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**Summary record of the 2453rd meeting**

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

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## 2453rd MEETING

Thursday, 4 July 1996, at 10.10 a.m.

Chairman: Mr. Mochtar KUSUMA-ATMADJA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Mikulka, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (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<sup>2</sup>)**

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES  
ON SECOND READING<sup>3</sup> (continued)\*

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

ARTICLE 19 (Crimes against United Nations and associated personnel) (concluded)\*

1. The CHAIRMAN said that the working group on the question of a new article concerning crimes against United Nations and associated personnel had prepared a new version of the proposed article (ILC(XLVIII)/CRD.7), which read:

***“Crimes against United Nations and associated personnel***

“1. Any of the following crimes constitutes a crime against the peace and security of mankind when committed intentionally and in a systematic manner against United Nations and associated personnel involved in a United Nations operation:

“(a) A murder, kidnapping or other attack upon any such personnel;

“(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

“2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”

2. Mr. CRAWFORD (Chairman of the working group) said the working group agreed that its purpose was to modify the proposed article, as contained in document ILC(XLVIII)/CRD.2 and Corr.1, as revised by Mr. Rosenstock, in response to concerns which had been expressed in the plenary about its breadth, while retaining the article's essential consistency with the relevant provisions of the Convention on the Safety of United Nations and Associated Personnel. Thus, the task was not to pre-empt any decision the Commission might make on the overall acceptability of the article, but to put the article in a form in which it might attract the broadest possible support. In its two meetings, the working group had been able to reach consensus on the draft article now before the Commission.

3. The working group had made two additions to the previous text of the proposed article. In so doing, it had operated on the assumption that certain matters would be clarified in the commentary. The words “and in a systematic manner” had been added to paragraph 1 to make it clear that the proposed article covered not only intentional but also systematic attacks. The idea of “a systematic manner” was echoed in other parts of the draft Code of Crimes against the Peace and Security of Mankind and the meaning was the same throughout: systematic attacks of a deliberate and calculated kind.

4. The working group had taken the view, reflecting that of the Commission, that the scope of the proposed article should not be limited to mass or large-scale attacks; an attack, even on a small number of persons, could have a significant effect on a United Nations operation. Indeed, the assassination of Count Bernadotte, one single individual, was an example of such an effect. The working group had, consequently, ruled out the idea of defining a numerical threshold.

5. The second addition made to the earlier text of the proposed article was the express requirement that the personnel under attack had to be involved in a United Nations operation, a requirement also set forth in the Convention on the Safety of United Nations and Associated Personnel. The point was to distinguish between personnel engaged in peacekeeping operations and personnel working at duty stations. It was not the function of either the Convention or the draft Code to provide general protection for United Nations personnel; rather it was to protect personnel placed in situations of vulnerability as a result of their involvement in a United Nations operation. The term “United Nations operation” had the same meaning in the proposed text as in the Convention: in effect, peacekeeping and analogous operations.

\* Resumed from the 2449th meeting.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

6. It had been decided not to modify paragraph 1, subparagraphs (a) and (b), the wording of which was identical to the Convention on the Safety of United Nations and Associated Personnel. Thought had been given to adding to subparagraphs (a) and (b) an element of severity, but the working group had concluded that the acts proscribed in those subparagraphs, when committed intentionally and systematically, were severe by definition and that the introduction of the word "severe" might give rise to doubts and uncertainties and would achieve nothing positive.
7. The working group was not proposing any change to paragraph 2, which was identical to article 2, paragraph 2, of the Convention on the Safety of United Nations and Associated Personnel and excluded United Nations operations in which the laws of war were applicable. Such operations were covered under other articles of the draft Code.
8. The working group had proceeded on the basis that the word "intentionally", in paragraph 1, was limited to situations in which the attackers knew that they were attacking United Nations or associated personnel. Accidental attacks on persons who happened to be members of United Nations forces would therefore be excluded from the scope of the article.
9. The working group had considered the question of whether to include a third element, that is to say specific intent to prevent or impede a United Nations operation. Any systematic and intentional attack would obviously impede operations and would be known by the perpetrators to have such an effect. A requirement of specific intent would place an additional burden on the prosecution, obliging it to show such intent in addition to demonstrating that the accused had committed an intentional and systematic attack. That element of subjectivity and that additional onus on the prosecution was considered by the working group to be an unnecessary and undesirable extension.
10. The working group's function was not to make any decision on the inclusion of the proposed article in the draft Code, but it did take the view that an intentional and systematic attack of the kind described in the draft article could be construed as amounting to a crime against the peace and security of mankind.
11. Mr. CALERO RODRIGUES said he would like to know whether a single, isolated, massive attack against United Nations personnel would be covered by the article.
12. Mr. CRAWFORD said that the precise details of the incident would, of course, have to be known. A single attack of any scale, which was carried out systematically and with the knowledge that the personnel were engaged in United Nations operations, would be covered.
13. Mr. ROSENSTOCK said that, from a logical standpoint, it was not inconceivable to have a large-scale attack which had not been systematically planned and carried out. Thus, an attack of that type would fall within the scope of the article, a point that could be underscored in the commentary.
14. Mr. CALERO RODRIGUES said that he was not convinced that the hypothetical case to which he was referring would be covered by the term "systematic", which implied an organized series of acts, rather than one single incident that might nonetheless be directed at a fairly large group of peacekeepers. It should therefore be stated clearly in the commentary that a single act would fall within the scope of the article. There must be no doubt about that.
15. Mr. JACOVIDES said he had consistently maintained the view that the draft Code merited an important place in the corpus of present-day international law and that it could and should serve the purpose of deterring future acts and of punishing the guilty. At the forty-seventh session, in 1995, he had welcomed the action by the Special Rapporteur in his thirteenth report,<sup>4</sup> who, in an appropriate concession to political realities, had drastically reduced the number of crimes covered by the draft Code to six which had grave consequences for international peace and security. At the same time, he had stressed that the substance of the Code must be preserved so that the final text would be a robust instrument with reasonable prospects of being accepted by the international community as a whole. The number of crimes had subsequently been further reduced to four, thus excluding, among others, international terrorism and drug trafficking. He respected the decisions reached, which were the considered expression of the collective wisdom of the Commission.
16. He was persuaded by the arguments set out in Mr. Rosenstock's memorandum (ILC(XLVIII)/CRD.2 and Corr.1) and his own conclusions about including the article under discussion in the draft Code were reinforced by the recollection of the serious casualties suffered by United Nations personnel as a result of excessive napalm bombing by the Turkish air force in support of the illegal invasion of Cyprus in 1974. The argument that the Convention on the Safety of United Nations and Associated Personnel was not yet firmly established was not convincing. In view of the serious and heinous nature of the crimes involved, the Commission could, in the present case, proceed on the basis of *lex ferenda*.
17. He did, however, have doubts as to whether it would be appropriate to include such crimes in a separate article, something that was particularly true at the present late juncture and, more importantly, the drastic surgery, amounting at times to mutilation, which had already been performed on the draft Code, reducing it to an absolute minimum. As it stood, the draft Code had a certain balance and it should, if possible, not be disturbed. The best course would be to accommodate crimes against United Nations personnel under another article, possibly as another paragraph for article 17, on crimes against humanity. Nevertheless, he would not stand in the way of incorporating such crimes under a separate article.
18. Mr. VARGAS CARREÑO said that he fully endorsed the draft article as proposed by the working group, in which he had participated. The text had been

<sup>4</sup> See 2441st meeting, footnote 9.

formulated with the view to achieving the broadest possible support. He shared the doubts expressed by Mr. Calero Rodrigues, doubts about the word “systematic” and had at one point suggested that a word such as *organizada* should be used in the Spanish version. Nevertheless, he would accept the present wording, provided the matter was clearly explained in the commentary.

19. The Commission obviously did not have time to consider further changes, but he did wish to suggest two possible additions which might be taken into account when the draft Code was considered by States. First, the article might make reference to personnel of ICRC. If the Commission was convinced that international and systematic attacks against United Nations personnel merited inclusion in the Code, then ICRC personnel, who were unarmed and selflessly and generously involved in field operations, certainly could be accorded equal protection. Secondly, account should be taken of the situation of personnel of regional organizations. He did not usually endorse the idea of providing protection for regional organizations. However, with the end of the cold war, many had engaged in healthy and effective co-operation with the Security Council in many regions of the world, such as OAU in Liberia and Rwanda, OAS in Haiti, or the European Union in the former Yugoslavia. Reference might also be made in the commentary to the fact that such personnel would be covered in the context of operations conducted in cooperation with the United Nations.

20. Mr. BENNOUNA said that he shared in great measure the views expressed by Mr. Jacovides. The article was a proposal for a belated addition to the draft Code, something that was all the more paradoxical in that the draft Code had been enormously reduced to crimes under customary law. While he would have preferred to retain some of the crimes earlier included in the draft Code, more particularly colonialism, apartheid, mercenarism and others, he had come to agree that it was more prudent to keep a core set of crimes the inclusion of which would be indisputable.

21. He was, of course, entirely opposed to any attacks against United Nations personnel, especially when they were engaged in peacekeeping operations, but including the proposed article in the draft Code, which was confined to crimes recognized under general international law, implied introducing a new crime that was so very broad in scope as to be unacceptable. The essence of the first part of paragraph 1 of the proposed article, in itself, might be included, if absolutely necessary, for it suggested an attack that was a kind of “aggression” against the United Nations. However, subparagraphs (a) and (b) broadened the scope of the proposed article excessively because they were so imprecise. Again, the word “systematic” might not be the best choice in the context of the draft Code. If one act could constitute “murder”, as the Commission was told, why include “systematic”? If it chose to include the proposed article in the draft Code, the Commission could well be criticized for adding a new crime when it had eliminated so many others of such a serious nature.

22. Plainly, it was late in the day to be considering a new article, especially since the matter had not been

adequately examined. The time was not yet ripe for codifying the crimes under consideration in the framework of the Code.

23. Mr. THIAM (Special Rapporteur) said that, in the working group he had stressed the need to refer to deliberate intent to prevent United Nations personnel from carrying out their duties, an idea that had not been incorporated in the article. It might, then, be appropriate to refer to it in the commentary.

24. Mr. de SARAM said that, as he had indicated previously, he was in favour of including crimes against United Nations personnel in the draft Code, but was not convinced that the phrase “when committed intentionally and in a systematic manner”, in paragraph 1, would cover the case of an act of murder of great consequence, such as the assassination of Count Bernadotte in 1948. The word “systematic” had probably been introduced to raise the threshold of gravity. However, it implied a repetitive act and would not, therefore, cover a single attack. The most important criterion was the fact that an attack had been made deliberately and with the knowledge that the victims were United Nations personnel.

25. He agreed with Mr. Jacovides that the proposed text could more fittingly be included under article 17, the *chapeau* of which referred to a situation that more aptly covered the case of a single attack. Paragraph 1 of the present formulation might have to be modified accordingly.

26. Mr. TOMUSCHAT said he still had doubts about the wisdom of including such an article in the draft Code because it would entail progressive development of the law, whereas all the other rules in the draft Code reflected customary international law. Such an approach might also make observers wonder why the Commission had not been bold enough to incorporate provisions on environmental protection, for example, or international terrorism. Despite his reservations, if a consensus emerged in favour, he would nonetheless be prepared to join it.

27. The meaning of “United Nations operation” must be further clarified, as it was a key element in the provision. If the phrase was used as in the Convention on the Safety of United Nations and Associated Personnel, it could involve, not only peacekeeping activities, but also election monitoring or any other activity regarding which the Security Council or the General Assembly had declared that there was a serious risk to the safety of the personnel involved. But had the Council or the Assembly ever made such a declaration?

28. Mr. HE said he agreed on the need to guarantee the safety of United Nations personnel, but was not in favour of listing the offences in question alongside the four great crimes against the peace and security of mankind. It had been understood in the Commission that, at the current, second, reading of the draft Code, only the four most indisputable crimes, those recognized by the whole international community as the “crimes of crimes” affecting the very foundations of mankind, should be included.

29. The current proposal had been drawn from the Convention on the Safety of United Nations and Associated Personnel, yet that Convention had not entered into force, despite the fact that only 22 instruments of ratification were required for its acceptance. The crime covered by that Convention had obviously not gained the same legal standing as had the four crimes set out in the Code.

30. Peacekeeping and peace maintenance activities involved not only United Nations and associated personnel, but also political leaders, influential personages and officials of governmental, non-governmental and inter-governmental agencies and humanitarian bodies. Violent attacks on such persons had taken a variety of dire forms, including murder, bombing and hostage-taking. The Code would hardly be comprehensive if it were to single out only attacks against United Nations and associated personnel as crimes against the peace and security of mankind, while leaving aside violence against other influential personages whose devotion to peace was often cherished the world over. The definition of the terms "United Nations personnel", "associated personnel" and "operation" likewise merited further consideration. Unduly enlarging the scope of application of those terms would only create difficulties, particularly for the host State for the operations. In some cases, there was no host State at all, but only parties to a conflict.

31. He would advocate a cautious approach: crimes against United Nations and associated personnel were a completely different matter from crimes against the peace and security of mankind. Elevating the former to the rank of the latter would not necessarily provide better guarantees for the safety of United Nations personnel, as complex political factors were involved. Legal measures were necessary and useful, but not in all cases. The goal of safeguarding the security of United Nations personnel could not be achieved simply by adding a fifth crime to the Code, something which would only disturb the balance achieved in the Code.

32. Mr. FOMBA said that, as Mr. Jacovides had pointed out, the Commission now had the unprecedented chance to create jurisprudence in its most pristine state. Was it to confirm the trend towards moving the centre of gravity of customary international law away from practice and towards *opinio juris*? Mr. Lukashuk had often stressed the need for a prudent approach to the interrelationship between customary law and treaty law. There was no disputing the legitimacy of the present proposal from the political point of view, but it did raise a number of problems. The working group's version differed from the earlier version only in that it elevated the new category of crimes to the level of crimes against the peace and security of mankind. It was a sound initiative, as it would then be for the General Assembly to determine whether the fact that the Convention on the Safety of United Nations and Associated Personnel had not won broad acceptance within the international community constituted an obstacle—and if so, to what extent—to the emergence of *opinio juris* in that area. In the final analysis, it would be up to States to make the decision, though their political choices must be informed by the Commission's technical expertise. Thus, despite his

lingering doubts about the proposal, he could go along with a majority in favour of it.

33. Mr. VILLAGRÁN KRAMER said he regretted that he could not endorse the working group's proposal, for a number of reasons. The Commission must not allow its emotional reaction to any given situation, or sympathy for a given cause, to influence its work. The argument that a certain circumstance could affect United Nations personnel carried great weight, but jurists bore the heavy responsibility of using the law as the primary basis for their work.

34. The crime being proposed for incorporation in the Code did not exist, by virtue of the dictum *nullum crimen, nulla poena sine lege*. There was no legal basis for including it in the Code, which covered crimes that existed under the law, crimes which, moreover, were deemed to be the "crimes of crimes". They were firmly anchored in the domain of widely accepted treaty law as in the case of genocide, and of general international law, as with aggression. Incorporating the proposed crime would entail progressive development of the law, which he rejected in favour of codification of existing law. On the other hand, it could have been covered by the jurisdiction of the international criminal court, on which the Commission had been working until fairly recently.

35. In the circumstances, he endorsed the proposal made by Mr. Jacovides, which had the merit of accommodating both groups of crimes in the Code and did so within the framework of existing law, without the creation of a new category of crimes. Even if the Commission decided to reject both the working group's proposal and Mr. Jacovides' suggestion, however, the debate had been fruitful, and the Commission could recommend that the General Assembly study the matter further.

36. Mr. Sreenivasa RAO said the working group's proposal was an improvement on the earlier version, but the discussion showed that it was still far from commanding universal support. The threshold beyond which attacks on United Nations personnel became systematic required further elaboration. He would not favour the Code's covering isolated attacks, and agreed with Mr. de Saram on the need for the threshold to be higher.

37. There were difficulties, as the Special Rapporteur had pointed out, with the interpretation of the word "intentionally". A distinction had to be drawn between the intention to attack a person, as opposed to an intention to affect international peace and security through an attack on a person. Isolated, occasional, emotional and spur-of-the-moment attacks, without the basic design of affecting international peace and security, must not come within the purview of the Code.

38. Observer missions, ceasefire monitoring and election monitoring all qualified as United Nations peacekeeping operations. Traditionally, peacekeeping operations had been defined exclusively as those that did not involve the use of force, except in self-defence or for the purposes of law and order management, and pursued no political objectives. That kind of operation merited the international community's full protection and moral and legal sanctions if attacks occurred. In any other situation, however, United Nations personnel played the same role

as other combatants, and paragraph 2 of the proposed article rightly made that point.

39. Some observer and peacekeeping missions had been going on for a very long time. In nearly all instances, they had been respected, and no United Nations staff members had been placed in jeopardy while carrying them out. On the other hand, there were situations in one or two areas of the globe today, where numerous objectives were involved and the United Nations itself was divided on the best way to deal with them. To bring those two disparate cases—where international consensus existed on the action involved, and when it did not—together under the Code was to minimize the significance of actions carried out on the basis of international consensus. The need for such consensus was enhanced when such operations gained in both scope and magnitude, as they could be expected to do in the future.

40. Although he had every desire to promote the security of United Nations personnel, it would be premature to incorporate that objective in the draft Code. The Convention on the Safety of United Nations and Associated Personnel was still too recent to be used as a basis for developing an international legal instrument. Having restricted the Code's coverage to a minimum number of crimes, the Commission would leave observers puzzled if it were to insert an additional crime at the current late stage. It should not be forgotten that the Commission's consideration of the draft Code on second reading was not the end of the work: the debate would be pursued in other forums, where further crimes would doubtless be suggested for inclusion. Consequently, he was against the proposal.

41. Mr. ROSENSTOCK said it would be extremely odd for a code of crimes against the peace and security of mankind not to cover attacks on United Nations peacekeepers. What better qualified as a "crime of crimes" than to strike at the system of collective security? The statement that threats to United Nations personnel occurred only sporadically was at variance with the facts. The gravity of the situation surrounding United Nations peacekeeping activities had been underscored by the Secretary-General, the Security Council and the General Assembly. In 1995, the world had witnessed with horror United Nations peacekeepers being chained and used as human shields, an event which had undermined the capacity of the United Nations to maintain and project its collective security system. The fact that the Convention on the Safety of United Nations and Associated Personnel was of recent vintage was not an acceptable reason for not adopting the working group's proposal. The Commission's work was not confined to codification and it should be able to respond rapidly to the changing world around it.

42. He did not think it advisable to assimilate the crime in question to crimes against humanity. The crime of attacking United Nations and related personnel had to do with preserving the collective security system, while crimes against humanity involved primarily human rights concerns.

43. The question had been raised as to whether the phrase "exceptionally dangerous" had ever been used in practice. It had not: it had been conceived as a compro-

mise. Some countries had favoured limiting the coverage of peacekeeping operations under the Convention on the Safety of United Nations and Associated Personnel to those decided on with the consent of the host country, in which the host country agreed to undertake certain obligations: such operations represented an increasingly small percentage of the activities of the United Nations. Others—a large majority—had wanted the Convention to cover all United Nations operations in the field. Yet to secure consensus adoption of the text and to respond to concerns raised by humanitarian organizations such as UNHCR and other United Nations staff operations, a compromise had been reached.

44. He was not in favour of adding a reference in the *chapeau* of paragraph 1 to the scale of the crime committed. An appropriate explanation in the commentary, as well as the record of Mr. Crawford's introductory comments made earlier in the meeting, would enhance the clarity of the provision without altering the meaning of the language employed. The commentary should make it clear that the provision was meant to cover situations such as the assassination of Count Bernadotte.

45. Some members had questioned the use of the words "when committed intentionally". A solid legal basis for that expression was to be found in, *inter alia*, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, where the term was used in a similar way and was also explained in the commentary. Mr. Crawford had made it clear that the phrase "when committed intentionally" meant acts committed with the knowledge that it was United Nations or associated personnel, property or premises that was being attacked. An attempt to go beyond that by using the *terminus technicus* "specific intent" would, in his view, be extremely imprudent, as it would give rise to difficult problems and would have unfortunate resonances not only for the draft Code but also for the Convention on the Safety of United Nations and Associated Personnel. In conclusion, he expressed the hope that the Commission would adopt a position on the proposed new article without delay.

46. Mr. THIAM (Special Rapporteur) said that he acknowledged and respected Mr. Rosenstock's good intentions in submitting the proposal, but felt that it had come too late for inclusion in the draft Code. As the Special Rapporteur on the topic, he had decided to leave out of the draft all matters that gave rise to controversy, maintaining only those on which there was universal agreement. Thus, with a heavy heart, he had taken the course of omitting articles dealing with such major crimes as international terrorism, the use of mercenaries, illicit drug trafficking and others. But even leaving that consideration aside, he totally failed to see where the proposed article, if accepted by the Commission, was to be placed in the draft. All in all, while again recognizing Mr. Rosenstock's good intentions, he considered that the proposal should be withdrawn.

47. Mr. GÜNEY said that, like most members, he was fully aware of the good intentions behind Mr. Rosenstock's initiative and wished to thank him and all others who had laboured to improve the original text.

Nevertheless, he still encountered enormous difficulties in accepting the proposal. First, the Commission had taken a decision of principle that only the most heinous crimes, or "crimes of crimes", should be included in the Code. The crime which formed the subject of Mr. Rosenstock's proposal did not fall in that category. Secondly, the reference to "associated personnel" was really very vague. Thirdly, the experience in the case of the Convention on the Safety of United Nations and Associated Personnel was hardly encouraging, as the Convention had so far been ratified by only a small number of countries.

48. It would seem, therefore, that adoption of the proposal would constitute neither codification of existing law nor progressive development of international law. While he had no doubts whatsoever about the seriousness of crimes against United Nations and associated personnel inasmuch as they constituted crimes against collective security, he failed to see how, if the Commission decided to include them in the draft Code, it could justify the exclusion from the Code of a crime such as international terrorism, which endangered the lives of countless innocent people as well as the integrity and sovereignty of States. For those reasons, he counted himself among those opposing the proposal. However, if a general view in favour of the proposal emerged in the Commission, he would be prepared to review his position.

49. Mr. CALERO RODRIGUES said that he remained unconvinced by the arguments advanced against the proposal. The Commission's previous decision to include only four categories of crimes in the draft Code did not justify the exclusion of a crime which, while not falling into any of those categories, was unquestionably a crime against the peace and security of mankind. He had not liked Mr. Rosenstock's original formulation because it had been too close to the text of the Convention on the Safety of United Nations and Associated Personnel, and he still felt that the wording could be made clearer. By and large, however, the working group's version was a great improvement and he had no fundamental objections to it.

50. The point had been made that the proposed article went beyond the codification of existing international law. If all the Commission had to do was to codify existing laws, that job could be done by an efficient secretary with a computer and would not require the presence of distinguished international lawyers. He was still not very happy about the phrase "in a systematic manner" in the *chapeau* of paragraph 1 but would agree to an explanation in the commentary. The words "or on a large scale" should, in his view, be added after "in a systematic manner". If the proposal was put to the vote, he would move an amendment to that effect.

51. Mr. AL-BAHARNA, noting the views expressed by the Special Rapporteur in his first statement as well as the point raised by Mr. de Saram to the effect that the threshold of gravity of the crime should be raised, suggested that the words "to impede a United Nations operation" should be inserted after the word "intentionally" in the *chapeau* of paragraph 1, thus establishing beyond a doubt the relevance of the proposed text in the

context of a draft code of crimes against the peace and security of mankind. As to the question of where the article should be placed, he saw no reason why it should not appear under a separate title after the article on war crimes.

52. Mr. EIRIKSSON said that he entirely agreed with all the comments made by Mr. Calero Rodrigues and hoped that those members who had expressed reservations would, in the light of the amendments that had been suggested, feel able to join in a positive consensus in the interests of the international community as a whole.

53. Mr. CRAWFORD said it was unfortunate that the Commission had not yet been able to reach consensus on the text before it, although he believed all members did agree that intentional and systematic attacks on United Nations and associated personnel were indeed a crime against the peace and security of mankind. Admittedly, it did not have the same basis in customary international law as the other crimes covered by the draft Code, but customary international law did not stand still, nor did the needs of the international community. A distinction had to be drawn between members who were opposed to the article on principle and those who might be prepared to accept it subject to further improvements that would bring it closer to existing customary international law.

54. The position of the first group had been stated with perfect clarity by Mr. He and there seemed to be little point in arguing any further. As to the other group, it seemed that the inclusion of the words "or on a large scale" proposed by Mr. Calero Rodrigues might go a long way towards meeting their objections. The only reason why the working group had not included those words in its proposal was that it had endeavoured to leave the wording of paragraph 1, subparagraphs (a) and (b), of Mr. Rosenstock's original proposal unchanged. If Mr. Calero Rodrigues' proposed amendment was accepted, the indefinite article at the beginning of each subparagraph would have to be deleted and the words "violent attack" in subparagraph (b) would have to be changed to "violent attacks" so as to avoid inconsistency with the idea of acts committed on a large scale.

55. He was wholly opposed to bracketing the article with crimes against humanity in article 17, which consisted of crimes against existing international law and should not be expanded to include crimes against United Nations and associated personnel. Secondly, crimes against humanity had, by definition, to be instigated or directed by a Government, organization or group, and the working group, having considered the point, had concluded that the same requirement did not apply to crimes against United Nations and associated personnel. Of course, a crime against United Nations and associated personnel could also be a crime against humanity, but only under certain circumstances. The points raised by Mr. Villagrán Kramer and Mr. Tomuschat could perhaps be dealt with in the commentary, although the commentary to the draft Code could obviously not confer additional powers upon the Security Council or redefine the concept of crimes against humanity. As for Mr. Sreenivasa Rao's remark that the present quinquennium was not the right one for the adoption of such a provi-

sion, he wondered whether any future quinquennium would be any more appropriate and urged the Commission to seize the opportunity to adopt the provision while it could.

56. The CHAIRMAN said that he had the impression that only a few members were opposed to the proposed article on principle. Most members who had expressed reservations with regard to the working group's formulation had indicated that they would be prepared to join a consensus if certain conditions were met. He hoped that the comments and suggestions of Messrs. Calero Rodrigues, Al-Baharna and Crawford would perhaps persuade those members to drop their objections. However, the absence of full consensus could not be denied and he therefore suggested, however reluctantly, that the proposal should be put to a vote.

57. Mr. MIKULKA, speaking on a point of order, said he was surprised and shocked by the Chairman's suggestion. For the past two years the Commission had proceeded on the basis that all its decisions concerning the draft Code were taken by consensus. If that method was to be changed at the last moment, he would have to reconsider his position on issues such as terrorism, colonialism, the use of mercenaries and others. It was not normal for a whole philosophy to be abandoned so lightly.

58. Mr. GÜNEY said that he shared Mr. Mikulka's view. It appeared that the principle of proceeding by consensus was to be waived. If a vote had to be taken, members should at least be clear about what they were voting upon. The secretariat should be asked to prepare a text indicating all amendments that had been proposed, suggestions as to where the proposed article was to be placed in the draft Code, and so on.

59. Mr. THIAM (Special Rapporteur), replying to Mr. Mikulka's point, said that the principle of working by consensus did not apply to decisions taken on second reading, where a vote could not be avoided under certain circumstances. It was true, however, that a decision taken by vote at the current late stage would place him in a very difficult position as far as the drafting of the commentary to the proposed article was concerned.

60. Mr. AL-BAHARNA suggested, as a way out of the difficulty, that the working group's proposal should be referred back to it for discussion of the amendments proposed during the meeting.

61. Mr. CRAWFORD said he was not certain that doing so would solve the problem unless the working group was enlarged to include members who had doubts about the original text and, in particular, Mr. Bennouna, Mr. Tomuschat and Mr. Güney.

62. Mr. Sreenivasa RAO said the main point was not the need to improve the wording of the article but the fact that some members thought it was not the time to include the article in the draft Code. An indicative vote should be taken on whether or not such an article, in whatever form, should in fact be included, after which the Commission could refer the matter back to the working group if it so wished.

63. The CHAIRMAN invited the Commission to vote on whether an article along the lines of the working group's proposal and as amended during the meeting should be included in the draft Code.

*There were 12 votes in favour, 5 against and 4 abstentions.*

64. Following a brief exchange of views in which the CHAIRMAN, Mr. THIAM (Special Rapporteur) and Mr. BARBOZA took part, the CHAIRMAN suggested that the meeting should be suspended to allow the working group to meet and consider its proposal as amended during the meeting.

*It was so agreed.*

*The meeting was suspended at 12.40 p.m. and resumed at 1.10 p.m.*

65. The CHAIRMAN invited Mr. Crawford to introduce the new amended text as agreed by the enlarged working group. Paragraph 2 would remain unchanged and paragraph 1 would read:

“1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

“(a) Murder, kidnapping or other attack upon any such personnel;

“(b) Violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.”

66. Mr. CRAWFORD said that there had been substantial concessions on all sides: by those who favoured extending maximum protection to United Nations personnel in their operations but nonetheless wanted the greatest possible degree of support for the article without prejudicing any convention language it contained, and by those who were concerned about the operation of the article as far as it might affect isolated attacks of a somewhat fortuitous nature but were prepared to make concessions, particularly with regard to that part of the wording of the article drawn directly from the Convention on the Safety of United Nations and Associated Personnel. When it came to consider the commentary, the Commission would have to make it clear that the article overlapped to a considerable degree with crimes against humanity in that the same act could constitute both a crime against humanity and a crime against United Nations personnel. There were, however, certain differences: in the case of a crime against United Nations personnel, the requirement of specific intent applied, but did not in the case of crimes against humanity. On the other hand, crimes against humanity had to be instigated or directed by Governments or groups, which was not the case with a crime against United Nations personnel.

67. The enlarged working group had agreed that it was not appropriate to incorporate the definition of a United

Nations operation as laid down in the Convention on the Safety of United Nations and Associated Personnel and the matter would have to be dealt with in the commentary. It was, however, clear from paragraph 2, which remained unchanged, that the United Nations operations referred to were those authorized under the Charter of the United Nations and carried out under United Nations control, as well as field operations such as peacekeeping.

68. As proposed by Mr. Calero Rodrigues, it had been agreed to include a reference to "large scale" and to delete, as a minor consequential change, the word "a" at the beginning of paragraphs 1 (a) and 1 (b). It had also been agreed, as a matter of interpretation, that the underlying genus of those two subparagraphs was an attack on United Nations personnel. To achieve a consensus, the working group had accepted the addition of the requirement of specific intent as reflected in the phrase at the end of the *chapeau*: "with a view to preventing or impeding that operation from fulfilling its mandate". The words "with a view to" had been used so as not to impose on the prosecution the intolerable burden of proving a subjective intention on the part of the particular individual who was, say, machine-gunning United Nations personnel.

69. There were certain other consequential and, as he understood it, non-controversial matters, including the placement of the article. It had earlier been agreed, in consultation with the Special Rapporteur, that the appropriate place would be between the provisions on crimes against humanity and on war crimes. That would have the advantage of creating a logical connection, since paragraph 2 referred to the law of international armed conflict.

70. Not all members of the enlarged working group had been entirely happy with the way in which the amended article had been drafted, which was perhaps not surprising at that stage in the quinquennium, but they were prepared to accept it by consensus. Accordingly, on behalf of the working group, he proposed that the Commission should agree to accept by consensus the text which had been circulated, on the understanding that the words "with a view to" would be rendered in French by the words *dans le but de*.

71. Mr. Sreenivasa RAO said that, while he appreciated the working group's efforts, he could accept the amended text without a vote only if the following sentence was included in the commentary: "In respect of United Nations operations referred to in paragraph 1 it is intended to include those operations which are non-combative and peacekeeping in nature involving no use of force except in self-defence or for the purpose of the maintenance of law and order".

72. Mr. CRAWFORD said he wondered whether the Commission might be prepared to do its best to accommodate Mr. Sreenivasa Rao's concern when it came to consider the commentary, but without adopting any particular form of words at the present stage as a condition for accepting the new text of the article.

73. Mr. ROSENSTOCK said that, insofar as any language in the commentary would depart from the precise and carefully negotiated scope of paragraph 2, it would

be totally unacceptable. Mr. Sreenivasa Rao's proposed wording was wholly unacceptable.

74. Mr. TOMUSCHAT said that he too objected to Mr. Sreenivasa Rao's proposal. A definition of the nature of the operation could not be imposed on the Commission at the very last minute. It must be carefully examined at a later stage in connection with the commentary.

75. Mr. Sreenivasa RAO said that, in view of the remarks by Mr. Crawford and Mr. Tomuschat, he would not insist on a vote but would leave the matter in their capable hands to deal with when the commentary was taken up in the Commission.

76. Mr. BENNOUNA said that, in its work on the draft Code, the Commission had proceeded throughout on the basis of a consensus and the best course would be for it to continue to do so. It was therefore particularly gratifying that Mr. Sreenivasa Rao had agreed that his point of view should be considered when the Commission took up the commentary.

77. Mr. MIKULKA, also expressing appreciation to Mr. Sreenivasa Rao, said that he too had made concessions as compared to his original position, in the interests of achieving a consensus in the Commission. He appealed to any members who were still hesitant to reconsider their position in that same spirit.

78. The CHAIRMAN said that, in the light of comments made, he would take it that the Commission wished to adopt the working group's new amended text for article 19 without a vote.

*Article 19, as amended, was adopted.*

79. The CHAIRMAN invited the Commission to adopt the draft Code against the Peace and Security of Mankind, as amended, as a whole.

80. Mr. VILLAGRÁN KRAMER said that the adoption of article 19 was not in line with the original conception of the draft Code, which was now a *mélange* of customary international law and the progressive development of international law. A mini-code of the kind being referred to the General Assembly—which, incidentally, had asked the Commission to embark on the task as far back as 1953—merited 8 or 10, not 5, crimes. He therefore formally proposed that the Commission should re-examine the proposals on first reading of the draft Code with regard to international terrorism, illicit traffic in narcotic drugs, wilful and severe damage to the environment and, if possible, intervention. The principle of non-intervention was upheld in Latin America with profound conviction.

81. Mr. THIAM (Special Rapporteur) said that he was appreciative of that proposal, having himself proposed, on first reading, the inclusion of such crimes in the draft Code. He had, however, encountered many difficulties because of a difference in approach. He would therefore suggest that Mr. Villagrán Kramer's remarks should be reflected in the summary record and would urge him not to insist on the adoption of his proposal. The best thing would be to accept for the time being the crimes now included in the draft Code and to add others at some subsequent stage of development of the Code.

82. The CHAIRMAN said it was his understanding that Mr. Villagrán Kramer agreed to his proposal being taken up at some future date.

83. Mr. VILLAGRÁN KRAMER said, that if his proposal was not opened up for discussion, he would vote against the draft Code.

84. Mr. Sreenivasa RAO said that he was very much alive to the need to include crimes such as terrorism, use of mercenaries, apartheid and colonialism in the draft Code but, unfortunately, it was too late to do so. The whole question of the Code had been thrashed out over many long years of arduous work when members had all had a chance to make their positions known. It was not, however, the end of the matter but only the beginning. He therefore appealed to Mr. Villagrán Kramer not to insist on a vote.

85. Mr. VILLAGRÁN KRAMER said that there were some subjects of vital importance to him and intervention was one. He could not see how intervention and drug trafficking could just be omitted from the Code, like that. He would nonetheless like to find a way out of the difficulty so as to avoid a vote. Possibly the Commission could agree on a statement reflecting an understanding that the five crimes which had been accepted were merely a beginning to the Code and not the Code in itself.

86. Mr. BENNOUNA, speaking on a point of order, said it simply was not possible to decide such a crucial matter at such a late hour. He suggested that a decision on the adoption of the draft Code should be deferred until later and that, in the meantime, further discussion should be held with Mr. Villagrán Kramer.

87. Mr. CRAWFORD said that Mr. Villagrán Kramer's concern could perhaps be met either in the commentary to the article or even by an appropriate statement made by the Chairman at the time of the adoption of the draft Code.

88. The CHAIRMAN suggested that a decision on the matter should be taken at the next meeting.

*It was so agreed.*

*The meeting rose at 1.40 p.m.*

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## 2454th MEETING

*Friday, 5 July 1996, at 10.15 a.m.*

*Chairman:* Mr. Robert ROSENSTOCK

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr.

Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

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### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (*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<sup>2</sup>)

[Agenda item 3]

#### CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING<sup>3</sup> (*concluded*)

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

1. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt part two of the draft Code of Crimes against the Peace and Security of Mankind.

*Part two, as amended, was adopted.\**

#### ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

2. The CHAIRMAN said that the Commission had completed its second reading of the draft Code of Crimes against the Peace and Security of Mankind and could now adopt it, with the following statement:

“In order to arrive at an agreement, the Commission has considerably reduced the scope of the draft Code, which, during the first reading in 1991, contained a list of 12 categories of crimes. Certain members have expressed regret that the Code has been restricted in that manner. The Commission took such action so that the text could be adopted and receive the support of Governments. It is understood that the inclusion of certain crimes in the Code does not change the status of other crimes under international law and that the adoption of the Code does not in any way prejudice the future development of the law in this important area.”

3. He said that, with that statement, if he heard no objections, he would take it that the Commission wished to adopt on second reading the draft Code of Crimes

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\* See 2464th meeting, para. 71.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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