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Summary record of the 2462nd meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
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1996. Until there was some indication as to the response and intentions of that group, the best course would perhaps be for the Commission to point out to the General Assembly that there were various possible routes, including a declaration, and mentioning very briefly some of the aspects that were clearly not *lex lata*, such as the provision on environmental damage.

52. Mr. CALERO RODRIGUES said that he agreed with much of what Mr. de Saram had said, and also with Mr. Rosenstock's suggestion. His firm belief, however, was that the articles should be incorporated in a treaty, since that was the only way of making sure they were mandatory for States. It would be entirely inappropriate to incorporate them in a declaration or resolution, which did not have the same binding effect. Moreover, if that were done, the provisions of the Code would in effect be left in limbo: the certainty afforded by a treaty was absolutely essential, particularly in the case of criminal law. True, the adoption of a treaty was a more complicated process and there was no knowing whether the States that accepted it would constitute a representative segment of the international community, but that was a risk the Commission would have to take.

53. Mr. YANKOV, endorsing Mr. Rosenstock's remarks, said that the consultations to be held in the Preparatory Committee on the international criminal court might prove helpful, for the court should not have to rely solely on customary rules of law and national legislation. He wondered, however, what the position would be if the Code was ratified by only a few States. In the circumstances, it would be better not to try to impose a solution a priori, though the report of the Commission to the General Assembly could state that various preferences had been expressed in the Commission, which, as a whole, took the view that at that stage the choice should be left to States.

54. Mr. LUKASHUK said the Commission should propose to the General Assembly that it first adopt a declaration and then, as a next step, should, if it so wished, prepare a convention, though that would be for the distant future, in his opinion.

55. Mr. MIKULKA said that it would be a mistake for the Commission to advocate only the treaty form. The Code represented the minimum on which the Commission had agreed and was more or less a codification of existing law on the matter. Consequently, even if its provisions were incorporated in a declaration, the Code would still be an authoritative statement of existing international law which could be applied by any international criminal court. That was the message the Commission's report to the General Assembly must convey. If States decided to adopt the Code in the form of a treaty, all the better, but, failure to do so must not be used as a pretext for denying the legal value of the Code.

56. It would also be possible to incorporate the Code's provisions in the statute of the international criminal court and he saw no contradiction in doing that and in also having a declaration. The main thing was to avoid any doubt about the value of the Code on the ground that it was not incorporated in a treaty.

57. Mr. HE said that he inclined to the opinions expressed by Mr. Rosenstock and Mr. Yankov, particularly in view of the close relation between the Code and the draft statute for an international criminal court. Since the final results of the consultations on the Code to be held in the Preparatory Committee on the international criminal court were still not known, the best course would be simply to refer the Code to the General Assembly for States to decide what form it should take.

58. The CHAIRMAN, speaking as a member of the Commission, said that there was, of course, a logical link between the statute of the international criminal court and the Code. As Mr. Mikulka had rightly noted, the Commission had codified the strict minimum, namely, those crimes that were fully recognized as such in international law, albeit with some nuances such as the environmental issue. Even without the Code, the international criminal court could always apply the penalties for the crimes involved although the best solution would perhaps be for the General Assembly to decide to include those crimes in the statute of the international criminal court.

59. The crimes codified by the Commission ranked, as Mr. Bennouna had pointed out, as peremptory norms of international law. For his own part, he was convinced that aggression and genocide, as well as other serious crimes against humanity and serious crimes involved in armed conflict, now formed part of the rules that were binding on all States. If the provisions of the Code were incorporated in a treaty, and if some States did not ratify that treaty, there would be a problem because of the resulting degree of ambiguity. That, however, would not exempt States from respecting the rules of international law prohibiting such crimes as set forth in the Code.

60. In the circumstances, he would suggest that the Commission should State a preference in one direction or another, but should leave it to the General Assembly or to States themselves to decide whether the Commission's preference met with their approval or whether they wished to follow some other course.

The meeting rose at 5.30 p.m.

2462nd MEETING

Wednesday, 17 July 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk,

Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer.

Draft report of the Commission on the work of its forty-eighth session

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.527 and Add.1 and Add.1/Corr.1, Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)

D. Articles of the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.527/Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)

1. The CHAIRMAN invited the Commission to adopt the commentaries to the draft articles constituting the future Code of Crimes against the Peace and Security of Mankind. The commentaries would be included in the report of the Commission to the General Assembly on the work of its forty-eighth session in chapter II. The documents under consideration were therefore being issued as sections of the draft report. In accordance with the usual practice, the Commission would consider the draft report paragraph by paragraph.

2. Mr. ROSENSTOCK said he had noted that crimes against humanity did not include "imprisonment". He had learned from his discussions with other members of the Commission that, on first reading, it had adopted a text based word for word on the Charter of the Nürnberg Tribunal.[1] Between that first reading and the current session, however, the International Tribunal for the Former Yugoslavia[2] and the International Tribunal for Rwanda[3] had been set up and their statutes did provide for the crime of "imprisonment". As that crime would probably have been committed in the regions where the Code was to be applied, it must be included among the types of conduct which the Code would punish. He intended to raise that question again during the consideration of the commentary to article 18 (Crimes against humanity), in which the necessary reference might be included in connection with the "other inhumane acts" listed in article 18 (*j*).

Commentary to article 1 (Scope and application of the present Code) (A/CN.4/L.527/Add.2)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

3. Mr. PELLET said that he was not satisfied with the second sentence, which read: "This provision is not intended to suggest that the present Code covers exhaustively all crimes . . .". It should, in his view, read: "This provision neither suggests nor rules out the possibility that the present Code covers exhaustively all crimes . . . .".

4. Mr. THIAM (Special Rapporteur) said that he supported the amendment by Mr. Pellet.

5. Mr. ROSENSTOCK said that it would be better for the second sentence to be retained as it stood because it corresponded exactly to the opinion which had prevailed in the Commission.

6. Mr. BENNOUNA said that the amendment proposed by Mr. Pellet would make the sentence meaningless. As Mr. Rosenstock had pointed out, the Commission had wanted to state a kind of reservation in order to show that the Code could be further developed. It had decided to reduce the list of crimes after lengthy discussions, on the understanding that it would be explicitly stated that the list was not exhaustive.

7. Mr. AL-BAHARNA said that he agreed with the opinion expressed by Mr. Bennouna and Mr. Rosenstock. Paragraph (2) should be left as it stood.

8. Mr. CALERO RODRIGUES said that the words "to make it clear" were used throughout the commentaries. They should be replaced by the words "to indicate".

Paragraph (2), as amended in English, was adopted.

Paragraph (3)

9. Mr. CALERO RODRIGUES said that he had doubts about the first sentence of that paragraph, which stated that "crimes against the peace and security of mankind" should be understood "in all other provisions of the present Code as referring to the crimes listed in Part II". It appeared to contradict the much broader definition given in paragraph (3) of the commentary to article 2. That contradiction must be eliminated.

10. Mr. LUKASHUK (Rapporteur) said that, although Mr. Calero Rodrigues' comment was entirely justified, he thought that paragraph (3) should be left as it stood and that paragraph (3) of the commentary to article 2 should be amended instead.

Paragraph (3) was adopted.

Paragraph (4)

11. Mr. PELLET said he was surprised that crimes against the peace and security of mankind were not defined anywhere in the commentary. If that explanation was not included in the commentary, he would like his very deep regret to be formally placed on record.

12. Mr. THIAM (Special Rapporteur) said that the point made by Mr. Pellet had been a controversial issue for a long time. The Commission had considered that the definition in question should not be given. It could now decide whether it should be referred to in the commentary.

13. The CHAIRMAN said that Mr. Pellet would make a draft text reflecting his point of view available later.

Paragraph (4) was adopted.

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[1] See 2439th meeting, footnote 5.

[2] See 2437th meeting, footnote 6.

[3] Ibid., footnote 7.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

14. Mr. CALERO RODRIGUES said that the words "makes it clear" in the first sentence should be deleted. He drew the Commission's attention to the second sentence, which stated that a type of behaviour characterized as a crime against the peace and security of mankind could be "authorized" by national law. Such a case was so unlikely that the reference to it should be deleted.

15. Mr. THIAM (Special Rapporteur) said it might simply be stated that the behaviour in question could be "allowed" by national law.

16. Mr. ROSENSTOCK, speaking on a point of order, said that, in the 1930s and 1940s, a national-socialist regime had adopted internal legislation that had allowed conduct constituting crimes against the peace and security of mankind. The Balkan region had recently offered some examples as well.

17. Mr. PELLET said that he objected to the point of order which had been made by Mr. Rosenstock and which, in his own opinion, constituted an abuse of process.

18. Mr. KABATSI, noting that, where a country claimed a territory and its Constitution provided that it was entitled to conquer that territory, it could be said that the national law of that country allowed aggression. The case referred to by Mr. Calero Rodrigues was thus not so unlikely. The sentence in question should therefore be retained.

19. Mr. MIKULKA said that he agreed with the comment by Mr. Calero Rodrigues. However, he referred to the crime of apartheid as an example of criminal behaviour authorized by national law. In fact, the problem was not that some behaviour was authorized, but that it was imposed by national law. Since the idea of authorized behaviour was implicit in that of non-prohibited behaviour, the second sentence should read: "It is conceivable that a particular type of behaviour . . . might not be prohibited and might even be imposed by national law."

20. Mr. ROSENSTOCK said that he agreed with that wording.

Paragraph (9), as amended, was adopted.

Paragraph (10)

21. Mr. LUKASHUK (Rapporteur) said the statement in the fourth sentence that "the Nürnberg Tribunal recognized in general terms what is commonly referred to as the supremacy of international law over national law in the context of the obligations of individuals" was too general. The principle of the supremacy of international law over national law must be stated in the context of the Code.

22. Mr. CALERO RODRIGUES said he did not think that a quotation from the Judgment of the Nürnberg Tribunal could be changed.

23. Mr. LUKASHUK (Rapporteur) said that that quotation did nothing to improve the text. The Judgment of the Nürnberg Tribunal had stated the principle of the supremacy of international law only in criminal matters. He proposed the following wording: ". . . recognized the principle of the supremacy of international over national law in the context of international criminal law".

Paragraph (10), as amended, was adopted.

Paragraph (11)

24. Mr. LUKASHUK (Rapporteur) said that the word "supremacy" was perhaps not the best choice because nothing in Principle II of the Nürnberg Principles quoted in that paragraph indicated that the supremacy of international law existed in the case in question. Reference should, rather, be made to the "autonomy" of international law.

25. Mr. ROSENSTOCK, supported by Mr. THIAM (Special Rapporteur), pointed out that, when there was a conflict between national law and international law, international law took precedence. The word "supremacy" was therefore appropriate.

26. Mr. LUKASHUK (Rapporteur), supported by Mr. CALERO RODRIGUES, said that, in general terms, that comment was quite correct, but, in the paragraph under consideration, the juxtaposition of the word "supremacy" and the quotation from the Nürnberg Principles was what caused a problem and destroyed the internal logic of the text.

27. Mr. MIKULKA said that it all depended on how the word "supremacy" was interpreted. In paragraph (11), it meant that national law gave way to international law and that international law did not admit of any excuse based on national law. In fact, any autonomy of national law was explicitly not allowed, whereas Mr. Lukashuk seemed to be proposing precisely the opposite of what flowed from the Nürnberg Principles.

28. The CHAIRMAN, summing up the discussion, said that Mr. Lukashuk's objections related more to a drafting problem than to one of substance. He also noted that paragraph (11) was based on a paragraph of the commentaries to Principle II of the Nürnberg Principles, which had been prepared by the Commission itself. If he heard no objection, he would take it that paragraph (11) was adopted.

Paragraph (11) was adopted.

Paragraph (12)

29. Mr. BENNOUNA said that, in the second sentence, the words "It is without prejudice to national competence in relation to other matters of criminal law or procedure, such as the penalties, evidentiary rules, etc." might place too much emphasis on national competence. The following wording should perhaps be added: "subject to obligations under the statute of an international court", since the establishment of such a court would obviously allow for less national competence.

30. Mr. THIAM (Special Rapporteur), replying to the point made by Mr. Bennouna, suggested that the words "such as the penalties, evidentiary rules, etc." should be deleted.

31. The CHAIRMAN said he thought that Mr. Bennouna's objection related to the words "It is without prejudice to". If an international criminal court was to be established, national competence could not remain entirely intact without a risk of conflict between such competence and that of the international court. That problem could, however, be dealt with later in the commentaries to articles 8 and 9, which related particularly to competence.

32. Mr. BENNOUNA said that he would have no objection if the question was dealt with later. He merely wanted account to be taken of the use that might be made of the Code, especially in the discussions on a future international criminal court.

33. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (12), subject to changes that might be made as a result of the discussions on the commentaries to articles 8 and 9.

Paragraph (12) was adopted on that understanding.

Commentary to article 2 (Individual responsibility)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

34. Mr. ROSENSTOCK proposed that, in the fourth sentence, the words "which deals with the different forms of participation in the crime" should be added after the words "article 16" to explain why reference was being made to that article.

35. Mr. CALERO RODRIGUES, supported by Mr. AL-BAHARNA, said he was not sure that that explanation was really necessary. Lengthy explanations of ways of committing the crime of aggression were also contained in paragraph (5).

36. Mr. ROSENSTOCK proposed that his suggestion should be provisionally adopted until paragraph (5) had been discussed.

Paragraph (2), as amended, was adopted on that understanding.

Paragraph (3)

37. The CHAIRMAN said that paragraph (3) also raised the problem to which Mr. Lukashuk had referred in connection with paragraph (3) of the commentary to article 1. The Commission therefore had to decide whether the words "irrespective of whether such crimes listed in the present Code" at the end of the fourth sentence should be deleted.

38. Mr. PELLET said that he also objected to the last sentence of the paragraph, in which the Commission recognized "that there might be other crimes of the same character that were not covered by the Code". His concerns about the scope of the Code were much the same as Mr. Lukashuk's.

39. Mr. FOMBA said that there were quite a few repetitions in that paragraph (3), particularly with regard to the concept of the criminal responsibility of individuals. The third sentence might just as well have been left out.

40. Mr. THIAM (Special Rapporteur) said that he had no objection to the deletion of that sentence, but pointed out that some members of the Commission preferred instructive, explicit commentaries.

41. Mr. GÜNEY suggested that the words "at present" should be added in the last sentence because such crimes were not covered by the provisions of the Code at the current time, but they might be in future.

42. Mr. ROSENSTOCK said that he had no objection to the amendment proposed by Mr. Güney, provided that careful consideration was given to the place where the words "at present" would be added.

43. Mr. CALERO RODRIGUES said that the Special Rapporteur should also take care to bring that paragraph into line with paragraph (3) of the commentary to article 1.

Paragraph (3), as amended, was adopted.

Paragraph (4)

44. Mr. CALERO RODRIGUES suggested that the word "clearly" in the last sentence should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

45. Mr. CALERO RODRIGUES said that, since paragraph (5) had a number of defects that it would be pointless to try to correct, it should be replaced by the following text:

"(5) Article 2, paragraph 2, deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3 indicates the various manners in which the role of the individual in the commission of a crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit that act; if he failed to prevent the commission of the act; if he incited the commission; if he participated in the planning of the act; if he was an accomplice to its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual, because the definition of the crime of aggression in article 16 already provides all the elements necessary to establish the responsibility. According to that article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. All the situations listed in paragraph 3 which would have application in relation to the crime of aggression are already found in the definition of that crime contained in article 16. Hence the reason to have a separate paragraph for the crime of aggression in article 2."

He suggested that that text should be distributed to the members of the Commission.

46. Mr. PELLET said that he too was totally opposed to paragraph (5). He was also of the opinion that the views of all sides did not have to be reflected in a commentary, which was not a summary record.

47. Mr. BENNOUNA, supported by Mr. THIAM (Special Rapporteur), said that there was no need to reflect the personal opinions of the members of the Commission in a commentary that was being adopted on second reading.

48. Mr. ROSENSTOCK said he agreed with that point of view. Moreover, paragraph (5) appeared to contain unnecessary explanations that would come up again in paragraph (6). The fourth and fifth sentences could very well be deleted. That would make the text more concise, while retaining the basic ideas.

49. Mr. de SARAM said that Mr. Rosenstock's proposal was very much to the point, but, before deciding on it, he would like to see the text proposed by Mr. Calero Rodrigues.

50. The CHAIRMAN suggested that the Commission should come back to paragraph (5) when that text had been distributed and that it should go on directly to paragraph (6).

Paragraph (6)

51. Mr. CALERO RODRIGUES drew attention to the drafting amendment which had been distributed and which involved deleting the entire text as from the second sentence and replacing it by the following:

> "Participation only entails responsibility when the crime is actually committed or at least attempted. In some cases it was found useful to mention this requirement in the corresponding subparagraph in order to dispel possible doubts. It is of course understood that the requirement only extends to the application of the present Code and does not pretend to be the assertion of a general principle in the characterization of participation as a source of criminal responsibility."

52. The CHAIRMAN said that the Commission would continue its consideration of paragraph (6) at a later meeting to give the members time to study that proposal in their own languages.

Paragraph (7)

53. Mr. CALERO RODRIGUES said that, although the word *auteur* in the first sentence of the French text was correct, the word "perpetrator" should be replaced by the word "individual" in the English text. In the second sentence, the words "under the present subparagraph" should be deleted. Although he was not making a formal proposal, he considered that the entire text of the rest of paragraph (7) could be cut in half without changing its content. For example, it was rather childish to state that an individual who committed a crime was held responsible for his own conduct, for that was a general principle of law. He suggested that the Special Rapporteur himself should amend the text to make it more concise and bring out its meaning more clearly.

54. The CHAIRMAN said that, in the penultimate sentence, the words "is consistent with" did not reflect exactly what the Commission meant. The idea was that it had used existing texts in its codification work. It would therefore be more accurate to say that the principle of individual criminal responsibility "flows from" the Nürnberg Charter and the other texts referred to.

55. Mr. THIAM (Special Rapporteur) said he realized that the text was too long and repetitious, but he did not think that it was out of place for the commentary to say that anyone who committed a criminal act was responsible, since that was what the article itself said.

56. Mr. ROSENSTOCK said that the text could probably be shortened by four or five lines, but it did relate to an absolutely essential article which established the general context of the Code. It would therefore be regrettable to mutilate it. It should thus be clearly indicated that the "commission" of a crime could mean either an act or an omission and it might be helpful to remind some Governments that a person who committed one of the crimes covered by the Code was responsible for his act at the international level.

57. The CHAIRMAN, noting that there were no substantive objections, suggested that the Commission should adopt paragraph (7), on the understanding that the Special Rapporteur would be asked to shorten the text, while keeping the bare essentials.

It was so decided.

Paragraph (8)

58. Mr. CALERO RODRIGUES suggested that the first two sentences should be combined. The text would then read: "Subparagraph (*b*) provides that an individual who orders the commission of a crime incurs responsibility for that crime." He also proposed that the part of the text from the sixth sentence onwards should be deleted because it was unnecessary.

59. Mr. ROSENSTOCK said that the deletion of that entire part of the text would be going too far and would remove elements that should be included. He therefore agreed with the deletion of the sixth sentence. He also did not object to the deletion of the last sentence, but he would like the seventh, eighth and ninth sentences to be retained and the word "Moreover" to be deleted at the beginning of the seventh sentence.

60. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph (8) with the amendments proposed by Mr. Calero Rodrigues, as amended by Mr. Rosenstock.

Paragraph (8), as amended, was adopted.

Paragraph (9)

61. Mr. CALERO RODRIGUES proposed that, because of the ambiguity of the word "instance", it should be replaced by the word "case" or the word "situation" in the second and fifth sentences.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

62. Mr. ROSENSTOCK said that the sentences in paragraph (12) reflecting the opinion of "some members", "other members" and "most members" should be deleted for the reasons already given during the consideration of other paragraphs. The first two sentences should thus be deleted, the third sentence should end with the word "crime" and the rest of the paragraph should be deleted.

63. Mr. VILLAGRÁN KRAMER said that the Commission had been divided on the question dealt with in paragraph (12) and that that disagreement should be reflected in the commentary. He and Mr. Bowett had defended a position that had differed from that of the majority.

64. Mr. ROSENSTOCK said that he had supported the position of Mr. Bowett and Mr. Villagrán Kramer, but it had been the minority position.

65. Mr. PELLET, supported by Mr. THIAM (Special Rapporteur), Mr. BENNOUNA and Mr. ROSENSTOCK, explained that the commentaries adopted on second reading were designed to give an objective explanation of the content of the provision they went with; they reflected the position which had prevailed and which was thus that of the Commission as a whole. Reflecting differences of opinion might weaken the provisions adopted by the Commission.

66. Mr. VILLAGRÁN KRAMER requested that his opposition to the proposed deletion should be reflected in the summary record and that the same should be done for all other paragraphs of the commentaries.

67. Mr. THIAM (Special Rapporteur) recalled that the Commission had decided that all sentences reflecting the opinion of one member or a group of members should be removed from the commentaries.

68. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (12), as amended by Mr. Rosenstock.

Paragraph (12), as amended, was adopted.

Paragraph (13)

69. Mr. CALERO RODRIGUES said that the first sentence distinguished between the "mastermind" and the person who "participates in planning or conspiring to commit such a crime", but such a distinction was not made in subparagraph (*e*). Perhaps that sentence should be amended.

70. Mr. THIAM (Special Rapporteur) said that the term *cerveau* was not very appropriate and that he would prefer the term *auteur intellectuel.*

71. The CHAIRMAN suggested that the Special Rapporteur should amend the first sentence of paragraph (13) in the light of the comment by Mr. Calero Rodrigues.

Paragraph (13) was adopted on that understanding.

Paragraph (14)

72. Mr. CALERO RODRIGUES said that paragraph (14) could be deleted because it did not really add anything to the commentary.

73. Mr. ELARABY, supported by Mr. VILLAGRÁN KRAMER, said that the explanations of the activities of military commanders contained in paragraph (14) were in fact very much to the point at the present time because of the events taking place in Bosnia. He would therefore like that paragraph to be retained.

Paragraph (14) was adopted.

Paragraphs (15) and (16)

74. Mr. PELLET, supported by Mr. YANKOV, proposed that, for the sake of logic, the order of paragraphs (15) and (16) should be reversed. He also proposed that, in the French text, the word *complot* should be deleted for the reasons which had led the Commission not to use it in article 2, subparagraph (*e*). Reference would be made to *participation à un plan concerté ou à une entente.*

75. Mr. ROSENSTOCK, supported by Mr. LUKASHUK (Rapporteur), proposed that paragraph (16) should be a footnote, with the footnote indicator being placed after the word "conspiracy" in the first sentence of paragraph (15).

76. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (15) as amended by Mr. Pellet and to make paragraph (16) a footnote, the footnote indicator being placed after the word "conspiracy".

Paragraphs (15) and (16), as amended, were adopted.

Paragraph (17)

77. Mr. CALERO RODRIGUES said that the fifth and sixth sentences seemed to distinguish between "direct" incitement and "public" incitement, but, in the case under consideration, incitement must be both direct and public. He therefore proposed that those two sentences, as well as the seventh, which was only an extension of them, should be deleted.

78. Mr. ROSENSTOCK said that that might not be the most felicitous wording, but it dealt with two aspects of incitement that should perhaps be explained. Those two sentences might be amended to remove the apparent dichotomy.

79. Mr. YANKOV said that there could be quite a big difference between "direct" and "public" in some cases and he therefore supported Mr. Rosenstock's proposal.

80. The CHAIRMAN said he took it that the Special Rapporteur was prepared to amend paragraph (17) in the light of the comments by Mr. Calero Rodrigues and Mr. Rosenstock. He said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (17) on that understanding.

Paragraph (17) was adopted on that understanding.

Paragraph (18)

Paragraph (18) was adopted.

The meeting rose at 1 p.m.

2463rd MEETING

Wednesday, 17 July 1996, at 3.05 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer.

Draft report of the Commission on the work of its forty-eighth session (*continued*)

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (continued) (A/CN.4/L.527 and Add.1 and Add.1/Corr.1, Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)

D. Articles of the draft Code of Crimes against the Peace and Security of Mankind (*continued*) (A/CN.4/L.527/Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)

1. The CHAIRMAN invited the Commission to resume its consideration of the commentaries to the draft articles.

Commentary to article 3 (Punishment) (A/CN.4/L.527/Add.2)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

2. Mr. ROSENSTOCK said that the last three sentences of the paragraph were unnecessary and undermined what the Commission had accomplished. He therefore proposed that they should be deleted.

Paragraph (7), as amended, was adopted.

New paragraph (8)

3. Mr. ROSENSTOCK proposed that a new paragraph (8) should be added, reading:

> "(8) It is, in any event not necessary for an individual to know in advance the precise punishment so long as he knows that the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgment[1] and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

[1] *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington, United States Government Printing Office, 1947), pp. 49-51."

4. Mr. THIAM (Special Rapporteur) said the disturbing thing about Mr. Rosenstock's proposal was that it meant the perpetrator of a crime would not have to know the penalty in advance. What then was the purpose of the maxim *nulla poena sine lege*?

5. Mr. ROSENSTOCK said that what the perpetrator of a crime did not need to know was the precise length of the sentence. Indeed, it was for that reason that his proposal was couched in rather precise terms. Given the severity of the acts involved, there would be no doubt in the mind of those who committed them that the penalty would be severe punishment.

6. Mr. BOWETT said that, on the whole, the proposed paragraph was good. It was the word "precise" that was all important. The *nulla poena sine lege* maxim operated where the individual did not know that his acts were punishable, but very few systems of law laid down precise punishments. So long as an individual knew that his acts were punishable by law, the fact that he did not know the precise punishment was irrelevant.

7. Mr. CALERO RODRIGUES said that he was in favour of Mr. Rosenstock's proposal, which was a very good attempt at justifying the wording of article 3, an article that did not lay down any penalties but merely stipulated that the punishment must be commensurate with the character and gravity of the crime. If the Commission did not at least try to explain the reason for the wording of article 3, the whole article would be called into question.

8. Mr. LUKASHUK said that he had nothing against the idea behind Mr. Rosenstock's proposal but the words "so long as he knows" caused him some concern.

9. Mr. THIAM (Special Rapporteur) said that he had included the wording in question because the Drafting Committee had decided, after much discussion, that it was unnecessary for the Commission to specify penalties.

10. Mr. MIKULKA said that it was important not to confuse two different issues: the principle of legality, or *nullum crimen, nulla poena sine lege*, and ignorance of the law, in which regard he would remind the Commis-