considered under the heading of crimes against humanity. There were, of course, some other questions which remained open, particularly in connection with protection of the environment, but that was a different issue.

6. In the light of all those considerations, the Drafting Committee recommended that the plenary should consider the present report as an "interim document" and should defer adoption of the articles until its next session, when, in accordance with the timetable adopted for the remainder of the quinquennium, the second reading was to be completed and the draft Code finally adopted for submission to the General Assembly with the commentaries attached thereto. In his view, that should be one of the priority tasks of the next session.

7. Going on to introduce the text adopted by the Drafting Committee on article-by-article, he recalled that chapter I of part one of the draft Code as adopted on first reading had been entitled "Definition and characterization" and that it had consisted of articles 1 and 2, respectively entitled "Definition" and "Characterization". In the light of observations made in plenary and of the comments of Governments, and bearing in mind the Special Rapporteur's suggestions in his twelfth report,[15] the Committee had redrafted the two articles and

[12] The Drafting Committee will re-examine paragraph 3 of the article in the light of the decision it will reach in relation to article 3.

[13] *Yearbook... 1991*, vol. II (Part Two), pp. 93 *et seq.*

[14] Ibid., paras. 171-172.

[15] *Yearbook... 1994*, vol. II (Part One), document A/CN.4/460.

had combined them in a single text now before the Commission as article 1.

8. Although entitled "Definition", article 1 as adopted on first reading had not provided a real definition but had, rather, purported to be a "scope" article. Accordingly, the Committee's reformulation, which appeared in paragraph 1 of article 1, did not alter the substance of the text adopted on first reading, except in one respect. While it restricted the scope of the draft to the crimes against the peace and security of mankind enumerated in part two, it did not exclude the possibility that there might be other crimes against the peace and security of mankind; it merely specified that only the crimes listed in part two were within the purview of the Code, a point that would be clearly explained in the commentary. The commentary would also indicate that the phrase "crimes against the peace and security of mankind", wherever it appeared in the draft, should be understood as referring to the crimes listed in part two. The Committee had considered the possibility of adding to paragraph 1 the words "hereinafter referred to as crimes against the peace and security of mankind" in order to dispel any possible misunderstanding, but had come to the conclusion that the shorter text was more appropriate and that the requisite explanation could be provided in the commentary. It would also be noted that the words "under international law", which had appeared in square brackets in the text adopted on first reading, had been deleted as they had at the present time become superfluous.

9. Article 2 as adopted on first reading had been entitled "Characterization". Some of the Governments which had commented on it had found it unnecessary and had suggested its deletion. The purpose of the article had been to establish the autonomy of the characterizations of international criminal law with regard to internal law. The Committee had seen merit in clarifying the relationship between domestic law and international law with respect to the crimes defined under the Code. Paragraph 2 of article 1 therefore established the supremacy of the characterizations of international law over those of internal law. Since that aspect was closely related to the issue of the scope of the draft Code, the Drafting Committee had agreed to cover it in paragraph 2 of article 1.

10. The title of the article had been changed to read "Scope and application of the present Code" so as to reflect the contents of the provision more closely and adequately.

11. The issue of the characteristics of crimes against the peace and security of mankind was one which deserved further attention and the Drafting Committee intended to revert to it once it had completed its work on the list of crimes to be covered and on the definition of those crimes. It would then have the requisite background material, based on the individual draft articles, for inferring, if necessary, the elements that might characterize crimes against the peace and security of mankind.

12. The title of chapter I of part one depended on the contents of the chapter and of the articles it would comprise, and had therefore been left in abeyance.

13. As to chapter II of part one (General principles), it would be remembered that the first article in that chapter had been article 3, entitled "Responsibility and punishment", which had, *inter alia*, addressed the problem of complicity and attempt, one which had not been finally settled on first reading. The Drafting Committee intended to revert to that problem and to article 3 as a whole at a later stage, on the basis of the definitions of the various crimes to be covered by the draft Code.

14. It would also be recalled that the draft adopted on first reading had contained an article 4 entitled "Motives", specifying that responsibility for a crime against the peace and security of mankind was not affected by any motives invoked by the accused. In his twelfth report the Special Rapporteur had noted that the provision had prompted reservations on the part of Governments, some of which had advocated its deletion. The Committee had taken the view that the article blurred the distinction between "motive" and "intent", and had felt that motive should be addressed in the context of extenuating or aggravating circumstances. It had therefore heeded the advice of the Special Rapporteur and it recommended that article 4 should be deleted.

15. In the view of the Drafting Committee, the function of article 5 (Responsibility of States) was that of a saving clause indicating that the criminal responsibility of an individual for a crime against the peace and security of mankind had no bearing on any question of State responsibility. The Committee had agreed that the wording adopted on first reading was problematic. Some members would have preferred to delete the article, which they regarded as an unnecessary reminder that questions of State responsibility were dealt with under another topic. Other members had thought it useful to make it clear that the criminal responsibility of an individual was without prejudice to any question of State responsibility under international law. The Committee had reformulated article 5 accordingly. The title remained unchanged. The Committee intended to consider later on the possibility of transferring the adopted text to article 1, where it would appear as paragraph 3. Turning to articles 5 *bis* and 6, and taking up article 6 first, he said that it embodied the fundamental *aut dedere aut judicare* principle underlying a large number of penal law conventions concluded over the past 25 years with a view to ensuring the punishment of a variety of crimes of international concern. The Drafting Committee had noted that the text adopted on first reading departed in several respects from the corresponding provisions of the penal law conventions in question. First, the word "try" was replaced by the words "refer the case to its competent authorities for the purpose of prosecution". The Committee had opted for the latter wording, which, aside from enjoying a wide measure of acceptance among States, had the advantage of preserving the required degree of prosecutorial discretion.

16. Secondly, the relevant provisions of the conventions in question explicitly ruled out the possibility of exceptions and specified that the obligation to extradite or prosecute was not conditional upon the offence having been committed in the territory of the State in whose territory the alleged offender was found. The Committee had examined the possibility of including parallel provi-

sions in article 6 and had come to the conclusion that, in the context of the draft Code, such clarifications would not serve any useful purpose and might in fact detract from the absolute character of the "prosecute or extradite" obligation. The commentary would make it clear, however, that the obligation in question did not admit of any exception, that it was binding on the State in whose territory the alleged offender was found, even in the absence of any request for extradition, and that it had to be complied with in good faith and, in particular, without undue delay.

17. It would be recalled that article 6 as adopted on first reading had contained two additional paragraphs. Paragraph 2 had dealt with the question of the order of priorities to be followed by a State faced with several requests for extradition. As indicated in paragraph (4) of the commentary,[16] the question was highly complex: should precedence be given to territoriality, the nationality of the victim, the freedom of action of the State which had received several requests for extradition, the requirement of the proper administration of justice, or some other criterion? On first reading, the Commission had found it impossible to reconcile the various positions on that issue. It had, however, highlighted the importance of the territoriality criterion by requiring that "special consideration shall be given to the request of the State in whose territory the crime was committed". As the commentary made clear, even that compromise formula had not been generally accepted and had given rise to express reservations.

18. The same doubts had resurfaced in the Drafting Committee at the present session. It had first been pointed out that paragraph 2 amounted to a political statement entailing no obligations on the part of the State which had received the requests, and was therefore of little legal value. As regards the possibility of establishing a clear-cut order of priority among extradition requests, the prevailing view had been that legal systems varied too much in that particular respect for any attempt at unification to be likely to succeed, and that upsetting well-established legal traditions would reduce the acceptability of the Code itself. The Drafting Committee therefore recommended that paragraph 2 should be deleted and the matter be left to the discretion of the States concerned, it being understood that appropriate explanations would be provided in the commentary.

19. The Committee had noted that paragraph 3 no longer corresponded to the factual situation on the international scene in that, subsequent to its adoption on first reading in 1991, the draft statute for an international criminal court had been completed by the Commission and was under consideration in the Ad Hoc Committee on the Establishment of an International Criminal Court.[17] It had therefore agreed to delete the paragraph. However, the Committee intended to review the question of the relationship between the Code and the future statute for an international criminal court once the list of crimes under the Code had been finalized, with a view to examining the possibility of exclusive international jurisdiction in the case of specific crimes, of which aggression was one.

20. If the "prosecute or extradite" option recognized in article 6 was to be effective, either alternative should be capable of implementation. The "prosecute" option required that the State where the alleged criminal was found should have jurisdiction over the crime. That requirement was addressed in new article 5 *bis*. The text proposed by the Drafting Committee was modelled on the corresponding provision which appeared in all the penal law conventions to which he had referred earlier and was self-explanatory. Inasmuch as article 6 now laid down an obligation to "refer the case to its competent authorities"—and not an obligation to try, as provided for in the text adopted on first reading—article 5 *bis* was of special importance, bearing in mind that the whole purpose of the "extradite or prosecute" principle would be frustrated if the courts of a State in whose territory an individual alleged to have committed a crime under the Code was found were to decide, once they had been seized of the case by the competent authorities, that they lacked jurisdiction.

21. The second alternative contemplated in article 6—extradition—required a legal basis for the extradition of alleged criminals in a variety of situations so that the State where an alleged criminal was found would have a real rather than an illusory choice. Accordingly, the Drafting Committee had agreed to include in the draft an article 6 *bis*, which was closely modelled on the corresponding provision in existing conventions. That article might have to be reviewed when the question of the relationship between the Code and the statute for an international criminal court had been examined more thoroughly.

22. The Drafting Committee, which was not recommending any text for article 7, on non-applicability of statutory limitations, noted that that article had been the subject of reservations on the part of a number of States, and that existing instruments on the matter dealt only with war crimes and crimes against humanity. The Committee would, if necessary, return to the issue once it had identified and defined all the crimes to be covered by the Code.

23. Article 8 had been supported by most Governments that had commented on it and was based to a large extent on article 14 of the International Covenant on Civil and Political Rights. The Drafting Committee had made only two changes to the text adopted on first reading. The first, of a purely drafting nature, related to paragraph 1 (*e*): the corresponding provision of article 14 of the Covenant, paragraph 3 (*d*), envisaged the provision of legal assistance "in any case where the interests of justice so require" and stated that "in any such case" no payment would have to be made by the person concerned. As the text adopted on first reading had not contained the words "in any case where the interests of justice so require", the words "in any such case", which had remained in the text due to an oversight, were meaningless and had thus been deleted. The second change was substantive and consisted of the addition of a paragraph 2, on the rights of appeal, which was closely modelled on article 14, paragraph 5, of the Covenant. A right

[16] See *Yearbook... 1988*, vol. II (Part Two), p. 68.

[17] Established by the General Assembly in resolution 49/53.

of appeal was also provided for under the statutes of the International Tribunal for the Former Yugoslavia,[18] and the International Tribunal for Rwanda,[19] as well as under the draft statute for an international criminal court adopted by the Commission.

24. The Drafting Committee had discussed article 9 (*Non bis in idem*) extensively, taking into account article 10 of the statute of the International Tribunal for the Former Yugoslavia and article 42 of the draft statute for an international criminal court, which dealt with the same issue. The text before the Commission was very similar to that adopted on first reading, but with some changes.

25. Paragraph 1 of article 9 dealt with the situation in which an accused person had already been tried by an international criminal court for a crime under the Code and had been either convicted or acquitted by that court. In such a case, the *non bis in idem* principle applied fully and without exception. Accordingly, an individual who had been tried by an international court could not be tried again for the same crime by another court, whether national or international. Paragraph 1 was identical to the text adopted on first reading except for one change: the words "under this Code" had been replaced by "under the present Code", for the sake of consistency. The footnote to the paragraph which had appeared in the text adopted on first reading, and which stated that the reference to an international criminal court did not prejudge the question of the establishment of such a court, had been deleted since it was superfluous now that the Commission had finalized the draft statute for that court.

26. Paragraph 2, which applied the *non bis in idem* principle to the case where an individual had been tried by a national court, provided that a person could not be tried for a crime under the Code in respect of an act for which he had already been finally convicted or acquitted by a national court. The Drafting Committee had deleted the final clause of the paragraph adopted on first reading. That clause had made it a general condition for the application of the *non bis in idem* principle in the case of a final judgement by a national court that, in the event of conviction, the punishment must have been enforced or should be in the process of being enforced. Some members of the Drafting Committee had thought that the clause would be useful in covering situations of fraud, such as a mock trial, a light sentence or non-enforcement of the punishment, while others thought that it unduly narrowed the scope of the *non bis in idem* principle. The latter view had prevailed. The Committee considered that the *non bis in idem* principle should be preserved to the maximum extent possible, that the issue dealt with in the clause in question was in any event ancillary, and that, on the whole, the exceptions laid down in subsequent paragraphs met the concerns expressed in regard to possible fraud. For the sake of consistency, the words "under this Code", in paragraph 2, had been replaced by "under the present Code".

27. Paragraph 3, which dealt with the first of two exceptions to the general principle of *non bis in idem*, provided that a case could be reopened under specific circumstances. The new text differed from that adopted on first reading in two major respects. First, it provided for the possibility of a retrial solely by an international criminal court and not by a national court, and secondly, in addition to the exception relating to inaccurate characterization of the act by the national court, it contemplated a further exception based on improper or unfair conduct of the initial proceedings. The wording of paragraph 3 (*b*), which dealt with the second aspect of that exception, was borrowed from article 10 of the statute of the International Tribunal for the Former Yugoslavia.

28. Paragraph 4, which laid down the second exception, permitted retrial by the national courts of specific States, namely, the State in whose territory the act which was the subject of the initial judgement had taken place, and the State which had been the main victim of the crime. The Committee realized that the reference, in paragraph 4 (*b*), to the State which "has been the main victim of the crime" was not altogether clear and called for some explanation in the commentary. The commentary should, for instance, indicate that a State was considered to be the main victim of the crime if its nationals had been the main victims of the crime or its interests had been otherwise affected in a major respect.

29. The Drafting Committee had also borne in mind that the exceptions laid down in paragraphs 3 and 4 were viewed by some as inconsistent with the *non bis in idem* principle and had also taken into account the concern of those who considered that the possibility of retrial by a national court of a person already tried by another national court was not consistent with the requirement of respect for State sovereignty. It was the Committee's opinion that the present wording struck the right balance between the need to preserve to the maximum extent possible the integrity of the *non bis in idem* principle and the requirements of the proper administration of justice under the Code.

30. In paragraphs 2, 3 and 4, the words "tried and punished" had been replaced, on a tentative basis, by the word "tried".

31. Paragraph 5 provided that, in the event of a retrial, account should be taken, when passing sentence, of previous penalties imposed and served as a result of a previous conviction. Under the text adopted on the first reading, the court was required, when passing sentence, to deduct any penalty imposed and implemented as a result of a previous conviction for the same act. The Drafting Committee considered that the more flexible wording of article 10, paragraph 3, of the statute of the International Tribunal for the Former Yugoslavia was preferable and had redrafted paragraph 5 accordingly.

32. The Drafting Committee wished to make it clear that the expression "an international criminal court" meant a court established by or with the support of the international community at large and not a court set up by some States without the support of the international community. The title of article 9 was unchanged.

33. Article 10 (Non-retroactivity) stated a basic principle of criminal law and of the law of human rights. It had not given rise to any reservations either by Governments or in the Commission. The Committee had there-

[18] See 2379th meeting, footnote 5.

[19] Ibid., footnote 11.

fore retained the wording unchanged, except for the following minor points. In paragraph 1, the words "under this Code" had been replaced by "under the present Code". In the version of paragraph 2 adopted on first reading, the term "domestic law"—which, for the sake of consistency, had been replaced by "national law"—had been qualified by the words "applicable in conformity with international law". The Drafting Committee thought the qualification was unnecessary and that the commentary could explain how the reference to national law should be interpreted. The title of the article remained unchanged.

34. In regard to article 11 (Order of a Government or a superior), the Drafting Committee had noted that the concluding phrase of the version adopted on first reading—"if, in the circumstances at the time, it was possible for him not to comply with that order"—was open to unreasonable interpretation and that, in any event, the matter should be dealt with in the context of defences. Consequently, it had agreed to delete the phrase. The Committee had further noted that, under the statute of the International Tribunal for the Former Yugoslavia the fact that a crime had been committed pursuant to a higher order could be considered in mitigation of punishment if justice so required. The Drafting Committee had agreed that a similar clause should be included in the draft Code and, specifically, in the article on mitigating or aggravating circumstances. The square brackets placed around that phrase in article 11 therefore did not indicate that there was any substantive divergence of views in the Drafting Committee but merely that the place of the clause in question in the draft articles had not been definitively decided.

35. The principle of the responsibility of the superior, laid down in article 12, had its antecedents in the jurisprudence of the international military tribunals established after the Second World War and in the texts on international criminal law adopted at that time. The Drafting Committee had made two changes to the text adopted on first reading, which had provided for the responsibility of superiors when two conditions were met. The first condition had been that the superiors knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit a crime. That wording, taken from article 86, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), was too loose in the context of the draft Code and would lend itself to a variety of interpretations that might allow superiors to evade responsibility. The Drafting Committee had therefore replaced the phrase "had information enabling them to conclude" by "had reason to know", which was borrowed from article 7, paragraph 3, of the statute of the International Tribunal for the Former Yugoslavia, and was not so open to subjective interpretation. The second condition had been that the superiors did not take all feasible measures within their power to prevent or repress the crime. There again, the Drafting Committee considered it important to eliminate subjective notions and had replaced the criterion of feasibility with the criterion of necessity, which it viewed as more objective. The title of the article remained unchanged.

36. The Drafting Committee noted that, while the text of article 13 (Official position and responsibility) adopted on first reading had not given rise to any objections, some States had raised the issue of the possible immunity of officials, including heads of State or Government, from judicial process. In the opinion of the Drafting Committee, the issue was a matter of implementation and should not be dealt with in the part of the Code on general principles. Procedural concerns should not affect the principle that, whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted. Accordingly, the Committee recommended that article 13 should remain unchanged.

37. Article 14 (Defences and extenuating circumstances), as adopted on first reading, had given rise to many reservations on the part of Governments and therefore required careful study. As indicated in the report of the Drafting Committee, it intended to revert to that article at a later stage.

38. In regard to part two of the draft, entitled "Crimes against the peace and security of mankind" adopted on first reading, the Drafting Committee had had time to work out tentative drafts only for the article on aggression (former art. 15) and the article on genocide (former art. 19). The texts before the Commission were therefore highly provisional. The Committee had also achieved only partial results with regard to article 22 on war crimes, which would of course provide the point of departure for future work on the article.

39. On first reading, the Commission had included a paragraph at the beginning of each of the articles in part two which dealt with two questions, identification of the person or persons to whom responsibility for each crime could be ascribed, and penalties. The opening paragraphs prepared by the Drafting Committee on second reading, on a very preliminary basis, dealt only with the first of those questions, the Committee's intention being to deal separately with the question of penalties. At that stage, paragraph 1 of both articles 15 and 19, which appeared between square brackets, had been included merely as a tool to make it easier to understand subsequent paragraphs. As indicated in the report of the Drafting Committee, the Committee would at a later stage re-examine each of the articles in part two in the light of the decision it would take on article 3 and with a view to deciding whether it would be possible to adopt uniform language.

40. In the article on aggression (provisionally numbered article 15), paragraph 1, between square brackets, retained the expression "as leader or organizer", which appeared in the Charter of the Nürnberg Tribunal[20] and in the Charter of the Tokyo Tribunal,[21] and recognized the fact that aggression was always committed by individuals occupying the highest decision-making positions in the political or military apparatus of the State or in its financial and economic life. At the present stage, how-

[20] Ibid., footnote 12.

[21] Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946, *Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 *et seq.*

ever, the Drafting Committee had restricted the scope of the paragraph to the commission of an act of aggression, leaving aside the planning or ordering of such an act, two notions which might be covered by article 3. He would reiterate that it had been generally agreed that paragraph 1 of article 15 would be reviewed, and that its purpose was simply to indicate the problems that still awaited a solution. As the Special Rapporteur had pointed out in his thirteenth report, all the paragraphs in article 15, except paragraphs 1 and 2, had given rise to much criticism by Governments. The Drafting Committee had therefore followed the Special Rapporteur's advice and deleted paragraphs 3 to 7. Paragraph 2 of the article had given rise to divergent views, the positions in the Drafting Committee being almost equally divided on the desirability of establishing a threshold below which the use of armed force would not qualify as a crime against the peace and security of mankind. While some members considered it essential to establish such a threshold in order to limit the scope of the Code to sufficiently serious acts, others took the view—which had prevailed and was reflected in the text before the Commission—that the use of armed force "against the territorial integrity or political independence of another State" was by definition a serious matter and that no further qualification was required. The definition of aggression proposed in paragraph 2 reproduced the terms of Article 2, paragraph 4, of the Charter of the United Nations.

41. The brackets around paragraph 1 of article 19 indicated that the wording was to be reviewed at a later stage. As tentatively formulated, the paragraph referred only to the commission of an act of genocide, unlike the text adopted on first reading, which had also referred to the ordering of such an act. The latter concept would be reviewed in the context of article 3 of the draft. Paragraph 2 of article 19 reproduced article II of the Convention on the Prevention and Punishment of the Crime of Genocide, while paragraph 3 was closely modelled on article III of the Convention. As indicated in the report of the Drafting Committee, the Committee would re-examine paragraph 3 in the light of the decision it reached in relation to article 3.

42. Action by the Commission on the articles he had introduced would be premature at that point, since almost all of them might have to be re-examined when the articles in part two had been reviewed. At that stage, therefore, the Commission might wish simply to take note of the report. He apologized for the length of his statement, but felt that such detailed treatment was important for the future work of the Commission and for the purposes of the commentary to be prepared by the Special Rapporteur. He trusted that, at the Commission's next session, the Drafting Committee would be granted sufficient time to enable it to complete its task.

43. The CHAIRMAN thanked the Chairman of the Drafting Committee for his introduction. He congratulated the members of the Drafting Committee on their diligent work in preparing the improved version of articles on second reading and asked the members of the Commission whether they wished to comment.

44. Mr. BENNOUNA said that he was unclear on one point. As he understood it, the Chairman of the Drafting Committee was asking the Commission not to open the discussion, but simply to take note of the articles, which were not definitive. If, however, the articles were intended to be definitive, he would want to comment on the definition of aggression in article 15, paragraph 2, which in his view was at variance with all legal opinion on the subject. A distinction had always been made between minor acts of force and acts of such seriousness that they constituted aggression. Consequently, although any violation of the territorial integrity of another State was serious, it was essential to decide whether the violation was deliberate and wrongful and whether it was of some dimension. Reproducing the terms of Article 2, paragraph 4, of the Charter of the United Nations was not adequate in the present instance.

45. Mr. YANKOV (Chairman of the Drafting Committee), speaking on a point of clarification, said that the Drafting Committee had proceeded on the understanding that its report was preliminary. That did not mean the Committee had not adopted certain articles; some had, in fact, been adopted by consensus. The articles as a whole had not, however, been completed and were provisional. It should be placed on record that the report of the Drafting Committee reflected the work of that body and its adoption of certain articles, but that specific articles needed further consideration.

46. Mr. KUSUMA-ATMADJA commended the Chairman of the Drafting Committee on his meticulous, fair and helpful report.

47. In his opinion, it all depended on how the term "aggression" was defined. Draft article 15, paragraph 1, had been placed in square brackets, and rightly so, because aggression could be overt and official or it could be carried out through the invisible arm of a Government. For example, his own country, which was large, had been the victim of such adventures and they had only come to light many years later.

48. Mr. ARANGIO-RUIZ said that he wanted to make two points. First, the definition of aggression in article 15, paragraph 2, was rather too close to the wording of Article 2, paragraph 4, of the Charter. The provision under consideration dealt with crimes, and therefore a phrase might be inserted in the first line to indicate that the use of armed force by a State, in order to qualify as a crime under the Code, must be deliberately directed against the territorial integrity or political independence of another State. It must be possible to differentiate for cases in which force was used without aggressive intent, perhaps by mistake.

49. Second, and more important, the Code should state that its substantive provisions should become part and parcel of the domestic law of the signatory States. That idea could most readily be inserted as a new paragraph 3 in article 1.

50. Mr. MAHIOU said that he had not been a member of the Drafting Committee and therefore was all the more grateful for an informative report and for the many improvements made to the draft articles. The report had

helped to obviate many of the questions he had had, but some still persisted.

51. As to the presentation of the report of the Drafting Committee, he assumed that it was the Drafting Committee's intention to discuss articles 17, 18, 20 and 23 later. For his part, he would not be in favour of deleting all those articles.

52. Mr. EIRIKSSON, referring to Mr. Bennouna's remarks, stressed that the articles in the report had been adopted by the Drafting Committee. The preliminary nature of the report was reflected in the footnotes to certain articles and in the square brackets in others.

53. Concerning article 15, he drew attention to the Definition of Aggression adopted by the General Assembly[22] and pointed out that the Drafting Committee had discussed whether the Security Council should play a role in the determination of aggression. A decision had been taken in respect of the draft statute, but nothing comparable had been decided with regard to a definition of aggression for the draft Code.

54. In his view, there was a significant difference between the paragraph as adopted by the Drafting Committee and Article 2, paragraph 4, of the Charter. Lastly, article 15 was not meant to deal with cases of accidental aggression.

55. Mr. VILLAGRÁN KRAMER said that in the coming year, he would be submitting a written proposal to reflect the modifications to the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) with regard to aggression itself.

56. He sought clarification from the Chairman as to whether the report of the Chairman of the Drafting Committee would be incorporated in the Commission's report to the General Assembly with some mention of the articles as they stood.

57. The CHAIRMAN said that that would be clarified when the report was adopted; he saw no need to anticipate the matter.

58. Mr. ELARABY said that the implications of article 15, paragraph 2, needed to be considered in depth. Although the Definition of Aggression had been adopted, many were not happy with it.

59. As he saw it, there was a danger of confusion between the notion of prohibition of the use of force as set out in Article 2, paragraph 4, of the Charter, and which should be broadly interpreted, and the notion of armed force in article 15, paragraph 2, of the draft articles, or "armed attack", to use the term in Article 51 of the Charter, which should be restricted to prevent States from taking action and then claiming that they had done so in self-defence. The Commission seemed to be departing from the Charter, because a consequence of article 15, paragraph 2, was that if States used force, but not armed force, it would not be considered aggression.

60. Any legally binding provision on aggression must not in any way affect the prohibition of the use of force contained in the Charter.

61. Mr. THIAM (Special Rapporteur) said that the Commission had been working on a definition of aggression for years. Indeed, the complexity of the matter was illustrated by the fact that the draft had been adopted in the Committee by a very close vote: six in favour and five against.

62. Some members endorsed the definition of aggression as it currently appeared in article 15. Others were of the view that the definition was too broad and should somehow be qualified, in particular by introducing the notion of gravity. Mr. Arangio-Ruiz wanted to incorporate the element of intent in the definition. While not opposed to such a modification, he wished to point out that the notion of intent was already implicit in the definition of crime. Under international and national criminal law, there could be no crime without intent. The sole category where intent was not present was that of minor offences.

63. Mr. GÜNEY said that he shared fully the concerns expressed by Mr. Mahiou in respect of draft articles 17, 18, 20, 23 and, in particular, 24. What exactly was the future of those articles?

64. Mr. ROSENSTOCK said that the report of the Drafting Committee was simply the outline of "work in progress". When it resumed its work on draft article 3, the Drafting Committee should bear in mind that, as the Special Rapporteur had just pointed out, intent or *mens rea*, was an indispensable element of any activity which was considered as criminal.

65. While not agreeing with all the solutions they had offered, he shared the views of those who criticized, for various reasons, the inadequacy of the current definition of aggression, as contained in article 15. In terms of article 19 he hoped that the commentary would reflect that specific intent was an essential element of the crime of genocide and that the expression was understood to mean an intent to destroy a substantial part of the group in question.

66. He endorsed the decision to delete article 4 and the bracketed words at the end of article 11. That did not, however, imply that the deleted material might not be used elsewhere in the draft.

67. If the Commission broadened the scope of the matters before the Drafting Committee, it would not be able to achieve its goal of completing its work on the topic at the next session in 1996.

68. The Commission would be well-advised to recall the comment on the difficulty, if not the impossibility, of defining aggression.

69. Mr. LUKASHUK said that the report of the Drafting Committee was a very important document. Perhaps as in the glosses by manuscript copiers in the Middle Ages, the members of the Commission should make some reference somewhere to their own diligent efforts, in particular those of the Special Rapporteur and the Drafting Committee.

[22] General Assembly resolution 3314 (XXIX).

70. Mr. ARANGIO-RUIZ said that he agreed with Mr. Mahiou's comments about those articles which did not appear in the set of draft articles adopted by the Drafting Committee.

71. His suggestion with regard to the definition of aggression had been considered inappropriate by the Special Rapporteur, who held that every crime involved the element of intent. Yet, the notion of *culpa* ranged all the way from slight fault to wilful intent, with many degrees of fault in between. In paragraph 2 of article 19 of the draft Code, the word "intent" was used in reference to genocide. Why should the Commission not mention intent or deliberate purpose with regard to aggression?

72. Mr. AL-KHASAWNEH said that he agreed with the remarks made by Mr. Arangio-Ruiz.

73. Mr. THIAM (Special Rapporteur) said that his words had been misinterpreted: he had certainly not asserted that Mr. Arangio-Ruiz's suggestion was inappropriate. He had simply wanted to emphasize that there was an element of intentionality in all crimes.

74. Mr. YANKOV (Chairman of the Drafting Committee) said that he appreciated all the remarks and observations that had been made. It was clear that the definition of aggression needed further refinement.

75. With regard to the fate of the draft articles, he recalled that, at its 2387th meeting, the Commission had decided to refer to the Drafting Committee articles 15, 19, 21 and 22 for consideration on second reading on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and, at its discretion, deal with all or part of the elements of articles 17, 18, 20, 23 and 24, as adopted on first reading. Thus, it had not been up to the Drafting Committee to decide which articles it would consider—it had simply been operating under the mandate given to it by the Commission.

76. With regard to including the threat of aggression in the draft articles, the Special Rapporteur had, in his report, taken into consideration not only the views expressed within the Commission but also the views of Governments in that regard.

77. The question of intent and motive had been rightly raised by several members. As stated in the report of the Drafting Committee, the Committee had taken the view that motive should be addressed in the context of extenuating or aggravating circumstances and that, accordingly, article 4 should be deleted from the draft. That did not mean, however, that the question of intent and motive should not be given further consideration.

78. Article 15 was surely one of the major provisions of the draft Code and he appreciated the lively debate on the question. Nevertheless, it might take years to arrive at a generally accepted definition of aggression and, even then, the final version might not be the best.

79. Mr. AL-KHASAWNEH said that when the Commission had decided to refer articles 15, 19, 21 and 22 to the Drafting Committee, it had done so on the understanding that the Committee would deal first with the crimes referred to in those articles and would then turn its attention to the crimes mentioned in the other articles.

80. Mr. ARANGIO-RUIZ said he agreed that it was very difficult to arrive at a definition of aggression. In his earlier remarks, he had been referring only to one aspect of that definition.

81. On the general issue he had raised with regard to the implementation of the Code as a whole, he had heard no reply to his suggestion that a third paragraph should be added to draft article 1 to the effect that States parties to the Code must ensure that its provisions were incorporated in their respective national laws.

82. Mr. THIAM (Special Rapporteur), speaking in his capacity as a member of the Commission, said that States could not be obliged to incorporate such provisions in their domestic law.

83. Mr. AL-KHASAWNEH said that he could not agree with Mr. Thiam. Indeed, by choosing to become party to the convention, a State would be undertaking that very obligation. There were a number of precedents in that regard. For instance, in many of the conventions on terrorism, the States parties undertook to recognize as crimes under domestic law the international crimes to which those conventions referred.

84. The CHAIRMAN said that all the suggestions and observations made by the members would be given due consideration by the Drafting Committee at its next meeting.

85. If he heard no objection, he would take it that the Commission wished to take note of the report of the Drafting Committee, but that it would not be adopting the draft articles at the present time.

86. Mr. EIRIKSSON said it was not clear why the Commission needed to take note formally of the report, which would mean that it would have to be incorporated in the report of the Commission to the General Assembly on the work of its forty-seventh session.

87. Ms. DAUCHY (Secretary to the Commission) said that it was not the Commission's practice to reproduce reports of the Drafting Committee in its report. The report of the Commission would simply state that, at a particular meeting, the Chairman of the Drafting Committee had presented the report of the Drafting Committee and that the Commission had taken note of it.

88. The CHAIRMAN said that the Commission would continue its discussion with regard to the report of the Drafting Committee at the next meeting.

The meeting rose at 1.05 p.m.