Document:-

A/CN.4/SR.2445

Summary record of the 2445th 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

45. The CHAIRMAN recalled that, before completing its consideration of article 17, the Commission still had to discuss subparagraph (*f*), which was under review in the Drafting Committee.

The meeting rose at 11.20 a.m.

2445th MEETING

Thursday, 20 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[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 17 (Crimes against humanity) (*concluded*)

Subparagraph (*f*) (*concluded*)*

1. The CHAIRMAN said the Drafting Committee had met the previous day to consider the question of institutionalized discrimination, and he invited the Chairman of the Drafting Committee to introduce the new proposal for article 17, subparagraph (*f*).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the new version of article 17, subparagraph (*f*), which read:

> "(*f*) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;".

3. At the request of the Commission, the Drafting Committee had held two more meetings to see how subparagraph (*f*) could be formulated more precisely. In the light of the views expressed in the Commission in plenary, the Committee had concluded that the subparagraph should incorporate three elements. First, it should focus on "institutionalized discrimination", a phrase inspired by the International Convention on the Suppression and Punishment of the Crime of Apartheid. However, the grounds for discrimination should not be limited to "race", but should also include ethnic and religious grounds, as did the original text proposed by the Drafting Committee and the Chairman's suggestion (2443rd meeting). Secondly, institutionalized discrimination, under that paragraph, would have to involve violations of fundamental human rights and freedoms. Thirdly, it must result in the serious disadvantaging of a part of the population. The Drafting Committee recommended the adoption of article 17, subparagraph (*f*), in its revised form.

4. Mr. VILLAGRÁN KRAMER congratulated the Drafting Committee on producing a new text based on the Chairman's suggestion. He had one question to put before deciding whether he would be able to support the new text. In the Spanish-speaking world, "institutionalization" occurred by virtue of laws or legal provisions. In referring to "institutionalized" discrimination, was the Drafting Committee envisaging *de jure* discrimination, or simply de facto discrimination?

5. Mr. THIAM (Special Rapporteur) said that in the discussion of the Chairman's suggestion it had been agreed that, for reasons of concision, some of its elements would be consigned to the commentary. In that regard, he drew attention to the fact that, although the vague term "disadvantaging" had been the one eventually adopted, it had also been clearly understood that it meant the domination and oppression of one part of the population by another.

6. Mr. FOMBA said that, although he did not oppose the consensus in the Drafting Committee with regard to subparagraph (*f*), he was not entirely happy with the wording. The "racial" and "ethnic" grounds posed no problem, but he experienced some difficulty with the reference to discrimination on "religious" grounds. Although a Muslim, he was not sufficiently well versed in the political and social philosophy of Islam to be able objectively to appraise the positive or negative character of certain distinctions drawn in the Koran between, for example, the rights of men and of women. Religion, moreover, was not a major issue in his region, unlike some other parts of the world. That being said, contemporary political history showed that religion always involved an inherent risk of discrimination.

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* Resumed from the 2443rd 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 text of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, see 2437th meeting, para. 7.

7. It went without saying that institutionalized discrimination intrinsically implied "the violation of fundamental human rights and freedoms" and the inclusion of that criterion was thus fully warranted. With regard to the third criterion—what he would call the "teleological finality" of discrimination—two formulations had been proposed. The first stated that discrimination was aimed at instituting or maintaining domination and oppression; the second stated that discrimination was aimed at establishing the supremacy of one part of the population over another. A consensus had finally been achieved by adopting the formulation "resulting in seriously disadvantaging a part of the population", a more neutral wording that was intended to avoid invoking the very controversial concepts of domination, oppression and supremacy.

8. He did not reject that formulation. However, he remained faithful to his original position, namely: first, that it was the crime of apartheid that had originally formed the basis for subparagraph (*f*); secondly, that its specific target remained the philosophy of domination and oppression without which there could be no apartheid—as was made clear by article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid and article 1 of the International Convention against Apartheid in Sports; and thirdly, that the threshold of criminality in subparagraph (*f*) must be the standard threshold constituted by the abominable crime of apartheid.

9. Mr. SZEKELY, referring to Mr. Villagrán Kramer's question, assured him that the word "institutionalized" was directly linked to the definition of apartheid contained in the International Convention on the Suppression and Punishment of the Crime of Apartheid, which referred not only to laws and legislative provisions, but also to policies and practices. In view of that precedent, there should be no problem with the use of the word "institutionalized" in article 17, subparagraph (*f*).

10. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt subparagraph (*f*) and article 17 as a whole.

It was so agreed.

*Article 17, as amended, was adopted.***

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

11. The CHAIRMAN invited Mr. Szekely to present the proposal by the small informal group for article 2, paragraph 2. The proposal was apparently also supported by other members of the Commission.

12. Mr. SZEKELY said that, having first considered whether some of the elements enumerated in the subparagraphs of paragraph 3, which were applicable to articles 16, 17 and 18, would also be applicable to article 15, the group had ultimately concluded that all of those subparagraphs were applicable. In other words, an individual would be responsible for the crime of aggression in any of the circumstances set out in paragraph 3, subparagraphs (*a*) to (*g*).

13. The group had been particularly concerned to ensure that there was no inconsistency with the drafting technique used for article 15. Thus, article 15 used the formulation "actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State"—a wording prompted by the fact that, in the case of aggression, the crime was one of participation by an individual in the commission of a crime by a State. The group had eventually decided that there was no inconsistency between that wording and the wording of other articles, since the subparagraphs of paragraph 3 simply made clearer the notion of "active participation" contained in article 15.

14. The group therefore proposed the deletion of article 2, paragraph 2, and the addition of a reference to article 15 to the list of articles enumerated in the *chapeau* to article 2, paragraph 3.

15. Mr. EIRIKSSON said that as a member of the Drafting Committee he remained loyal to the original text. He had already expressed his opposition to the changes proposed when the matter had first been raised (ibid.). The arguments he had put forward on that occasion had clearly not been convincing, so a fresh attempt was perhaps called for.

16. He had given his view that the subparagraphs of paragraph 3 could be divided into four categories. Subparagraph (*a*), with its component of "intentionally commits" was already included in article 15, so there was no need to reproduce it. Many elements of responsibility were already included in the definition in article 15, so the proposed change would be inappropriate. The second category, consisting of subparagraphs (*b*) and (*c*), was also covered by the definition provided in article 15, because if a person ordered someone else to order, or failed to prevent someone else from ordering or participating, that person was an original criminal, not a subsidiary criminal as would be the case if the draft currently before the Commission was adopted. Finally, with regard to the component of direct participation, if the change was made, there would then be a crime of participation in participation, and therefore, again, an original criminal. Hence it would then be totally unnecessary to treat that component separately in subparagraph (*e*). Lastly, there was the substantive point—which should suffice to bury the proposal—that the Drafting Committee had deliberately not included an attempt to commit aggression among the crimes set out in the Code. For all those reasons, he did not support the proposed change.

17. Mr. FOMBA said he fully supported the proposal made by Mr. Szekely, which put an end to a somewhat artificial and unwarranted distinction between the crime of aggression and the other categories of crimes against the peace and security of mankind.

18. Mr. BOWETT said that the effect of adopting Mr. Szekely's proposal would be to broaden the scope of the crime of aggression so as to include offences that had never before been recognized as such. He did not know

** Subsequently, a new subparagraph was added to article 17 (renumbered article 18) (see 2464th meeting, paras. 49 et seq.).

*** Resumed from the 2438th meeting.

of any instance of an attempt to commit aggression being regarded as a separate crime. Nor did he think that providing the means for its commission was a separate crime: the owner of a factory producing armaments would then be guilty of aggression. It would be a mistake to adopt the proposal.

19. Mr. TOMUSCHAT said it would be extremely unwise to accept Mr. Szekely's proposal, which would broaden the scope of the crime of aggression far beyond what had been established at Nürnberg, so that even ordinary soldiers would be covered by the provisions of the Code, with unforeseeable consequences. Aggression was a collective act in which many people participated; what was needed was to target the command level, not the ordinary soldier. Article 2 should be left unchanged.

20. Mr. THIAM (Special Rapporteur) said that when Mr. Rosenstock had proposed the initial text to the Drafting Committee, he had had some reservations, since aggression was a crime first and foremost, and consequently it should not be dealt with under a separate heading. In that respect, he was satisfied with the new text now being submitted.

21. However, comments regarding the form and the substance of article 2 were called for. Under the legal system to which he belonged, a crime always had a component of intentionality; in his view, the word "intentionally", in paragraph 3 (*a*), was therefore redundant. Secondly, subparagraph (*b*) referred, in the French version, to a crime *effectivement exécuté* ou *tenté*. A crime was *commis*; whereas an order was *exécuté*.

22. As to Mr. Bowett's remarks, the concept of attempted aggression was a debatable one. The matter had been discussed at length in the past and the Commission had decided that, since it was unable to agree as to when an attempt existed, it should be left to the court to decide in each case whether an attempt was possible. With regard to the comment about providing the means to carry out aggression, his fourth report[4] set out an abundance of case law from the military tribunals established at the end of the Second World War, which had found, for example, that an industrialist who had supplied a State with the means to commit aggression was at least an accomplice—and thus a participant—in aggression. Unless Mr. Bowett could offer more convincing arguments, there was no reason to discuss the matter further. The texts could not spell out everything, and it must be left to those applying them to decide whether or not they were applicable. He himself would be tempted to leave the text as it stood.

23. The CHAIRMAN noted that the specific characteristic of the crime of aggression under article 15 was that the individual held responsible was involved "as leader or organizer". He therefore doubted that an industrialist or an ordinary soldier could fall within the scope of that crime.

24. Mr. CALERO RODRIGUES, speaking as a member of the Commission, said that, like many other members, he did not favour the proposed change. The existing provisions were very clear, and it was very doubtful that all the conditions established in article 2, paragraph 3, would apply to the crime of aggression. Mr. Eiriksson had already demonstrated that that was true. The crime under consideration was active participation or ordering as a leader or organizer. Subparagraph 3 (*e*) referred to direct participation in planning or conspiring to commit such a crime. The case would then arise of "planning of planning", which made little sense. Further serious study was evidently needed before it could be established that all of the elements included in paragraph 3 did indeed apply to the crime of aggression, with its very specific characteristics. He was therefore opposed to the proposed change, unless it could be clearly demonstrated that all the subparagraphs of paragraph 3 applied to the crime of aggression—which, he believed, was not the case.

25. Mr. YANKOV said that, as a member of the Drafting Committee, he felt obliged to say that the completely different treatment given in article 2 to the crime of aggression, on the one hand, and to the other crimes covered by the Code, on the other, had always caused him some uneasiness. While recognizing that aggression was intrinsically different from the other crimes covered by the Code in that it was an act committed by a State, he none the less thought that all the eventualities covered by paragraph 3 with the exception of subparagraph (*g*), namely, attempt to commit the crime, were also fully applicable to the crime of aggression in accordance with article 15. As a possible way of achieving consensus on a very important issue, article 2 might be revised in the following way: (*a*) deleting paragraph 2; (*b*) adding a reference to article 15 to the list of articles appearing in the *chapeau* of paragraph 3 and deleting subparagraph (*g*); and (*c*) adding a new paragraph consisting of the *chapeau* of paragraph 3 in its present form and the text of subparagraph 3 (*g*). He would go along with the majority view, but wished to place his personal position on record.

26. Mr. VILLAGRÁN KRAMER noted that the fundamental objection to extending the provisions of article 2, paragraph 3, to the crime of aggression appeared to be the idea of attempt. The question of intentionality did not seem to present a problem, since a crime that was not intentional could hardly be considered to constitute a crime. As to the point raised by Mr. Bowett, under the terms of article 15, criminal responsibility arose only in the case of an individual who acted as "leader or organizer" of an act of aggression rather than of an individual actively involved in the performance of the act. As for Mr. Tomuschat's point, an interpretation of paragraph 3 (*d*) whereby an ordinary soldier could be held responsible and punished for the crime of aggression was just not possible. In the light of those considerations, he could accept Mr. Szekely's proposal.

27. Mr. GÜNEY said that, while he appreciated Mr. Szekely's efforts to find a way out of the present impasse, he was unable to support the proposal because he was not convinced that all of the elements listed in paragraph 3 were applicable to the crime of aggression. The proposal, if accepted, would inevitably enlarge the scope of the concept of a crime of aggression and would, in practice, open the way to abusive interpretations.

[4] *Yearbook ... 1986*, vol. II, (Part One), p. 53, document A/CN.4/398.

28. Mr. YAMADA said he associated himself with those who had expressed opposition to Mr. Szekely's proposal. As pointed out on earlier occasions, it had to be borne in mind that article 15 had been drafted quite differently from articles 16 to 18 because it was targeted at individuals with responsibility at the command level. He could not agree with the view that extending the provisions of article 2, paragraph 3, to the crime of aggression would not broaden the scope of article 15. Subparagraph 3 (*d*) would make criminals of a leader's assistants. Subparagraph 3 (*b*) made it punishable to order the commission of a crime whether it in fact occurred or was attempted, yet a crime of aggression committed by a State was surely determined by its actual execution. The Drafting Committee had opted for a different formulation in connection with the crime of aggression because that crime was intrinsically different from all others.

29. Mr. BOWETT said that, as he saw it, extending the concept of attempt to the crime of aggression simply would not work. In the draft statute for an international criminal court, the Commission had accepted the principle that prior to any finding of aggression against an individual there had to be a finding by the Security Council that aggression by a State had taken place. He could not see how the concept of attempt could be introduced in such a context. Despite the explanations by the Special Rapporteur, he continued to believe that the application of the elements listed in article 2, paragraph 3, would extend the concept of the crime of aggression to unrecognizable proportions. For example, the owner or operator of a factory engaged in armaments production might be held responsible for a crime of aggression. In that connection, he wished to point out that in the war crimes trials after the Second World War, the Krupps armaments concern had been charged with war crimes but not with the crime of aggression.

30. Mr. ROSENSTOCK, recalling a remark made by Mr. Sreenivasa Rao (2441st meeting) to the effect that the General Assembly would perhaps regard members of the Commission as either pusillanimous or too clever by half, said that there was a further risk of the Commission's appearing not to know what it was doing. Mr. Yamada was right to point out that article 2 would make no sense if paragraph 3 was extended to apply to the crime of aggression. Article 15 was structured in an entirely different way from the articles on other crimes against the peace and security of mankind, and the attempt to lump them together in the context of individual responsibility would result in redundancy or in an unreasonable expansion of the concept of aggression.

31. Mr. de SARAM said aggression was different from ordinary crimes, such as murder, and that was the reason why the Drafting Committee had correctly decided not to attempt to define the term of aggression as employed in the Charter of the United Nations. He said that similar attempts by other United Nations bodies had been fruitless. It had therefore been decided that no such attempt should be undertaken in the present context, but that article 15 and article 2, paragraph 2, should define the relationship that had to exist between an individual and an act of aggression in order for that individual to be held responsible for such an act. Obviously, that relationship could not be as wide as would be the case with other crimes, such as murder in national law. It was the Commission's customary practice to proceed by consensus, and emphasizing the importance of that practice in a body called upon to legislate for States, he said that, in his view, the Commission should decide to maintain the provisions contained in article 2, paragraph 2, and article 15.

32. Admittedly, members of the Commission who were not also members of the Drafting Committee were seeing the proposed texts for the first time, but he would appeal to them to bear in mind that many of the points now being raised had already been debated in the Drafting Committee and discussed in informal consultations. Mr. Szekely's proposal was very helpful, but it would have been preferable to see it put forward in the Drafting Committee.

33. Mr. ROBINSON said that Mr. Szekely had raised an interesting point and deserved thanks for trying to integrate the Commission's approach to all four categories of crimes covered by the Code. However, he could not agree that all the elements listed in paragraph 3 were equally applicable to the crime of aggression. His own view was that the provisions of subparagraphs (*b*) and (*e*), in particular, were redundant in that connection, but of course opinions could differ. While remaining flexible and willing to be guided by the majority view, he would suggest that one way of dealing with the problem of redundancy would be to delete paragraph 2, maintain paragraph 3 in its present form, and add a new paragraph stating that the provisions in paragraph 3 with the exception of subparagraphs (*b*) and (*e*) applied to the crime of aggression in accordance with article 15.

34. Mr. MIKULKA said that it would come as no surprise if he, as a member of the Drafting Committee, spoke in favour of adopting the Committee's proposal. The problem raised by Mr. Szekely had been considered in the Drafting Committee and the conclusion had been reached that a real reason existed for treating the crime of aggression differently from the other crimes covered by the Code. It would have been a mistake not to stress that individual responsibility for the crime of aggression was limited to a very small number of leaders or organizers at the State or army command level. The subparagraphs mentioned by Mr. Robinson were not the only ones that would be redundant if extended to the crime of aggression in accordance with article 15. The same could be said of subparagraphs (*a*) and (*d*) and also subparagraph (*f*), which, if thus extended, could be interpreted to mean that participants in a demonstration in favour of going to war could all be found guilty of aggression. And, of course, the same was true of subparagraph (*g*). All those elements had been deliberately omitted in relation to article 15. To adopt the course advocated by Mr. Szekely would be to engage in an unrealistic exercise that would ultimately be injurious to the actual concept of aggression set out in the Drafting Committee's text.

35. Mr. THIAM (Special Rapporteur) said that, while it was true many of the points being raised had already been discussed in the Drafting Committee, every proposal made in an attempt to improve the final product was to be welcomed and accusations of disloyalty were

certainly not called for. With reference to the remarks by Mr. Bowett, he could not agree that the Security Council was alone responsible for determining a crime of aggression. As the case law he had quoted in previous reports demonstrated, aggression could not be completely distinguished from war crimes. He could not see why all the elements listed in article 2, paragraph 3, with the exception of the provision in subparagraph (*g*), should not also be applied to the crime of aggression. The difficulty currently being experienced by the Commission was, in his view, largely due to the difference between what he would describe as the "continental" and the "Anglo-Saxon" approaches.

36. Mr. FOMBA said there was a strange tendency to think that all the hypotheses under article 2, paragraph 3, had to be applied *ipso facto* to all allegations of crime. Yet any approach in criminal law, whether national or international, was necessarily selective, random, functional and demonstrative. Law evolved: what today might give rise to controversy might no longer do so tomorrow.

37. As to attempted aggression, *ratione personae*, it was clear that the point was to cover the crime of aggression, *de lege lata* or *de lege ferenda*, solely in regard to leaders or organizers. The logic behind the idea of the provision on attempt was to achieve the greatest possible deterrence and to reduce the risk of impunity to a minimum, bearing in mind the gravity of a crime against the peace and security of mankind.

38. Lastly, the definition of aggression had been left aside as not falling within the Commission's mandate, but that did not rule out the need to define an attempt to commit a crime of aggression in terms of individual criminal responsibility.

39. Mr. SZEKELY said he wished to thank members of the Commission who had supported the informal working group's proposal; some of them were members of the Drafting Committee. He was not impressed by the implicit accusations of disloyalty to the Drafting Committee levelled against him by Mr. de Saram and Mr. Mikulka. The record would show that he had not endorsed one thing in the Drafting Committee only to propose something else in plenary. He had raised no objection to the Drafting Committee, although he had not liked the Committee's formulation. When Mr. Robinson had called for consideration of the question of paragraph 2 (ibid.), several members, including the Chairman, had thought it would be worthwhile to do so and it had been decided to set up a small working group.

40. A number of members had missed the point. Mr. Mikulka had postulated the case of someone who participated in a street demonstration encouraging the head of State to commit a crime of aggression, and Mr. Tomuschat had spoken of an ordinary soldier who might end up committing the crime of aggression. They seemed to have forgotten that only leaders or organizers were at issue. On the other hand, it might be justifiable to establish a hierarchy of leaders, because it was not the Commission's intention to have a corporal and a general bear the same responsibility.

41. The comments made suggested that the Commission was split on the issue, having been unable to draw a mental distinction between the crime of aggression in the Code and the crime of aggression as it related to the law on State responsibility. The crime of aggression under the Code was something committed by individuals and, with reference to Mr. Bowett's comment, there was no problem regarding action commencing the execution of a crime by an individual, even though the State, in its own crime under international law, did not succeed in carrying out the crime of aggression. What was perhaps dividing the Commission was the concept of punishment for natural persons who to one degree or another were involved in what might become the commission by a State of a crime of aggression under international law, and which under the Code was also called an individual crime of aggression. Maintaining international peace and security was the Organization's most important role. It was essential to see to it that anyone who acted against that supreme value would bear the corresponding consequences in criminal law.

42. Mr. EIRIKSSON said that the original intention had been to try to merge aggression and the other categories of crimes, but two of the subparagraphs of paragraph 3 had been identified as not applying to aggression. Hence, there was still a separate category in article 2 that related to aggression and not to other crimes.

43. The question whether the Drafting Committee should include attempts to commit aggression had been a very sensitive one and the Committee had concluded that it should not. He agreed, because otherwise it would be prejudicial to the whole exercise. Nor had there been any intention of including attempts in the definition of aggression in article 15.

44. There were certain logical problems. Paragraph 3 (*c*) contained a reference to article 5, which concerned superiors. However, superiors were original criminals and not criminals who had aided or abetted the commission of a crime. Again, with regard to ordering the commission of the crime, the logical reading of the proposal was that one person ordered another to participate or ordered another to order someone else to participate. As he saw it, that was an original criminal, and not the criminal who should be covered by article 2. If he were to examine which of the subparagraphs applied to aggression, he could only conclude that the proposal of the Drafting Committee was preferable.

45. Mr. LUKASHUK said that the logic of Mr. Bowett's comment was irresistible. In order to arrive at a compromise, he suggested explaining the Commission's position in the commentary. But he was in favour of leaving article 2, paragraph 2, as it stood.

46. Mr. Sreenivasa RAO said that the main thrust of Mr. Szekely's proposal was to show that article 2, paragraph 3, had a number of elements which could be applicable to the crime of aggression as defined in General Assembly resolution 3314 (XXIX) and as contained in the draft Code of Offences against the Peace and Security of Mankind,[5] the 1954 attempt by the Commission

[5] *Yearbook... 1954*, vol. II, pp. 150-152, document A/2693, para. 54.

to draft such a definition. Yet that was beside the point. The present context was a different one. The Drafting Committee's decision not to deal with the definition of aggression was a wise and realistic one because it did not unravel earlier efforts. However, that did not mean some of the members of the Commission were not disappointed that certain elements had been left out. Whereas the Commission had been active in defining articles 6, 7, 16, 17 and 18, it had not shown the same conviction in the present instance. But he yielded to the better judgement of the Drafting Committee, which had spent more time on it than the plenary could ever hope to do. Mr. Szekely's proposal was one more attempt to bring out elements which some members would have liked to see as explicitly forming part of the definition under article 15. If that was not possible, he could go along with the consensus, provided the words "leader or organizer" were properly explained in the commentary, because that would capture some of the elements to which he had just referred.

47. Mr. VILLAGRÁN KRAMER said that it might be useful, when analysing the subject, to go back to the wording of article 15 as proposed by the Drafting Committee on second reading at the forty-seventh session:

> "An individual who, as leader or organizer, commits an act of aggression shall be punished under the present Code."[6]

Thus, aggression had been understood to mean the use of force. At the current session, the words "leader or organizer" had been retained, but not the definition of aggression. During the discussion, reference had been made to the difficulty of the subject, because the Security Council had a responsibility to qualify an act as one of aggression. The argument was that, as long as the Council did not express its position on the matter, a court could take no action. From that point of view, the Code was dependent upon the Council.

48. He knew of only one Security Council resolution which had qualified a State as an aggressor or an act of a State as a war of aggression. Over the years, the Council had been very careful not to brand a State as an aggressor. Hence, was the Commission talking about a crime which might be judged one day contingent upon a decision by the Council or about the individual responsibility which persons might incur in specific circumstances? It should be borne in mind that, in the future, it would be very difficult for the Council to qualify anything as an act of aggression. The case of Iraq was a good illustration, there having been no punishment of Iraq or prosecution of those responsible.

49. He wondered what the attitude of members of the Commission would be if their countries were the target of an act of aggression. Would they be so understanding towards the aggressor? Would they be so meticulous in clarifying who was an accomplice, who had intervened, who had not, who was a leader and who was not? As he saw it, if an act of aggression was committed but was not qualified as such by the Security Council, any national system would have very clear criteria for determining the scope of the concept.

50. He wished to point out that he had not renounced his right to examine the views of the Drafting Committee, whether or not he had participated in its deliberations. Nor did he consider that he had delegated his right to discuss issues raised in plenary simply because the Drafting Committee had already considered them. The Commission should not delegate its powers to a small number of members. It was simply examining Mr. Szekely's proposal in the light of elements that had been adduced. Mr. Robinson had made a very judicious statement in which he had mentioned an option that might well prove to be a solution.

51. The General Assembly had discussed the subject at its fiftieth session (A/CN.4/472, sect. A). Some delegations had said that aggression was the quintessential crime of international relations, that it must therefore constitute the core of the Code, and that its inclusion therein had enjoyed the support of the Commission, despite certain difficulties. Other delegations had reserved their opinion until a sufficiently clear definition of the crime of aggression had been arrived at in the light of the provisions of the Charter of the United Nations. Furthermore, some delegations had supported the text of article 15 adopted by the Commission on first reading. In response to the argument that the Definition of Aggression, adopted by the General Assembly in 1974,[7] was of a political nature, it had been recalled in the Sixth Committee that ICJ, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*[8] had expressly referred to that definition as an expression of customary international law. The debate in the Sixth Committee was useful to bear in mind, as was its comment that the Commission should offer alternatives.

52. Mr. de SARAM said that he apologized if he had unintentionally hurt Mr. Szekely's feelings. What he had had in mind in his comment was that Mr. Szekely's proposal, although clearly of substance and great concern, ought now to be referred to the Drafting Committee, practical difficulties notwithstanding. It was important to consider the implications of each of the subparagraphs under paragraph 3. Also, what about the wording of article 15, which had historical links to the Charter of the Nürnberg Tribunal?[9] The Commission must under no circumstances come to a decision before the Drafting Committee had fully considered the implications.

53. Mr. TOMUSCHAT said that the question whether the determination of aggression presupposed a decision by the Security Council was not dealt with in the draft Code of Crimes against the Peace and Security of Mankind. Mr. Villagrán Kramer's concerns were therefore unfounded so far as the existing text was concerned.

54. Mr. Szekely believed his proposal to delete paragraph 2 would entail no major changes and that only the leaders or organizers of a crime of aggression would be

[6] See 2437th meeting, footnote 3.

[7] General Assembly resolution 3314 (XXIX), annex.

[8] See 2441st meeting, footnote 7.

[9] See 2439th meeting, footnote 5.

punishable. That was an erroneous interpretation of the far-reaching consequences of his proposal. Article 15, if read together with article 2, paragraph 3, would mean that an ordinary soldier would come within the purview of article 15 and thus could be found guilty, under article 2, paragraph 3 (*d*), of knowingly aiding, abetting or otherwise assisting the leader or organizer of a crime of aggression. It would therefore be very unwise to delete paragraph 2.

55. A consensus seemed to be emerging, however. Since Mr. Szekely considered that his proposal would not affect article 2, paragraph 3, subparagraphs (*a*) to (*f*), the discussion centred on subparagraph (*g*), under which an attempt to commit a crime of aggression would be punishable. He himself could very well do without that provision, since an attempt did not have the gravity of a crime against the peace and security of mankind, and the whole issue could indeed be resolved by deleting subparagraph (*g*). He was nonetheless prepared to go along with those members who preferred to retain it, but would urge the need for the utmost caution. For instance, if an act of aggression planned by certain leaders was averted by the Security Council at the last minute and the actual aggression did not take place, the international community should rejoice for the system under the Charter of the United Nations would have proved its worth. Above all, no attempt should be made to bring to trial the leaders who had not put their criminal plans into effect. With those considerations in mind and even though he did not think that attempted aggression should be a crime under the Code, he would suggest that the matter should be referred back to the Drafting Committee, or possibly only subparagraph (*g*), for further consideration.

56. Mr. ROSENSTOCK said he would point out that, in the view of some members at least, a crime was committed by the individual whereas a State committed an act of aggression.

57. It was imperative for the Commission to come to a decision on article 2 at the current meeting. The never-ending *renvoi* between the Drafting Committee and the Commission served no useful purpose. There were no complex drafting issues to be resolved and the whole question was quite straightforward. He trusted that those who wanted to delete paragraph 2 would not insist on doing so but, even if they did, the Commission should take a decision that day.

58. Mr. HE said that Mr. Szekely's proposal merited further consideration, since most of the provisions of paragraph 3 could apply in the case of the crime of aggression. Also, he would have preferred to see in the Code the wording used in the Charter of the Nürnberg Tribunal which referred to the planning, preparation, initiation or waging "of a war" of aggression.

59. As to the other points raised in Mr. Szekely's proposal, would the words "leader or organizer", which appeared in article 15, suffice to cover all individuals likely to be involved in a crime of aggression? The only way out of the Commission's difficulty would be to deal with the various elements of Mr. Szekely's proposal in the commentary. In that way, it would be possible to cover all situations that might arise so far as individual criminal responsibility for the crime of aggression was concerned. He could not, however, agree that the matter should be referred back to the Drafting Committee.

60. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Szekely's proposal commanded his full support. He had some difficulty in understanding why, under subparagraphs (*f*) and (*g*), a mere individual who directly and publicly incited others to commit genocide, or to torture people or cause them to disappear, would be punished but not the leaders or organizers of such crimes. Why should a citizen who took part in a demonstration in support of genocide or torture be punished and not the heads of States and Ministers who, on television and in the press, called for the far more serious act of aggression to be committed? In his view, the crime of aggression could apply only to its leaders and organizers and that must be made crystal clear. In no circumstances could he agree to its being attributed to persons other than those referred to in article 15. To do so would be quite inconceivable and morally and legally shocking. It was also important to note that subparagraph (*g*) provided not only for an attempt to commit a crime, in the abstract, but for action "commencing the execution" of a crime. At all events, if the crime of attempt was to be deleted in the case of the leaders and organizers of aggression, then it should be deleted for all the other crimes too.

61. Should the matter come to a vote, he would vote against the Drafting Committee's proposal and in favour of Mr. Szekely's proposal. He would not, however, oppose a consensus on the Drafting Committee's proposal but would enter the reservations he had just expressed.

62. Mr. SZEKELY said that there had been many references to "Mr. Szekely's proposal" though the proposal was in fact the result of an informal meeting, held at the request of the Commission, between the Special Rapporteur, Mr. Pellet, the Chairman in his capacity as a member of the Commission, and himself.

63. To overcome the Commission's difficulty and in order not to have to refer the matter back to the Drafting Committee, he would personally suggest that a statement should be included in the commentary to article 2 to the effect that the absence of a reference to article 15 in article 2, paragraph 3, should not necessarily be taken to mean that none of the provisions in paragraph 3 applied to article 15, since article 15, was of a specific nature and would have to be assessed by the court in each particular case.

64. Mr. THIAM (Special Rapporteur), Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), Mr. ROSENSTOCK and Mr. IDRIS said that they supported that proposal.

65. Mr. FOMBA said that the proposal was not altogether satisfactory, as a statement in the commentary did not have the same legal value as the text of the article itself. He was, however, prepared to join in any consensus on the proposal provided his reservation was reflected in the summary record.

66. The CHAIRMAN, noting that there was a consensus in favour of the proposal just made by Mr. Szekely, suggested that the Commission should agree to adopt the

text of article 2 as proposed by the Drafting Committee on the understanding that the commentary to article 2, paragraph 2, would reflect the main elements in the debate and that the application, if necessary, of any of the subparagraphs of paragraph 3, in the case of aggression, was not precluded.

It was so agreed.

Article 2, as amended, was adopted.

67. Mr. ROBINSON said he would like the record to show that he was unhappy with that consensus. A court which had to apply a criminal code needed to be certain about the ingredients of the offence in question. The use of the commentary would only add to the confusion. He had not, however, wished to oppose the consensus.

68. Mr. BARBOZA said that he endorsed the reservations expressed by the Chairman and agreed with Mr. Fomba that the commentary did not really suffice. There should be a more explicit reference in the text of the article itself. The Commission tended to solve matters through the commentaries which were only an auxiliary means of interpreting texts. The Commission should make less use of the commentary and express its consensus more in the texts of the articles themselves.

69. Mr. TOMUSCHAT said that he had joined in the consensus. He fully agreed that article 15, as drafted, contained many of the rules embodied in article 2, paragraph 3.

70. Mr. Sreenivasa RAO said that he had had no difficulty in joining in the consensus, though he would have liked the article itself to have been more explicit.

71. Mr. VILLAGRÁN KRAMER said that he had joined in the consensus but under protest.

The meeting rose at 1 p.m.

2446th MEETING

Friday, 21 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*concluded*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN welcomed the Observer for the Inter-American Juridical Committee and invited him to address the Commission.

2. Mr. ESPECHE GIL (Observer for the Inter-American Juridical Committee) said that the OAS legal advisory body, which had been created in 1906, and the Commission were bound by a tradition of cooperation. The Committee was therefore pleased to inform the Commission about the work it had carried out in 1995 and 1996. That work was very varied, as attested to by the study on dispute settlement procedures in the context of the integration measures being taken in South America, which had been published in Buenos Aires and which was being placed at the Commission's disposal by the Committee.

3. At its session in August 1995, when it had had the pleasure of welcoming Mr. Calero Rodrigues, the Committee had adopted resolutions on a number of subjects: the right to information, stock market regulations in the Americas, the international legal effects of bankruptcy, improvements in the administration of justice and international cooperation in the fight against corruption. The last question had taken up a large part of the session and had been the subject of a report in which the Committee formulated observations on a preliminary draft of a convention that was itself based on a draft submitted by the Permanent Mission of Venezuela, and which was subsequently adopted as the Inter-American Convention against Corruption.

4. The Inter-American Convention against Corruption, the importance of which must be stressed, represented a significant step forward in international collaboration in the punishment of unlawful acts which could be grouped together under the heading of corruption. It duly characterized the acts that were prejudicial to the integrity and civic spirit of the civil service. States were for the first time required to prohibit and punish—to borrow the words of the definition it had laid down—the direct or indirect supplying or granting by their own nations or by natural or legal persons having their usual residence in their territory to agents of other States of any object of pecuniary value or any other advantage or benefit in exchange for the agents' carrying out or not carrying out an act in the performance of their functions in connection with an economic or commercial transaction. That provision, which was entitled "Transnational Bribery" and whose immediate forerunner was the legislation the United States of America had adopted in the matter, opened up new perspectives for the effective punishment of the acts to which it applied. Another new development was the obligation imposed on States parties to

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* Resumed from the 2433rd meeting.