Document:-

A/CN.4/SR.2437

Summary record of the 2437th 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:-

1996, vol. I

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the current session. That, however, did not seem to be the wish of the Commission.

62. He believed he must thus conclude that his views on questions he regarded as essential were not shared by the Commission. Consequently, he considered that the Commission should now appoint, if it deemed it necessary to do so, a new special rapporteur on the topic of State responsibility. He intended to resign from the post of Special Rapporteur with which, on a proposal by Mr. Reuter, the Commission had entrusted him in 1987. He believed he had said, done and written everything he should on the question of State responsibility. In his view, it was high time for him to stop resisting the views that the Commission seemed to prefer and for someone else to take his place.

63. The CHAIRMAN expressed the hope that the Special Rapporteur would reconsider his decision.

The meeting rose at 1.05 p.m.

2437th MEETING

Thursday, 6 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3[2])

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

1. The CHAIRMAN invited the Commission to consider, article by article, the text of the 18 draft articles of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Drafting Committee on second reading (A/CN.4/L.522 and Corr. 1).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), introducing the draft articles adopted by the Drafting Committee on second reading, said that the Commission had decided at its previous session to allocate at least three weeks of concentrated work for the Drafting Committee in order to achieve the goals it had set for the current quinquennium, of which it was now in the final year. The Commission, at its current session, had agreed with that plan of work for the Drafting Committee. As a result, the Drafting Committee had held 23 meetings from 7 to 31 May, which had necessitated intensive work for its members, for the Special Rapporteur and, of course, for the secretariat. He therefore wished to express his wholehearted thanks to all those involved, for their hard work, spirit of cooperation and discipline in attending all 23 meetings.

3. At the forty-seventh session in 1995, the Drafting Committee had provisionally completed its consideration, on second reading, of articles 1, 2, 4 to 6 *bis*, 8 to 13, 15 and 19. The Commission had taken no action on those articles, instead deferring action to the current session, when it could have all the articles of the draft Code.[3] In order to facilitate the Commission's work, all the articles of the draft Code adopted by the Drafting Committee at the preceding and the present sessions were reproduced in document A/CN.4/L.522 and Corr. 1 (reproduced in para. 7 below).

4. At the previous session, the then Chairman of the Drafting Committee, Mr. Yankov, had indicated that the report was of a tentative character and that some of the articles provisionally adopted at that time might need to be looked at again or modified in the light of the definition of crimes. The current Drafting Committee had modified the text of some of the articles adopted in 1995 precisely for the reasons anticipated by Mr. Yankov. He would indicate those changes when introducing the respective articles.

5. In his statement at the forty-seventh session, the previous Chairman of the Drafting Committee had also explained that the work of the Drafting Committee had been much more substantive than the usual second reading exercises, owing to a variety of factors. First, the Commission had deliberately deferred some important issues to the second reading. Secondly, the commentaries adopted for the articles on first reading had indicated that on a number of issues the views of members of the Commission were divided and that those issues would be reconsidered on second reading. Thirdly, the mandate given to the Drafting Committee by the Commission had implied possibly major changes in the scope of the draft and the structure of a number of articles. In addition, when, at the previous session, the Commission had referred to the Drafting Committee the articles on four crimes, namely, aggression, genocide, systematic or

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* Resumed from the 2431st meeting.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 et seq.

[2] Reproduced in *Yearbook ... 1996*, vol. II (Part One).

[3] For the texts of the draft articles and the statement of the then Chairman of the Drafting Committee, see *Yearbook ... 1995*, vol. I, 2408th meeting; see also *Yearbook ... 1995*, vol. II (Part Two), paras. 142-143.

mass violations of human rights and exceptionally serious war crimes, it had done so 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 the crimes which had not been referred to the Committee. Those crimes were: intervention; colonial domination and other forms of alien domination; apartheid; recruitment, use, financing and training of mercenaries; and international terrorism. As a result, some of the texts proposed by the Drafting Committee were substantially different from those adopted on first reading.

6. As to structure, the set of articles was divided into two parts. Part one (General provisions) comprised three sections: section 1 dealt with general principles; section 2 dealt with the articles on individual criminal responsibility; and section 3 dealt with procedural issues and jurisdiction. Part two (Crimes against the peace and security of mankind) then defined and listed crimes against the peace and security of mankind. In order to facilitate cross-referencing, the numbers in square brackets indicated the number of the corresponding articles adopted on first reading.

7. The titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, read:

PART ONE

GENERAL PROVISIONS

Section 1

Article 1 [1 and 2]. Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out 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.

Section 2

Article 2 [3]. Individual responsibility and punishment

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 15.

3. An individual shall be responsible for a crime set out in article 16, 17 or 18 if that individual:

(*a*) Intentionally commits such a crime;

(*b*) Orders the commission of such a crime which in fact occurs or is attempted;

(*c*) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 5;

(*d*) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(*e*) Directly participates in planning or conspiring to commit such a crime which in fact occurs;

(*f*) Directly and publicly incites another individual to commit such a crime which in fact occurs;

(*g*) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

4. An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment which is commensurate with the character and gravity of the crime.

[Article 4. Motives]

[Deleted]

Article 3 [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 4 [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.

Article 5 [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 6 [13]. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Section 3

Article 7. Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 16, 17 and 18. Jurisdiction over the crime set out in article 15 shall rest with an international criminal court.

Article 8 [6]. Obligation to extradite or prosecute

The State Party in the territory of which an individual alleged to have committed a crime set out in article 16, 17 or 18 is found shall extradite or prosecute that individual.

Article 9. Extradition of alleged offenders

1. To the extent that the crimes set out in articles 16, 17 and 18 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 territory of any other State Party.

[*Article 7. Statute of Limitations*]

[Deleted]

Article 10 [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 according to law.

Article 11 [9]. Non bis in idem

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

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(*a*) By an international criminal court, if:

(i) The act which was the subject of the judgment in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

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

(*b*) By a national court of another State, if:

(i) The act which was the subject of the previous judgment took place in the territory of that State; or

(ii) That State was the main victim of the crime.

3. 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 12 [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 precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Article 13 [14, para. 1]. Defences

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Article 14 [14, para. 2]. Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

PART TWO

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15. Crime of aggression

An individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression.

Article 16 [19]. Genocide

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.

Article 17 [21]. Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(*a*) Murder;

(*b*) Extermination;

(*c*) Torture;

(*d*) Enslavement;

(*e*) Persecution on political, racial, religious or ethnic grounds;

(*f*) Institutionalized discrimination on racial, religious or ethnic grounds;

(*g*) Arbitrary deportation or forcible transfer of population;

(*h*) Forced disappearance of persons;

(*i*) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation, severe bodily harm and sexual abuse.

Article 18 [22]. War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(*a*) Any of the following acts committed in violation of international humanitarian law:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement of protected persons;

(viii) Taking of hostages;

(*b*) Any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) Making the civilian population or individual civilians the object of attack;

(ii) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) Making a person the object of attack in the knowledge that he is *hors de combat*;

(v) The perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(*c*) Any of the following acts committed wilfully in violation of international humanitarian law:

(i) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) Unjustifiable delay in the repatriation of prisoners of war or civilians;

(*d*) Outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(*e*) Any of the following acts committed in violation of the laws or customs of war:

(i) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(ii) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(iii) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(iv) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(v) Plunder of public or private property;

(*f*) Any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

(i) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(ii) Collective punishments;

(iii) Taking of hostages;

(iv) Acts of terrorism;

(v) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(vi) Pillage;

(vii) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(*g*) In the case of armed conflict,

ALTERNATIVE A

using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

ALTERNATIVE B

using methods or means of warfare not justified by military necessity in the knowledge that they will cause widespread, long-term and severe damage to the natural environment, thereby gravely prejudicing the health or survival of a population, and such damage occurs.

PART ONE (General provisions)

ARTICLE 1 (Scope and application of the present Code)

8. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said the article had been adopted by the Drafting Committee on second reading at the forty-seventh session and the current Drafting Committee had made no changes to it. The Chairman of the Drafting Committee at that session had explained that article 1 had incorporated articles 1 and 2 as adopted on first reading.[4] The article constituted section 1 of part one and the Drafting Committee proposed that the Commission should adopt it.

9. Mr. PELLET said that he deplored the fact that the text still contained no definition of crimes against the peace and security of mankind.

10. Mr. PAMBOU-TCHIVOUNDA endorsed Mr. Pellet's comment. At the previous session, he had expressed his hope that a definition could be found for the concept of a crime against the peace and security of mankind.

11. Mr. THIAM (Special Rapporteur) said that, at the outset of its work, the Drafting Committee had discussed at length the possibility and desirability of providing a conceptual definition. The criterion finally adopted had been that of "extreme gravity"—what Mr. Pellet was wont to refer to as a "crime of crimes". Mr. Pambou-Tchivounda had indeed laid great stress on the need for a definition, had promised to submit a proposal, and had even suggested visiting him in Dakar to discuss the problem. So far, however, no proposal had been forthcoming. He would welcome any suggestions for an acceptable definition founded on a general criterion. However, in the absence of any specific proposal, there was no alternative but to retain article 1 in its present form.

12. Mr. CRAWFORD said he actively welcomed the absence of any definition other than that given in the current article 1, since he believed that no further definition was possible.

13. Mr. VILLAGRÁN KRAMER said that in criminal law as it operated in Latin America, the crime was always definable, since the judge did not necessarily

[4] For the explanations given by the Chairman of the Drafting Committee at the forty-seventh session, see *Yearbook . . . 1995*, vol. I, 2408th meeting, paras. 2-42.

require a definition, but provided his own when qualifying the crime. In such cases, it was the gravity of the crime that identified it as an international crime.

14. Mr. YANKOV said that draft article 2 under consideration by the Drafting Committee at the forty-seventh session had been an attempt to pinpoint the characteristics of such a crime. After discussion both in the Committee and in the Commission in plenary, it had been accepted that it was not necessary to provide such a definition, for the enumeration contained in part two contained all the elements of such crimes.

15. In the penal codes of his own and of several other European countries, no such prior definition was required, and crimes were enumerated by their parameters, components and consequences. He urged the Commission not to reopen what had already been a lengthy general debate on the question of a definition, particularly since no concrete proposal had been made in that regard. Any dissenting opinions could be duly placed on the record.

16. Mr. IDRIS said that he concurred with Mr. Yankov. He for one had not been satisfied with the imprecise wording of the current draft article 1, but had accepted it because no better alternative proposal had been put forward. He too appealed to other members not to reopen the debate on an issue that had been discussed extensively and intensively in the Drafting Committee and in plenary meetings of the Commission.

17. The CHAIRMAN said it was his understanding that members would simply have the opportunity to place on record their positions on that issue and their regret at the absence of a definition of a crime against the peace and security of mankind.

18. He said that if he heard no objection, he would take it that the Commission wished to adopt draft article 1.

Draft article 1 was adopted.

ARTICLE 2 (Individual responsibility and punishment)

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced article 2 which was the first in a series of articles in section 2 addressing the question of individual criminal responsibility. It corresponded to article 3 adopted on first reading, which had consisted of three paragraphs and had dealt with that issue in general terms. During the consideration of that article on first reading, there had been uncertainties as to how best to deal with the question of individual criminal responsibility. The majority view at that time had been to address the question in individual articles describing the crimes. During the consideration of the article on second reading at the preceding session, the importance of the article on the establishment of individual criminal responsibility in the Code had been emphasized. At that time the Drafting Committee had felt that it would be preferable to deal with all aspects of individual criminal responsibility in a single article. It had therefore deferred consideration of the article, pending a final decision on the articles on the list of crimes. Having finalized the list of crimes, the Drafting Committee now proposed a much more detailed and comprehensive text. The article consisted of four paragraphs, the first three dealing with the principle of individual criminal responsibility, and the fourth addressing the question of penalties.

20. Paragraph 1 set out the general principle of individual criminal responsibility for crimes against the peace and security of mankind. Even though, in accordance with paragraph 1 of article 1, the Code applied only to those crimes against the peace and security of mankind that were listed in part two of the Code, the Drafting Committee had felt that individual criminal responsibility was a general principle applicable to all crimes against the peace and security of mankind, whether or not they were listed in the Code. For that reason, paragraph 1 set forth the principle with no qualification.

21. Paragraph 2 dealt with individual criminal responsibility for the crime of aggression. The paragraph only reaffirmed the principle and referred to draft article 15 (Crime of aggression), which, for reasons he would explain when introducing that article, also dealt with the issue of individual criminal responsibility.

22. Paragraph 3 set out the principle of individual criminal responsibility for the remaining crimes under the Code. Those remaining crimes were genocide, crimes against humanity, and war crimes. The paragraph had seven subparagraphs, describing seven types of criminal acts. Subparagraph (*a*) was the actual intentional commission of a crime. Subparagraphs (*b*) to (*f*) dealt with conspiracy and complicity, and subparagraph (*g*) with attempt, in other words, with situations in which the participation of the individual in the commission of a crime entailed his responsibility.

23. He said that it should be noted that, under paragraph 3 (*b*), ordering the commission of a crime was a criminal act only if the crime had in fact occurred or had been attempted. The Drafting Committee had felt that an individual who ordered the commission of the crime should entail criminal responsibility under the Code, not only when that crime had in fact been committed, but also when its commission had been attempted. Otherwise, there might be an anomalous situation in which an individual who had attempted the commission of a crime would bear criminal responsibility under paragraph 3 (*g*) but the individual who had ordered the commission of that crime would not. Some members of the Committee had felt that ordering the commission of the crime was a criminal act in itself, even if the criminal act was not committed. They had noted that the Nürnberg Principles[5] and the statute of the International Tribunal for the Former Yugoslavia[6] and the statute of the International Tribunal for Rwanda[7] had attributed criminal responsibility to an individual who had ordered the commission of a criminal act whether or not the crime was in fact com-

[5] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127). Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45.

[6] Reference texts are reproduced in *Basic Documents*, 1995 (United Nations publication, Sales No. E/F.95.III.P.1).

[7] Security Council resolution 955 (1994) of 8 November 1994, annex.

mitted. They had been concerned that the formulation of that subparagraph might be interpreted as raising the threshold. Other members of the Drafting Committee, however, had been of the view that the Nürnberg Principles and the statutes of the two International Tribunals had been drafted in view of situations which had already taken place. It was therefore unnecessary to add the requirement that the crime should in fact have occurred. The Code, however, was intended to cover situations which might occur in the future. Ordering a crime would not of itself endanger peace and security, in the absence of the commission of the crime for whatever reason.

24. Paragraph 3 (*c*) dealt with the failure of the superior in the discharge of his or her responsibility in the circumstances set out in article 5.

25. Paragraphs 3 (*d*) to 3 (*f*) dealt with various forms of conspiracy and complicity and, it would be noted, set a rather high threshold for bringing such ancillary crimes under the Code. However, with regard to the application of those subparagraphs to the crime of genocide, the Drafting Committee did not intend any modification of the threshold set out in the Convention on the Prevention and Punishment of the Crime of Genocide. The commentary would make that point very clear.

26. Subparagraph (*d*) dealt with aiding and abetting or otherwise assisting in the commission of a crime, including providing the means for its commission. The acts in the subparagraph, however, were qualified by three requirements: they should be committed knowingly; they should be direct; and they should be substantial. Those three requirements were intended to limit the application of the Code to those individuals who had had a significant role in the commission of a crime under the Code.

27. Paragraphs 3 (*e*) and 3 (*f*) dealt with participation in planning, conspiring and incitement. For reasons stated in relation to subparagraph (*a*), acts described in subparagraphs (*e*) and (*f*) entailed individual criminal responsibility under the Code only if a crime in fact occurred.

28. Lastly, Paragraph 3 (*g*) dealt with attempt. The statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda did not include attempt as an independent criminal act. In the view of the Drafting Committee, however, the crimes listed in the Code were of such gravity that an individual who took action commencing the execution of a crime which did not occur because of circumstances independent of that individual's intentions should nevertheless bear individual criminal responsibility.

29. Paragraph 4 addressed punishment. He recalled that on first reading, the issue of punishment was to have been covered in individual articles dealing with crimes. It was only on second reading that the Commission had indeed had a serious debate on various forms of punishment and, in particular, on the death penalty. The views in the Commission, as in the Drafting Committee, had been diverse. The Committee had concluded that it was unlikely that the Commission could agree on penalties and that the establishment of penalties at that stage was not essential to the usefulness of the Code. Accordingly, the Committee had found it prudent to formulate only a general provision on penalties, leaving specific establishment of penalties to the competent court or tribunals implementing the Code. Paragraph 4 therefore only provided that individuals who were responsible for a crime against the peace and security of mankind were liable to punishment commensurate with the character and gravity of the crime. The commentary would also make it clear that the paragraph did not rule out any form of penalty.

30. The title of the article had been changed to "Individual responsibility and punishment", which reflected more accurately its content. The Drafting Committee recommended that the Commission should adopt article 2.

31. Mr. GÜNEY said that, while fully aware of the discussions that had taken place in connection with paragraph 4 and of the explanations just provided by the Chairman of the Drafting Committee, he continued to be of the opinion that the paragraph should form a separate article, thereby giving greater prominence to the fact that an individual responsible for a crime against the peace and security of mankind would be liable to punishment commensurate with the character and gravity of that crime.

32. Mr. IDRIS, referring to paragraph 3 (*d*), said that the word "and" in the phrase "directly and substantially" was problematic. He asked whether the implication was that, if the assistance rendered was direct yet not substantial, a crime was not committed. A crime could be committed with assistance that was direct yet not substantial, or vice versa.

33. Mr. PELLET said that, first of all, he disapproved of the structure of the article, and particularly of the different forms in which paragraphs 2 and 3 were cast, the reason for which had not been made clear by the Chairman of the Drafting Committee. The wisdom of singling out the crime of aggression for separate treatment was debatable.

34. Secondly, he was not at all happy with the new wording of paragraph 1. He personally had found paragraph 1 of the old article 3 infinitely more satisfactory. Thirdly, with regard to paragraph 3 (*e*), he would welcome clarification as to the reasons why the Committee had felt it useful to retain the idea of conspiring to commit such a crime, since the Statute of the International Tribunal for the Former Yugoslavia had very deliberately avoided reference to the notion of conspiracy.

35. Lastly, he was troubled by the wording of paragraph 4. Did the reference to punishment "commensurate with the character and gravity of the crime" mean that, within the concept of a crime against the peace and security of mankind, there were crimes of differing character? He quite failed to see how that could be possible, and was greatly opposed to the use of the word *nature*, in the French version, which should be deleted.

36. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said the object of paragraph 3 (*e*) was to make it clear that responsibility was incurred not only by those who actually committed the crime but also by those who participated in planning it. As for para-

graph 4, Mr. Pellet's difficulty could perhaps be resolved by replacing the word *nature* in the French version by the word *caractère*, which corresponded to the term used in the English text. The point made by Mr. Güney that paragraph 4 should become a separate article had been considered by the Drafting Committee and the conclusion had been reached that the provision was relatively insubstantial inasmuch as it did not say much about penalties and it could therefore be combined with the other provisions of article 2.

37. Mr. THIAM (Special Rapporteur) agreed that the word *nature* in the French version of paragraph 4 should be replaced by *caractère*.

38. Mr. TOMUSCHAT agreed with Mr. Güney that paragraph 4 should appear as a separate article. It contained two substantial propositions and could perfectly well stand on its own. With regard to paragraph 3 (*g*), an attempt to commit a crime against the peace and security of mankind did not, in each and every instance, qualify as such a crime. Instances where an attempt was of sufficient gravity to qualify as a crime and to require prosecution did undoubtedly occur, but the provision in subparagraph (*g*) went too far. He did not, however, wish to question the subparagraph at so late a stage and merely asked that his observations be placed on record. Paragraph 4 was, in his view, well drafted, at least in English. The difference between, say, misuse of the emblem of the Red Cross and wilful killing was obviously very great in terms of the punishment that should be imposed on the perpetrator.

39. Mr. RAZAFINDRALAMBO said the structure of article 2 was puzzling. It was difficult to see why the crime of aggression was singled out in paragraph 2, unless it was to distinguish aggression from the crimes set out in articles 16, 17 and 18. Indeed, paragraph 3 seemed to introduce all the relevant general principles of criminal law in rather pell-mell fashion. He wondered whether, in the interests of clarity, subparagraph (*g*) on attempts to commit a crime should not be moved up to follow on directly from subparagraph (*b*), where the concept of attempt was introduced for the first time. He agreed that the provision in paragraph 4 should form the subject of a separate article, and also endorsed the proposal to replace the word *nature* in the French text by the word *caractère*. It might be possible to use a term such as *élément caractéristique*.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the structure of paragraph 3 was dictated by the need to combine the principles of civil law with those of common law. He did not think it would be helpful to establish a closer relationship between paragraphs 3 (*b*) and 3 (*g*). The former dealt with the ordering of a crime, while the latter spelt out the concept of attempt. The reason why aggression was dealt with separately from other crimes against the peace and security of mankind was that article 15 itself set out all the possible elements of action by the individual concerned. Lastly, he would have no objection to the provision in paragraph 4 becoming a separate article if that was the wish of the majority of members.

41. Mr. THIAM (Special Rapporteur) said that he, too, would have no objection to such a course. With reference to paragraph 3 (*b*), the word *exécuté* in the French version should be replaced by *commis*.

42. Mr. PAMBOU-TCHIVOUNDA said that, like Mr. Pellet, he was not entirely satisfied with the wording of paragraph 1 and suggested that the words *de son auteur*, (of the perpetrator) or similar language, should be added at the end of the French text. While agreeing that the provision in paragraph 4 should form a separate article, he wondered whether it would not be technically more correct to replace the words "responsible for" by "found guilty of". In the French version, the word *nature* should replace *caractère*.

43. Mr. CRAWFORD said that he experienced the same difficulties as did Mr. Tomuschat. While recognizing that it was beyond anyone's capacity to improve the text of article 2 at the present stage, he could not help noting that, as the Chairman of the Drafting Committee himself admitted, the definitions in part two invoked in paragraphs 2 and 3 of the article involved quite different techniques. Moreover, some of the cases listed in paragraph 3 referred to acts that had not in fact occurred, whereas genocide, crimes against humanity and war crimes were defined in terms of acts that had in fact taken place and produced results. However, as already stated, it was probably too late to make any changes, but the defective drafting could be improved in one respect. The inclusion of attempts to commit a crime against the peace and security of mankind, as now formulated, was undesirable. Paragraph 3 (*g*) should simply be deleted. Public incitement was certainly highly relevant and was already covered in paragraph 3 (*f*). All other cases could be covered by including a reference to the relevant separate conventions already in existence. Admittedly, the Convention on the Prevention and Punishment of the Crime of Genocide did, in its article III, include attempt to commit genocide among the punishable acts, but the Commission was not engaged in re-enacting that Convention, nor should it so engage. It was dealing with a particular category of very grave crimes. Attempts that did not involve public incitement, planning and so forth should be omitted.

44. The provision in paragraph 4, as it stood, ran counter to the principle of *nulla poena sine lege* in that it failed to specify a maximum penalty. The paragraph set out an independent principle of criminal responsibility that had nothing to do with maximum penalties. The draft statute for an international criminal court as adopted by the Commission[8] specified the maximum penalty of life imprisonment. The Code was not self-executing, as it would require each national legislature to add its own tariff of maximum penalties, which in some countries might involve the death penalty.

45. Mr. THIAM (Special Rapporteur) recalled that the concept of attempt had been discussed in considerable detail in the past. The upshot had been that it should be left to the court to decide whether the concept of attempt was or was not applicable in each particular case. The fact that in some cases an attempt did qualify as a crime against the peace and security of mankind had been

[8] See 2433rd meeting, footnote 5.

considered sufficient reason for including the concept as a general principle.

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that where the attempt involved, say, systematic or large-scale killing, and where the circumstances that prevented the execution of the crime had been beyond the control of the individual making the attempt, a crime against the peace and security of mankind surely existed. In the case of crimes of a different character and lesser gravity, the concept of attempt might not be applicable. With regard to the question of penalties raised by Mr. Crawford, he had always thought the Commission should propose a maximum and a minimum penalty. The difficulties were, however, enormous, because of differences between national legislations and especially because of the fundamental issue of the death penalty. Some countries would not accept the Code if it prescribed the death penalty, and others would not accept it if it did not. In his own view, paragraph 4 as it stood said very little, but he would nevertheless plead for it to be maintained. The Code should contain at least some reference to punishment.

47. Mr. FOMBA said that, as a member of the Drafting Committee, he of course agreed with the results of the Committee's work and wished only to make a few brief comments.

48. As he understood it, the reason why paragraph 1 did not speak of criminal responsibility was to leave the door open for civil responsibility as well. He would have preferred the words "of the perpetrator" to be added at the end, but could endorse the paragraph as it stood. As far as paragraph 2 was concerned, the purpose of placing the crime of aggression in a separate provision was to underscore its special nature.

49. In the first sentence of paragraph 3, the words *responsable du crime* could well be changed to *responsable d'un crime* in the French version, but he would not insist on such an amendment. There had been some hesitation in the Drafting Committee about the distinction between paragraph 3 (*b*) and paragraph 3 (*g*). The main point of paragraph 3 (*b*) was to make the ordering of the crime a crime in itself, so as to serve as a deterrent.

50. The word "substantially", in paragraph 3 (*d*), posed a problem, because it was not easy to assess. In the absence of better wording, however, he was not opposed to its being retained.

51. He would have preferred the word *caractère* to *nature* in paragraph 4 of the French text, but considered that the debate on that point was somewhat artificial. He certainly agreed that the paragraph should form a separate article.

52. Mr. VILLAGRÁN KRAMER said that there was no need to make a reference in paragraph 1 to perpetrators and accomplices, although there was no harm in so doing. Anyone reading the article would immediately realize that, only in the case of aggression, mentioned in paragraph 2, were the perpetrators guilty or punishable, whereas in the case of other crimes, both the perpetrators and the accomplices were guilty. That brought him to paragraph 3, under which the idea of intent and attempt related solely to crimes under articles 16, 17 and 18, namely genocide, crimes against humanity and war crimes. Clearly, in the case of aggression, only perpetrators, without further qualification, were responsible, whereas the various elements set forth in paragraph 3 applied in the other cases.

53. He wondered, in that connection, how the Commission would deal with the situation of accomplices if Mr. Rosenstock's proposal for an article 22 *bis*, on crimes against United Nations and associated personnel, contained in the memorandum submitted by Mr. Rosenstock at the suggestion of the Drafting Committee (ILC (XLVIII)/CRD.2 and Corr.1), was incorporated in the draft. The Commission was identifying articles 16, 17 and 18. By using that method, it was saying that subparagraphs (*a*) to (*g*) all applied only to genocide, crimes against humanity and war crimes, whereas if the words "except for the crime of aggression" were inserted in paragraph 3, it would cover all other crimes.

54. The CHAIRMAN said he thought it was not the time to raise Mr. Rosenstock's proposal.

55. Mr. THIAM (Special Rapporteur) said he agreed. The Commission should wait to see whether the proposal was adopted before deciding what importance to give it in the Code.

56. Mr. VILLAGRÁN KRAMER said he did not disagree, but as the draft now stood, intent and accomplices only entered into play in articles 16, 17 and 18. They would not enter into play if other crimes were added later, in which case it would be necessary to revert to the matter.

57. Paragraph 3 rightly touched on the case of an attempted crime and on the question of accomplices, but it did not address situations in which the attempt was foiled or the issue of those responsible for covering up the crime. The law of the Spanish-speaking countries also covered the case of the *encubridor* (accessory after the fact). He had no objection to excluding that aspect, but it should be made plain that the Commission was doing so deliberately.

58. Lastly, Mr. Güney was right to say that paragraph 4 should form the subject of a separate article. However, as Mr. Crawford had rightly pointed out, in countries in which the principle of *nulla poena sine lege* applied, it would be impossible for a court to apply such a provision. It might therefore be preferable, when separating that paragraph, to return to the question of maximum and minimum sentences. He had no difficulty in mentioning the death penalty in countries where it was applied, but it was possible to exclude them by including a reference to the effect that, apart from countries with the death penalty, the maximum punishment would be life imprisonment.

59. Mr. BOWETT said he had been struck by the fact that, whereas the Commission had been dealing with the attempt to commit a crime, it had not addressed the attempt to conceal the commission of a crime. In view of the very serious attempt to conceal the commission of war crimes on a large scale in Bosnia, he wondered whether that matter should not also be taken up.

60. Mr. THIAM (Special Rapporteur) said that an attempt to conceal a crime in fact constituted complicity in that crime.

61. Mr. TOMUSCHAT said he disagreed with Mr. Crawford's assertion that paragraph 4 was a violation of the principle of *nulla poena sine lege*. International law in that field had never been understood as requiring that a penalty be determined. At Nürnberg, for example, it had been found that crimes against peace had been crimes under customary law, although there had been no provision for penalties. Likewise, in the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, although provision was made for penalties, many of the acts had been committed beforehand. The basis was customary international law, which did not stipulate penalties. Thus, there was no violation of the recognized standards of international human rights law.

62. He said he would maintain his proposal to make paragraph 4 a separate provision and suggest dividing it into two sentences. The first would end after the word "punishment", and then the second would begin with "Punishment is commensurate".

63. Mr. HE said that he agreed with Mr. Tomuschat and the Chairman of the Drafting Committee about paragraph 4. There was no need to set a maximum punishment. The most serious crimes were at issue. The case of genocide, for example, involved abhorrent mass killings. In a national court, the perpetrator of such crimes might be sentenced to death if the law of the State in question stipulated the death penalty. If life imprisonment was made the maximum punishment, then the national court of a country with the death penalty would be reluctant to hand over the criminal to the international criminal court. He had no strong feelings about whether or not the paragraph should be made a separate article.

64. Mr. PELLET, first addressing the question of punishment in paragraph 4, said it was apparent that, after so many years of consideration, there was still some confusion about the very function of the Code. The Code was not enough on its own. It would be applied either by domestic courts or by an international criminal court, which would set the scale of punishment. He had no criticism of paragraph 4 in that regard. As he saw it, the question of *nulla poena sine lege* would be resolved in the framework of the statutes of the courts. The Special Rapporteur had rightly suggested replacing the word *nature* by *caractère* in the French text of the paragraph to bring it into line with the English version. But even the English word "character" was not entirely satisfactory. In both the French and the English versions the term should be placed in the plural.

65. He said that he was very hostile to the use in the English version of paragraph 3 (*e*) of the phrase "conspiring to commit". Conspiracy had a very specific meaning in common law and was a concept that did not exist in civil law countries. It was therefore entirely unacceptable to introduce it in a text with a universal scope of application. In the drafting of the statute of the International Tribunal for the Former Yugoslavia, great thought had been given to the problem and it had been decided, contrary to what had been done at Nürnberg, not to include conspiracy. First, it was impossible to identify general principles of law on the concept of conspiracy that were common to the common law system and to the civil law system. Secondly, it had been very difficult at Nürnberg to decide just how far conspiracy went. For example, had membership of the National Socialist Party constituted conspiracy or not? There was no point in including the concept in the draft, especially as ordering the commission of such crimes was already covered. In his view, the word "participate" was sufficient.

66. He was sceptical about the usefulness of singling out the crime of aggression. Admittedly, article 15 had been the result of a painful compromise and he was not firmly opposed to it, but he was not sure that separate treatment in article 2 for crimes of aggression was warranted. If the Commission wanted to move ahead in adopting article 2, it should postpone the adoption of paragraph 2 until it had considered article 15. The Commission could very well cover crimes of aggression in article 2, paragraph 3, while leaving the wording of article 15 as it stood.

67. He much preferred retaining the wording of article 3, paragraph 1, adopted on first reading, which read:

> An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.[9]

It was vastly superior to article 2, paragraphs 1 and 4.

68. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), referring to a question raised by Mr. Pellet, drew the Commission's attention to paragraph (4) of the commentary to article 3, adopted on first reading, which stated:

> Paragraph 2 also refers to conspiracy to commit a crime against the peace and security of mankind . . . Instead of the French term *complot*, the Commission preferred the term *entente*, which was taken from article III of the Convention on the Prevention and Punishment of the Crime of Genocide and differed, in French at least, from the term used in the 1954 draft Code and in Principle VI of the Nürnberg Principles. *Entente* and *complot* were both translations of the word "conspiracy", which was used in the English version of the draft article. In any event, the punishable conduct in question was participation in a common plan for the commission of a crime against the peace and security of mankind. The Commission used that concept to mean a form of participation, not a separate offence or crime.[10]

That would not solve Mr. Pellet's problem that conspiracy was unknown in civil law systems, but it showed that the concept had already been included in other legal instruments and in the text of the draft Code as adopted on first reading.

69. As to the possibility of punishing complicity in cases where persons who committed a crime had been aided and abetted after the crime was committed, that was the only question that had not been discussed in the Drafting Committee. It was useful, in that connection, to refer to paragraph (3) of the commentary to article 3 of the draft Code as adopted on first reading, which stated:

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[9] See footnote 1 above.

[10] Ibid.

Most members agreed that any aiding, abetting or means provided prior to the perpetration of the crime or during its commission constituted obvious cases of complicity. On the other hand, opinions were divided on how to deal with aiding, abetting or means provided *ex post facto*, in other words, after the commission of the crime, for example, when the perpetrator was helped to get away or to eliminate the instruments or the proceeds of the crime, and so on. A conclusion seemed to be reached that complicity should be regarded as aiding, abetting or means provided *ex post facto*, if they had been agreed on prior to the perpetration of the crime. However, opinions were divided as to aiding, abetting or means provided *ex post facto* without any prior agreement. In the view of some members who represented certain legal systems, that was also complicity and the accomplice would be known under those legal systems as "an accessory after the fact". For other members, that was an offence of a different kind, known as "harbouring a criminal". They did not see how, for example, a person who gave shelter to the perpetrator of genocide could be compared to that perpetrator as a participant in a crime against the peace and security of mankind. That person did, of course, commit a crime, but he did not take part in the perpetration of a crime against the peace and security of mankind.[11]

As he saw it, it should be possible to resolve the problem by including a statement in the commentary, as in the commentary to the articles adopted on first reading, pointing out that doubts persisted on the question.

70. Mr. THIAM (Special Rapporteur) said that the concept of complicity had a broader meaning in common law countries than in civil law countries. There was no need to dwell on the question, which was of a purely theoretical nature. He had already discussed the distinction in his commentary.

71. Mr. KABATSI said that paragraph 4 should stand as drafted. Admittedly, it departed from the norm in that in many jurisdictions crimes and their punishments were strictly defined, but it catered for a special situation in which a wide divergence of policies in the matter of sentencing had to be taken into consideration. He, too, favoured a separate article for the provision.

72. Mr. ARANGIO-RUIZ said he would like to know why Mr. Pellet believed that the word *nature*, in the French text, should be replaced by the word *caractères*, in the plural. His own feeling was that the word *nature*, or the word *caractère*, in the singular, was better, since it denoted the kind of crime referred to.

73. Mr. EIRIKSSON said that he would have preferred the draft Code to provide for a maximum penalty of life imprisonment for the gravest crimes.

74. Mr. Sreenivasa RAO said article 2 dealt with a number of concepts that had been the subject of widely differing interpretations under the various systems of law. It was therefore particularly important to ensure that the commentary to the article was carefully drafted to bridge the gaps, in so far as possible, and show how certain concepts had been drawn together. The way in which some concepts had been borrowed from established practice must be viewed afresh in order to arrive at a better understanding of what precisely was involved. Otherwise, the article would only continue to give rise to debate not only in the Commission but also in the Sixth Committee and in other bodies.

75. In general, he could go along with the various points raised, provided they met with general consensus. Like Mr. Pellet, however, he had some difficulty with paragraph 2 of the article and its reference to article 15, one which spoke of an "individual, who, as leader or organizer". A point would have to be clarified. If a participant in aggression was not an organizer or leader, would he be exempted from responsibility under article 15 and hence under paragraph 2 of article 2? Also, why was the provision in paragraph 2 not included along with articles 16, 17 and 18? What was the reason for its separate treatment? He would be grateful for clarification.

76. Mr. ROSENSTOCK said that the extract read out by the Chairman of the Drafting Committee from the commentary adopted on first reading indicated disagreement among members of the Commission. He did not, however, believe there was any disagreement that someone who hid or otherwise concealed the fact, or perpetrator, of a crime was guilty of a crime. Only at the very conceptual level was there any such difference. It was true that, because of the inclusion of the words "in the commission of such a crime", paragraph 3 (*d*) could be perceived as being limited to conduct before the actual commission of the crime. But the Commission could perhaps agree that what that provision covered was not merely conduct before the crime but also actions which, under one legal system, would make the perpetrator an accessory after the fact and under another would constitute independent crimes. If such agreement was not possible, some relatively minor drafting changes could perhaps be made, for instance, by adding to paragraph 3 (*d*) some wording along the lines of "or in deliberately concealing the commission". He saw no basis whatsoever for any member taking the view that acts such as hiding the perpetrator of a crime or destroying evidence did not amount to criminal conduct. Nor did he see why the commentary should indicate that anybody thought it was not criminal conduct, which seemed to be the implication of what had been read out.

77. Mr. TOMUSCHAT said that he could not agree with Mr. Rosenstock. To conceal or hide a person after that person had committed a crime against the peace and security of mankind might constitute criminal conduct, but it certainly did not amount to a crime against the peace and security of mankind. If such concealment or hiding formed part of a concerted plan, that was a different matter, but to hide a criminal after he had committed even a terrible act was not an act of sufficient gravity to amount to a crime against the peace and security of mankind. The scope of article 2 would be broadened enormously and he had been among those who had opposed such a course at the forty-third session, in 1991.

78. Mr. PELLET said that the purpose of a commentary was to clarify a text, not correct it. If the text was unsatisfactory, then it should be corrected. The commentary should not be used to state the opposite.

79. With regard to Mr. Arangio-Ruiz's comment, the reason why he wanted to replace the word *nature* by the word *caractères* was precisely because crimes of the same *nature*, could have different *caractères*. Crimes against the peace and security of mankind fell into a specific category and, within that category, such crimes

[11] Ibid.

could differ either as to their object or intent or because of participation or incitement. The word *caractères* removed the ambiguity inherent in the word *nature*, and to a lesser extent in the word *caractère*, which gave the impression that in the general concept of crimes against the peace and security of mankind there were crimes of a diverse *nature*. And that shocked him.

80. As to the use of the word *entente* (conspiring) in the French text, the extract read out from the commentaries adopted on first reading was not altogether satisfactory. He therefore proposed formally that the phrase "or conspiring to commit" in paragraph 3 (*e*) should be deleted and also that some reference should perhaps be included in the commentary to indicate that the word "planning" embraced the common law concept of conspiracy which had no equivalent in civil law.

81. Mr. BOWETT, referring to the remark by Mr. Tomuschat, said that, in proposing the addition of the words "attempts to conceal the commission of a crime", he had certainly not had in mind merely giving shelter to or hiding the criminal but rather the large-scale and systematic attempts by the Government in Bosnia to conceal the evidence and the commission of crimes against humanity and war crimes.

82. The CHAIRMAN, speaking as a member of the Commission, said paragraph 1 was too general, and he therefore proposed that the words "of the perpetrator" should be added at the end of the sentence.

83. The wording of the English and French versions of paragraph 4 should certainly be brought into line and he would have no objection if the word *nature*, in the French text, was replaced by the word *caractères*. As to whether paragraph 4 should form the subject of a separate article or remain as a provision in article 2, he would be happy to go along with either possibility.

84. While he understood Mr. Pellet's reservations regarding the words *entente* and "conspiring", he would not go so far as to demand that they be deleted. Possibly, however, the commentary could sound a note of warning against certain interpretations of those terms. In any event, the courts that would have the task of applying the provision in question would take account of its scope and would not arrive at their decisions lightly. Since it was obviously not possible to draft a text that would be satisfactory to all, the best thing would be to try to reflect in the text ultimately adopted a harmonization of the various legal systems.

85. Mr. EIRIKSSON, noting that some of the proposals made would require further thought, said that the Chairman of the Drafting Committee might wish to have more time to consult with the authors of those proposals.

86. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he did not think he would be able to produce anything approaching a compromise solution, particularly since the formulations the Commission had before it were already compromises worked out in the Drafting Committee. Moreover, of the proposals made during the discussion, only one, in his view, would meet with general acceptance, namely the proposal that paragraph 4 should form the subject of a separate article, and possibly also Mr. Tomuschat's proposal that the paragraph should be recast as two sentences. The other proposals made in the course of discussion could be put to the vote, if necessary.

87. Mr. PELLET said he would propose that paragraphs 1 and 4 of article 2 should be merged and redrafted on the basis of paragraph 1 of article 3 adopted on first reading, with the possible addition of the second sentence of paragraph 4 as proposed by Mr. Tomuschat.

88. Mr. THIAM (Special Rapporteur) said that, while he had every sympathy with that proposal, it did not have the Drafting Committee's support.

89. Mr. PELLET reminded members that he had also proposed that the Commission should not adopt paragraph 2 of article 2 until it had examined article 15. He therefore proposed that paragraph 2 should be placed between square brackets and that the Committee should revert to it after it had examined article 15.

90. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he would suggest, as an alternative, that paragraph 2 should not be placed between square brackets but that it should be approved on the understanding the Commission would revert to it, if need be, after it had approved article 15.

91. Mr. PELLET said that, in that event, he would be obliged to call for a vote, as he was totally opposed to paragraph 2.

92. Mr. EIRIKSSON suggested that discussion of paragraph 2 should be deferred until article 15 had been examined and that it should not be placed between square brackets.

93. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he would have no objection to that solution.

94. The CHAIRMAN suggested that, in a spirit of conciliation, the Commission should leave aside paragraph 2 for the time being and revert to it after it had adopted article 15.

It was so agreed.

95. The CHAIRMAN reminded members that the Commission also had before it a proposal by Mr. Pellet to delete the reference in paragraph 3 (*e*) to "conspiring".

96. Mr. BOWETT proposed that the words "or its concealment" should be added after the words "in the commission of such a crime", in paragraph 3 (*d*), and that the words "or concealment" should be added at the end of that provision. He would welcome a vote on those proposed changes.

97. Mr. GÜNEY suggested the Commission should at that point simply agree that paragraph 4 of article 2 should form the subject of a separate article and that it should defer consideration of all the other proposals until the next meeting to allow time for reflection.

It was so agreed.

98. The CHAIRMAN said that he would ask the Chairman of the Drafting Committee and the Special Rapporteur to prepare for the Commission's consideration a new wording for paragraph 4.

The meeting rose at 1.05 p.m.

2438th MEETING

Friday, 7 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3[2])

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[3] (*continued*)

PART ONE (General provisions) (*continued*)

ARTICLE 2 (Individual responsibility and punishment) (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of article 2 (Individual responsibility and punishment) of part one of the draft Code of Crimes against the Peace and Security of Mankind and to take decisions on two draft amendments to paragraph 3 of that article. The first draft amendment, proposed by Mr. Pellet, would involve deleting the words "or conspiring to commit" in subparagraph (*e*).

Mr. Pellet's amendment was rejected by 8 votes to 4, with 4 abstentions.

2. The CHAIRMAN invited the members of the Commission to give their views on the second draft amendment, which had been proposed by Mr. Bowett and which consisted in adding, after subparagraph (*f*), a new subparagraph (*f*) *bis*, to read:

> "(*f*) *bis*. Deliberately attempts to conceal the commission of such a crime;".

3. Mr. EIRIKSSON said that it would be wiser to add that text to the end of subparagraph (*d*), which would then read:

> "(*d*) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission and deliberately attempting to conceal the commission of such a crime;".

4. Mr. BOWETT said that he had no objection to relocating the text in subparagraph (*d*), but, in that case, he would reword it to read:

> "(*d*) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime or its concealment, including providing the means for its commission or concealment;".

5. Mr. PAMBOU-TCHIVOUNDA said he wondered how it would be possible to establish materially an attempt to conceal a crime, particularly if that attempt was deliberate. He would welcome elucidation on that point before deciding on the proposed text.

6. Mr. THIAM (Special Rapporteur) said that he, too, had not clearly grasped Mr. Bowett's proposal and would welcome a fuller explanation.

7. Mr. BOWETT said that his proposal was not an attempt to introduce into the draft Code the general concept of an accessory after the fact. It was concerned with a specific crime, namely, the deliberate concealment, not of the perpetrator of a crime, but of evidence that a crime had been committed. Thus, the mass graves which had just been discovered in Bosnia and in which between 3,000 and 8,000 bodies were thought to be buried were an example of the deliberate concealment of evidence of a crime.

8. The CHAIRMAN asked whether that idea was not already covered by the expression "aids, abets or otherwise assists . . . in the commission of such a crime", used in subparagraph (*d*).

9. Mr. VILLAGRÁN KRAMER said that a distinction must be made, as was the case in Spanish and Latin American criminal law, between the person who committed a crime, the person who aided the commission of that crime and the person who concealed that crime. It was the latter act that was the subject of Mr. Bowett's proposal and it had nothing to do with the act of protecting the perpetrator of a crime, which constituted an entirely different offence. It was generally easy to determine the perpetrator of the crime and his accomplice, in other words, the person who participated directly or indi-

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[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

[2] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[3] For the text of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, see 2437th meeting, para. 7.