Document:-

A/CN.4/SR.2440

Summary record of the 2440th 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

event, once a national jurisdiction had completed a trial, the case was open for retrial. That indirectly encouraged trials *in absentia*. On the other hand, if a person had served his sentence and had then found himself in the territory of a country where he might be prosecuted, that created a danger of double jeopardy.

96. He was not convinced that for any given crime there would always be more than one jurisdictional basis for a trial by more than one State. He was in favour of deleting paragraph 2 (*b*).

97. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) agreed that there were reasons to believe that paragraph 2 (*b*) was not fully consistent with the principle of *non bis in idem*. It could have been possible to establish priority for extradition, for example, by saying that extradition took precedence over trial by the State in which the individual was found. But that had not been done. The current wording was meant to satisfy the interests of both States—the State of which the person was a national and the State which was the victim of the crime. Strictly speaking, paragraph 2 (*b*) was not perfect, but the Commission could live with it. If the Commission deleted the provision, it would be doing away with an important point.

98. Mr. ROBINSON said he could not imagine that paragraph 2 (*b*) reflected the direction in which the law should be developed. It might well be precisely in those circumstances that there was a need to insist on the application of the principle of *non bis in idem*. He could only agree to an exception in relation to a national court if it was placed on the same bases as applied in relation to an international criminal court.

99. Mr. Sreenivasa RAO, referring to the last statement by the Chairman of the Drafting Committee, said that if a document was not perfect, it should not be transmitted to the General Assembly.

100. The CHAIRMAN said he was not sure that it was imperfect. It was a limitation on the extension, or progressive development if one wished, contained in paragraph 2 (*b*).

101. Mr. FOMBA said that, in his opinion, the criteria of territoriality and of the main victim were sufficient per se, due account being taken for national sovereignty. But from the point of view of the strictly logical link with the principle of *non bis in idem*, those two criteria were somewhat inadequate. To remain consistent with the logic of the provision, paragraph 2 (*b*) should reflect the same guarantees as were contained in paragraph 2 (*a*) (ii). That had the merit of clarity, without prejudging the basic question of whether the Commission should retain the provision.

102. Paragraph 2 (*b*) was a major exception to the *non bis in idem* rule. If the Commission retained paragraph 2 (*b*), he would have no objection, but it was particularly important to include a reference to court proceedings that had not been impartial or independent.

103. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, although it might seem logical to include in paragraph 2 (*b*) the same requirements as those under paragraph 2 (*a*) (ii), that was surely unacceptable. An international court could find that the proceedings in a national court were not impartial, but how could the court of another State take such a decision? That would be contrary to the basic principles of nationality and statehood and might even lead to war.

104. Mr. Sreenivasa RAO agreed that no State would accept that its jurisdiction should be open to question in another jurisdiction.

105. The CHAIRMAN suggested that the Commission should vote on the two proposals concerning paragraph 2 (*b*).

*The proposal to delete paragraph 2 (*b*) was rejected by 9 votes to 3, with 4 abstentions.*

*The proposal to include in paragraph 2 (*b*) the guarantees contained in paragraph 2 (*a*) (ii) was rejected by 11 votes to 3, with 3 abstentions.*

106. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 11 as proposed by the Drafting Committee.

Article 11 was adopted.

The meeting rose at 1.15 p.m.

2440th MEETING

Wednesday, 12 June 1996, at 11.20 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. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, 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])

[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).

[Agenda item 3]

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

PART ONE (General provisions) (*continued*)

ARTICLE 12 (Non-retroactivity)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to resume his introduction of the draft articles adopted on second reading (A/CN.4/L.522 and Corr.1).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 12 laid down a basic principle of criminal law and of human rights law. As provisionally adopted on first reading as article 10, it had not given rise to any reservations, either by Governments or in the Commission. At the current session, the Drafting Committee had made only two drafting changes in paragraph 2: it had replaced the words "shall preclude" by the word "precludes" and had deleted the words "and punishment", the purpose of the latter being to align the article with article 11. The Drafting Committee recommended the adoption of article 12 to the Commission.

3. Mr. LUKASHUK proposed that the end of paragraph 1 should be amended to read: ". . . for acts committed before the entry into force of its provisions", otherwise the Code of Crimes against the Peace and Security of Mankind could remain irrelevant until the end of time.

4. Mr. TOMUSCHAT said that, as article 12 applied to the whole of the Code, it should be placed at the end of the text, as was the rule with treaties.

5. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the draft Code would perhaps take the form of a treaty one day, but its existing structure consisted of a part one dealing with general provisions and a part two dealing with the actual crimes. Article 12 therefore did have a place in part one because its provisions were part of the principles of criminal law and not of treaty law procedure. Mr. Lukashuk's proposal reflected the concern that the existing wording of paragraph 1 would intimate that the draft Code would inevitably take the form of a treaty. The proposed change involved what was perhaps a superfluous clarification, but it would do no harm.

6. Mr. THIAM (Special Rapporteur) said he wondered what provisions of the Code would come into force before the Code did. That point could perhaps be clarified in the commentary. As for the placement of article 12, part one of the draft dealt with general principles, and the *nullum crimen sine lege* principle was one of the basic principles, if not the most basic, of criminal law.

7. Mr. TOMUSCHAT said that, while he agreed article 12 could in fact have a place in part one, he would point out that part one consisted of three sections. The first section was very general, the second dealt with responsibility and punishment, in other words, with substantive law, and the third with procedural provisions. Articles 12, 13 and 14 then dealt with fundamental guarantees and not with procedures and therefore belonged in the second section. Articles 13 (Defences) and 14 (Extenuating circumstances), for example, had a close link with article 4 (Order of a Government or a superior) and with article 6 (Official position and responsibility) and those four articles should therefore be included in the same section.

8. Mr. ROBINSON said that Mr. Lukashuk's proposal was not essentially different from the existing text. What was important, therefore, was that the commentary should indicate the various ways in which the Code could come into force.

9. Mr. EIRIKSSON said that the question of the placement of the articles in the draft had been considered at length in the Drafting Committee.

10. With regard to Mr. Lukashuk's proposal, he pointed out—and was supported in that regard by Mr. ROSENSTOCK—that paragraph 1 clearly referred to conviction "under the present Code". It would therefore suffice to state in the commentary to paragraph 2, not paragraph 1, that a trial under some other auspices was in no way precluded.

11. Mr. CRAWFORD said he too considered that paragraph 1 should not be changed. As to the placement of the article, he would point out that there were no titles to the three sections in part one and that the third simply contained what had not been placed in either of the two others. One option would perhaps be to delete the sections altogether.

12. Mr. LUKASHUK said he did not think that there should be any difficulty if paragraph 1 were reworded to read: "No one shall be convicted, under the provisions of the present Code, for acts committed before the entry into force of those provisions".

13. Mr. FOMBA said that he had no objection to paragraph 1 being retained as drafted because, in his view, the words "provisions of the present Code" did not add anything to the words "present Code". The main thing was that the words "before its entry into force" did not prejudge the form in which such entry into force would be effected.

14. Mr. TOMUSCHAT said that, by analogy with internal law, the third section should belong to a code of criminal procedure, whereas articles 12, 13 and 14, and even article 11, should appear in the criminal code itself. Logically, therefore, those articles should form part of the second section.

15. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had been unable to agree on titles for the three sections of part one. Those sections could in fact be deleted.

16. Mr. Sreenivasa RAO supported that proposal.

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

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to delete the division into three sections of part one of the draft articles.

It was so agreed.

18. The CHAIRMAN reminded the Commission that it still had to take a decision on Mr. Lukashuk's proposal.

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he personally had no objection to that proposal, but was afraid that the majority of members would not go along with him.

20. Mr. Sreenivasa RAO said he thought that the text was sufficiently clear as it stood, but he would not oppose a change that might make it even clearer.

21. Mr. ROSENSTOCK said that a good case could be made for claiming that article 28 of the Vienna Convention on the Law of Treaties obviated the need for article 12. But, as article 12 existed, it was essential not to blur the extremely clear distinction between paragraphs 1 and 2. The former clearly stated that no one could be convicted under the Code for acts committed before its entry into force, and the latter clearly stated that a person could be convicted for acts which, at the time of their commission, had been criminal in accordance with international law. If some provisions of the Code were already part of international law or would become part thereof before the Code came into force, it would be possible to be convicted under those provisions before the Code came into force. That point might perhaps be spelled out in the commentary to paragraph 2.

22. Mr. LUKASHUK said he was sorry that his proposal posed such a problem for the other members of the Commission and that he would therefore not insist on it. He still thought, however, that States might use paragraph 1 as a pretext for not applying the Code because it had not entered into force. Furthermore, paragraph 2 contained a reference to acts which, at the time of their commission, were already criminal in accordance with international law before the entry into force of the Code, but no mention was made of acts which would become criminal in accordance with international law in the future.

23. Mr. TOMUSCHAT thought that Mr. Lukashuk's proposal raised the question of the form that the Code would eventually take. It was nowhere stated that it would be adopted as an international treaty in good and due form, as Mr. Lukashuk seemed to intimate by his proposal. It might very well be adopted as a declaration of the General Assembly. The Commission must not prejudge the question, but it might be useful if it were to discuss it on completion of the adoption of all the articles proposed by the Drafting Committee in order to decide what recommendation it would address to the General Assembly on the matter.

24. Mr. ROBINSON said that he wondered why national law was referred to in paragraph 2 of article 12 if the purpose of that paragraph was to preserve the application of customary international law. In his view, the text of that provision should resemble the text of paragraph 2 of article 15 of the International Covenant on Civil and Political Rights, rather than paragraph 1 of that article. He also wished to know whether, in the Commission's view, it was taken for granted that the principle of non-retroactivity applied to punishment as well as to trial or whether that should be expressly indicated.

25. Mr. THIAM (Special Rapporteur), replying to Mr. Robinson's first question, said it was true that paragraph 2 contained a reference to national law which did not feature in article 15 of the International Covenant on Civil and Political Rights. It had been added at the request of certain members of the Drafting Committee after a long debate; however, he personally had no objection to deleting it and keeping to the text of article 15 of the Covenant.

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had not participated in the drafting of the article and had not been present during its adoption on first reading and that, at the current session, the Drafting Committee had simply agreed on the wording of the article without entering into a discussion on the issues.

27. Mr. Sreenivasa RAO said that, when the article had been adopted on first reading, it had been his understanding that the purpose of that provision had been to preserve the application of national law in the case of any act that was criminal in accordance with that law. The application of the Code was only a possibility, for international law must be understood to mean all the provisions existing in other treaties or conventions and the provisions of customary law. Nothing precluded the trial of an individual for acts that were criminal by virtue of principles already recognized, whether at the national or at the international level. That was the sense of the paragraph.

28. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the article stated a basic principle of criminal law and of human rights law. Furthermore, when adopted on first reading, it had given rise to no reservation or objection either on the part of the Commission or of Governments. Consequently, the members of the Commission should not be so punctilious.

29. The CHAIRMAN said that, in the article adopted on first reading, mention had indeed been made of national law, but it had been specified that the reference was to "domestic law applicable in conformity with international law", a formulation that had been eliminated from article 12 in its current form.

30. Mr. THIAM (Special Rapporteur) said that that formulation did indeed appear in the article adopted on first reading, but that it was obvious that national law must be in accordance with international law and that it was therefore not necessary to state the fact in the actual text of the article; it would be enough to explain it in the commentary. That being said, the simplest solution would still be to follow the text of the International Covenant on Civil and Political Rights and accordingly delete the reference to national law in paragraph 2.

31. Mr. FOMBA said that it could be clearly seen from article 1, paragraph 2, that international law prevailed over national law, as that article stated that crimes against the peace and security of mankind were punishable under international law, whether or not they were punishable under national law. In those circumstances, he would have no objection to the elimination of the reference to national law in article 12, paragraph 2, given that, in any case, the question of the relationship between international law and national law in general and, in particular, at the criminal level, would always arise. It must be considered that, in principle, international law must prevail and that national law should be taken into account only subject to its being in conformity with international law.

32. Mr. EIRIKSSON said that an innocent question put by Mr. Robinson had caused the Commission to revisit decisions it had already taken on first reading. In his opinion, the Commission should first decide on the text that was before it, the wording of which he himself supported, before embarking on a substantive debate on the question.

33. Mr. PELLET expressed surprise that the text of article 12 should be different from that of article 10 adopted on first reading, as the Chairman had stated, and that no explanation of the fact had been given by the Drafting Committee. With regard to the substance of the debate, he pointed out that article 15 of the International Covenant on Civil and Political Rights was not of course conceived in the same manner, but that its paragraph 1 did indeed refer to national or international law, whereas its paragraph 2 merely referred to the "general principles of law recognized by the community of nations". Consequently, the arguments by the Special Rapporteur in favour of the deletion of the reference to national law were not convincing.

34. Furthermore, a conviction under national law "applicable in conformity with international law" was not the same as a conviction under international law. That formulation simply meant that a person could be convicted on the basis of national law if it did not contain a rule contrary to international law. So the elimination of any mention of national law would imply that an individual could be convicted only under international law—and that was a quite different matter. In his view, it was therefore important to mention national law in article 12 in order to avoid erroneous interpretations of that provision.

35. Mr. THIAM (Special Rapporteur) said that the point at issue was in fact what must be done when a State requested the application to one of its nationals of a punishment that was provided for in its internal law, but that was not in accordance with international law; hence the inclusion in the article of a reference to national law and the formulation "applicable in conformity with international law". But it was obvious that national law could not be applied if it was contrary to international law and that it was therefore not necessary to say so. Nevertheless, if the formulation was retained, the reasons for its presence should be explained in the commentary.

36. Mr. TOMUSCHAT said that article 12, paragraph 2, must be interpreted as meaning that national authorities had full power to institute proceedings against the perpetrator of acts that were criminal in accordance with international law or their national law and also recognized as such in the Code, notwithstanding the fact that the Code had not entered into force, for paragraph 1 might be misinterpreted as stating that no one could be prosecuted for a criminal act listed in the Code as long as the Code had not entered into force.

37. On the other hand, article 15 of the International Covenant on Civil and Political Rights had a totally different meaning from article 12 of the Code. Article 15 of the Covenant established that the fact that an act was not considered as an offence punishable in accordance with national law did not prevent it from being punishable in accordance with international law, whereas under article 12 of the Code, international law was not an obstacle to a conviction under national law.

38. Mr. ROSENSTOCK said that, for the reasons given by Mr. Tomuschat, it would be best to maintain the safeguard clause appearing in article 12, paragraph 2, whose purpose was to allay certain fears and concerns. Accordingly, he proposed that the wording of the article should remain unchanged.

39. Mr. de SARAM concurred with Messrs. Pellet, Rosenstock and Tomuschat that article 12, paragraph 2, should be kept in its current form. There was no provision in the Code that would prevent States and their courts from trying or sentencing an individual in accordance with their national law. That was made very clear by article 11 as well.

40. Mr. VILLAGRÁN KRAMER said that the non-retroactivity of laws was a principle which was well established in international law, embodied in the constitutions of many countries and emerged very clearly from paragraph 1 of article 12. So far as paragraph 2 was concerned, he thought it better to use the terms contained in an instrument already in force, namely, the International Covenant on Civil and Political Rights, which had been ratified by a large number of States.

41. Mr. THIAM (Special Rapporteur) recalled that the question of the application of national law had been raised by certain States in the context of the drafting of the statute for an international criminal court in connection, in particular, with penalties; that was why it had been expressly indicated in article 12 that national law had to be in accordance with international law. As it went without saying that national law could not be contrary to international law, however, he did not think it necessary to say so expressly in article 12; an explanation could be given in the commentary, if necessary. He would nonetheless not insist on his proposal if the majority of the members of the Commission were in favour of maintaining article 12 as it stood.

42. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 12 as proposed by the Drafting Committee.

Article 12 was adopted.

ARTICLES 13 (Defences) AND 14 (Extenuating circumstances)

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the articles had been considered by the Drafting Committee at the current session. They were the last two articles in section 3 dealing with procedural and jurisdictional issues. Their text essentially followed that of article 14 which had been provisionally adopted by the Commission on first reading and which the Drafting Committee had now divided into two separate articles based on the advice given by the Special Rapporteur in his twelfth report.[4] The concepts of defences and of extenuating circumstances were of a different order in that, while the former stripped an act of its criminal character, the latter merely had an effect on the penalty for a crime. It was therefore better to deal with them separately. He wished to point out that, in article 14, the phrase "in accordance with the general principles of law", already included in the text on defences, had been added. It was thus clearly stated that the competent court should be guided by the general principles of law when considering defences as well as extenuating circumstances. The Drafting Committee recommended that the Commission should adopt articles 13 and 14.

44. The CHAIRMAN suggested that it would make the discussion easier if articles 13 and 14 were considered one by one.

45. Mr. PELLET said that he continued to be disturbed by the use of the singular in the phrase "character of each crime", which seemed to imply that crimes were of a different nature and that it was their intrinsic character that mattered, whereas it was surely the characteristics or, in French, *les caractères* of each crime—concretely speaking, the extent to which each crime was committed—that could justify the existence of defences, the attenuation of penalties and so forth. He very much regretted the use of the singular, but, in view of the fact that the Commission had, for what he considered to be disputable reasons, failed to accept the amendment he had proposed to article 2 whereby the singular would have been replaced by the plural, he would resign himself to the singular. He nevertheless continued to think that the text gave the wrong idea of the Commission's intention, as the point at issue was surely not the character, but the particular characteristics of each specific crime that was committed.

46. Mr. THIAM (Special Rapporteur) explained that the English-speaking members of the Commission did not think that the use of the plural would be appropriate in the article under consideration and that the French-speaking members had not been convinced by the arguments for replacing the singular by the plural. He therefore proposed that the Commission should maintain the singular in the text of the article and that Mr. Pellet's reservation should be reflected in the commentary.

47. Mr. TOMUSCHAT said that, in his view, it would certainly have been better to list the admissible defences in detail, but, in order to do that, the Commission would have had to ask for the assistance of criminal law experts. Failing that, the Commission had to resign itself to relying on the practice of the courts which would be called upon to apply the Code and which would be in a position to benefit from the practice followed in many countries, as well as from the experience of judges specializing in criminal law.

48. He therefore wished to place on record his reservations with regard to the slightly general nature of the text, while at the same time recognizing that the Commission could not improve on the text unaided.

49. The CHAIRMAN said he wished to point out that the text's lack of precision in that regard would be compensated for by the inclusion in the commentary of a reference to the standard concepts in that field. Furthermore, the courts required to apply article 13 would also be able to draw on the jurisprudence of the International Tribunal for the Former Yugoslavia[5] and the International Tribunal for Rwanda.[6]

50. Mr. ROSENSTOCK, noting that there were no specific provisions on defences in the Charter of the Nürnberg Tribunal,[7] said that, in his view, article 13 was unnecessary and potentially dangerous. In the case of crimes covered by the Code, as also of the crimes whose perpetrators had been tried at Nürnberg, the only possible defences could consist in the refutation of an essential element of the crime alleged by the prosecution. Bearing in mind the very different context and the particularity of the acts in question from the point of view of their gravity, their nature and their character, the Commission should not venture into the realm of defences that might possibly be admissible in the context of internal criminal law and applicable to crimes under internal law.

51. Mr. EIRIKSSON, referring to the point made by Mr. Tomuschat, said that the Commission in its collective wisdom could have drawn up a list of defences. As to substance, however, it would be better for the Commission to confine itself to a short article, leaving it to the court or to any competent authority to prepare the defences. Mr. Rosenstock's comments confirmed the validity of that view.

52. Mr. ROBINSON said that he was surprised by so much sensitivity about the Drafting Committee's work. Having listened with interest to the comments made by Mr. Pellet, he thought that the phrase "in the light of the character of each crime" added nothing to the text and even introduced an element of confusion. Did it mean the characteristics of a particular crime before the court or the character of the crime in general? The text would be no less meaningful if the phrase were deleted.

53. Mr. KABATSI thought that article 13 did not pose any problem and that it was preferable to give the competent courts free rein. However, he was not in full agreement with the idea that the only possible defences might be failure to prove an element of the crime. There

[4] See 2439th meeting, footnote 13.

[5] See 2437th meeting, footnote 6.

[6] Ibid., footnote 7.

[7] See 2439th meeting, footnote 5.

might be definite defences for a particular conduct arising out of the interpretation of evidence.

54. Mr. THIAM (Special Rapporteur), speaking for the benefit of members of the Commission who had doubts about the need to retain article 13 in the Code, said that there were two opposing views on defences for crimes against humanity. Some writers, considering that no circumstance could justify a crime against humanity, deemed the word "defences" inappropriate in the current case. Others, going by the case law of the tribunals created at the end of the Second World War, were of the view that there could be defences, such as the order of a superior. Consequently, it had been thought better to include a general provision which the courts would interpret on a case-by-case basis.

55. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 13 as proposed by the Drafting Committee.

Article 13 was adopted.

56. Mr. CRAWFORD, referring to article 14, said that the work of the Commission demonstrated that it was far from drafting a true code of crimes against the peace and security of mankind and that it might be more accurate to call it a "list" of such crimes. However, for the reasons stated by Mr. Tomuschat, the Commission had no other option.

57. With regard to extenuating circumstances, he thought that the Commission was committing a solecism. Whereas he could conceive that there might be general principles of law applicable to the question of criminal responsibility, he could not imagine what the general principles of law were in relation to extenuating circumstances. He supposed that there might be a general principle of law that extenuating circumstances were to be taken into account, but, after that, it was a question of considering the particular facts of the particular case. In his view, the Commission was inferring the existence of general principles of law of which there was no evidence.

58. Mr. TOMUSCHAT said that the meaning of article 14 was different: it stated that, according to a general principle of law, extenuating circumstances were relevant and must be taken into account, not that there existed a panoply of rules on extenuating circumstances.

59. Mr. CRAWFORD said that that point would have to be spelled out in the commentary.

60. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.

*Part one, as amended, was adopted.**

PART TWO (Crimes against the peace and security of mankind)

61. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that part two of the draft Code contained four articles dealing with four crimes.

62. As a preliminary observation, he said that the Drafting Committee's work had primarily involved legal archaeology and the aim had been not to innovate, but just to codify the existing law.

ARTICLE 15 (Crime of aggression)

63. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, as had been the case on first reading, one of the most difficult issues raised had been whether to include aggression as a crime under the Code and, if so, how to define it.

64. At its forty-third session, the Commission had adopted a lengthy definition for aggression, on first reading, which had been taken almost verbatim from the Definition of Aggression contained in General Assembly resolution 3314 (XXIX) and had given rise to objections and criticism from Governments. The Drafting Committee's decision at the forty-seventh session, following the Special Rapporteur's advice, to reduce the definition to two paragraphs, one dealing with the form of participation by an individual in aggression and the other with a general definition of aggression based on Article 2, paragraph 4, of the Charter of the United Nations, had not been entirely satisfactory.

65. At the current session, the Drafting Committee had continued its work on the basis of two ideas: first, it had taken the view that a clear distinction had to be drawn between the definition of aggression committed by a State, on the one hand, and the crime of aggression committed by an individual, on the other. A majority of the members of the Drafting Committee had felt it unnecessary for the Commission to attempt to define aggression, which was covered in the Charter and defined by the General Assembly, especially as individuals, and not States, were the subject of the Code. The issue, therefore, turned to finding a formulation in which the role or involvement of an individual in the commission of aggression by a State could be defined for the purposes of attributing a criminal act to an individual.

66. Secondly, the Commission should avoid reliance on General Assembly resolution 3314 (XXIX), which had been adopted in 1974 and had not been intended to produce a definition that might be useful for a criminal code, and on Article 2, paragraph 4, of the Charter, which had proved controversial on two levels: first, as to whether all violations of that paragraph constituted aggression, and secondly, as to what degree of violation of Article 2, paragraph 4, constituted aggression.

67. Consequently, the Drafting Committee had decided at the current session to recommend a single article on aggression as a crime under the Code, focusing only on the identification of the role of an individual in the commission of aggression by a State. Under that definition, individual involvement was limited to that of a

* See 2465th meeting.

leader or organizer, the roles that had appeared in the Charter of the Nürnberg Tribunal and in the Charter of the Tokyo Tribunal.[8] The threshold of involvement of an individual in his capacity as leader or organizer was active participation in or ordering the planning, preparation, initiation or waging of aggression committed by a State. The threshold of involvement was thus rather high and, as in the Charters of the Nürnberg and Tokyo Tribunals, was based on the fact that aggression was always committed by individuals occupying the highest decision-making positions in the political or military apparatus of the State and/or in its financial and economic sector.

68. Concerning the structure of the article, it should be noted that an individual could be guilty of the crime of aggression only if aggression had been committed by a State. In that connection, the majority of the members of the Drafting Committee had agreed that there was no need for a definition of aggression by a State. But some members had thought otherwise; in their view, it would be difficult for a judge to apply article 15 in the absence of such a definition. The Drafting Committee had also not discussed the issue whether a court implementing the Code could itself define aggression or whether it could deal with the possible criminal responsibility of an individual only if and when the Security Council had determined that there had been an aggression by a State.

69. The Drafting Committee proposed that the Commission should adopt article 15.

70. The CHAIRMAN invited the Commission to continue consideration of article 15 at the next meeting.

The meeting rose at 1 p.m.

[8] Charter of the International Military Tribunal for the Far East; *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.

2441st MEETING

Thursday, 13 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, 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 TWO (Crimes against the peace and security of mankind) (*continued*)

ARTICLE 15 (Crime of aggression) (*continued*)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), continuing his introduction of article 15 from the previous meeting, said that the article contained a clear definition of the crime of aggression, entailing individual responsibility. It did not say what aggression by a State was taken to mean. That had not been deemed to be the Commission's task when considering individual crimes. The definition of State aggression had its roots in the Charter of the United Nations, and in other instruments, such as the definition of aggression contained in General Assembly resolution 3314 (XXIX). The Commission might wish to explain in the commentary why it had decided to leave aside the definition of State aggression and where such a definition might be found.

2. The CHAIRMAN said that the Chairman of the Drafting Committee had done well to focus on the main difficulty of article 15: the fact that it contained no definition of a State crime. The Commission was seeking to define the crime of an individual who, on a case of aggression committed by a State, might be a leader or organizer of the crime and was personally liable for it. Of course the criticism could be made that, while the area under discussion was criminal law, the crime concerned had to be defined elsewhere. That was the weak point of article 15 which, as everyone was aware, was due to the fact that the crime of aggression was on the borderline between the draft Code of Crimes against the Peace and Security of Mankind and the draft on State responsibility.

3. Mr. BOWETT said he was in favour of stating in the commentary that article 15 concerned not just one single leader or organizer, but rather the group of persons, who,

[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.