Document:-

A/CN.4/SR.2085

Summary record of the 2085th 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:-

1988, vol. I

informal group to prepare a redraft of paragraph 5 of article 7 for submission to the Commission at the next meeting.

It was so agreed.

The meeting rose at 5.55 p.m.

2085th MEETING

Friday, 22 July 1988, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

later: Mr. Ahmed MAHIOU

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*concluded*) (A/CN.4/404,[2] A/CN.4/411,[3] A/CN.4/L.422)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 7 (*Non bis in idem*)[4] (*concluded*)

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that a decision on paragraph 5 of article 7 had been left over from the previous meeting. An informal working group had redrafted that paragraph in French and, subject to possible stylistic changes, the English text would read:

> "5. In the case of a new conviction under this Code, any court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act."

The main elements of the previous text had been retained, but the emphasis was now placed on the fact that the rule would apply in cases of new convictions.

2. Prince AJIBOLA suggested the alternative wording:

> "5. In the case of a new conviction under paragraphs 3 and 4 of this article, any court, in passing sentence, shall take into consideration any term of imprisonment already served as a result of a previous conviction for the same crime."

He had deliberately used the term "crime" instead of "act" because, once there was a conviction, the word "act" was no longer appropriate. He had also changed the unnecessarily lengthy formula "penalty already imposed and implemented" to "term of imprisonment already served" and introduced a reference to paragraphs 3 and 4 of article 7. Paragraph 5 applied to those paragraphs alone and not to the whole of article 7.

3. Mr. BEESLEY, referring to the amendment proposed earlier for paragraph 4 (*a*), asked whether the new formula "a national court of another State" was intended to be analogous to the expression "foreign court".

4. He would also like to know whether it was clear that the last part of the new text of paragraph 5 (para. 1 above) referred to a previous conviction by a national court and not by a court acting in the capacity of a court applying the code.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he was opposed to Prince Ajibola's suggestion to introduce in paragraph 5 a reference to paragraphs 3 and 4, because it would make the provision much too narrow. Paragraphs 3 and 4 described the jurisdiction of national courts as an exception to the *non bis in idem* principle and not the possible jurisdiction of an international criminal court—a matter which had been left entirely open.

6. The suggestion to replace the words "shall deduct" by "shall take into consideration" had been discussed at length, but the Drafting Committee had considered that the former were necessary in order to have a strict and rigid rule. The alternative wording proposed by Prince Ajibola (para. 2 above) left too much room for flexibility.

7. The proposal to incorporate a reference to a "term of imprisonment" would involve an important change of substance. The form of language adopted by the Drafting Committee encompassed any kind of penalty, including fines and such sanctions as expulsion from a country, although the main thrust of paragraph 5 did, of course, relate to terms of imprisonment. He himself had an open mind on the matter, but it was for the Commission to decide.

8. With regard to the possible replacement of the word "act" by "crime", it was important to cover situations in which an individual was convicted of some offence which later proved to be an act characterized as a crime against the peace and security of mankind and was prosecuted and convicted a second time. The rule set out in paragraph 5 should apply in all instances in which an individual was being tried a second time. In the draft code, any reference to "crime" would normally mean a crime against the peace and security of mankind. If the word "crime" were used, paragraph 5 would no longer encompass the situation mentioned in paragraph 3.

9. As for the questions raised by Mr. Beesley, the issue as to whether or not a court trying an individual for a crime against the peace and security of mankind was

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[4] For the text, see 2083rd meeting, para. 63.

acting as an agent of the international community was rather academic. Functionally, the court could be regarded as acting as an agent of the international community, and he sympathized with that interpretation; but the point was doctrinal and did not affect the wording of paragraph 5. The reference to a "foreign court" in paragraph 4 (*a*) meant the court which had handed down the first judgment; thereafter there was a second trial by a national court of another State. He had no doubts regarding the adequacy and clarity of the language used in paragraph 4 (*a*).

10. Mr. THIAM (Special Rapporteur) said that, on the subject of the "foreign court", precise explanations would be given in the commentary in order to avoid any misunderstanding.

11. The CHAIRMAN said that it would perhaps be clearer if paragraph 4 simply stated:

"Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court for a crime under this Code:

"(*a*) if the act which was the subject of the judgment by a court of another State took place on the territory of that State.

". . ."

12. Mr. BEESLEY said that that formulation was very close to what he himself had had in mind.

13. Mr. FRANCIS suggested that the words "passing sentence", in paragraph 5, should be replaced by "any penalty imposed". It would indeed be better not to use the expression "shall deduct", and paragraph 5 should be reworded to read:

"In the case of a new conviction under this Code, any penalty imposed by the court shall be abated to the extent of any penalty already imposed and implemented as a result of a previous conviction for the same act."

14. Mr. CALERO RODRIGUES said that none of the suggestions he had heard appeared to improve the text. As it stood, paragraph 5 provided clear guidance to any court that would have to pass judgment a second time for the same act.

15. Mr. McCAFFREY pointed out that the expression "new conviction" was unsuitable, since it was not a legal term. It was necessary to find a better expression and "subsequent conviction", although less inadequate, was still imperfect.

16. Prince AJIBOLA said that the expression "subsequent conviction" was the most adequate.

17. Mr. BARBOZA said that, in the Spanish text, the expression *cualquier tribunal* was not appropriate and he suggested replacing it by *el tribunal*.

18. Mr. TOMUSCHAT (Chairman of the Drafting Committee) suggested that the Commission should adopt the following revised text for paragraph 5 of article 7:

"In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act."

It was so agreed.

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 proposed by the Drafting Committee, as amended.

Article 7 was adopted.

20. Mr. FRANCIS said he wished to place on record his view that paragraph 5 of article 7 should have read as he had proposed earlier.

21. Mr. EIRIKSSON said that, following the adoption of article 7, he wished to revert to the question he had asked at the previous meeting about the impact of paragraph 2 on possible subsequent action by an international criminal court. He had been assured that it was the Drafting Committee's intention that, if an international criminal court were established with some national jurisdictions under a combined system, the international court would not be barred from taking up a case again when a national court had finally convicted or acquitted an individual of a crime, even in cases other than those envisaged in paragraphs 3 and 4 of article 7. That point was not clear from the wording. If that was indeed the intention and an international criminal court were established, the restrictions set by paragraph 2 on a second trial would apply only to a second trial in a national court. Hence there would be no need for the reference in paragraph 3 to an international criminal court, for that court could always take up a case even in the event of a final acquittal by a national court.

22. The CHAIRMAN said that that was the understanding of the Special Rapporteur and the Drafting Committee, even if the actual wording was not absolutely clear.

ARTICLE 12 (Aggression)

23. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12,[5] which read:

CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART I. CRIMES AGAINST PEACE

Article 12. Aggression

1. Any individual to whom acts constituting aggression are attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

[5] Article 12 corresponds to paragraph 1 of the revised draft article 11 submitted by the Special Rapporteur and considered at the present session (2053rd to 2061st meetings).

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(*a*) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(*b*) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(*c*) the blockade of the ports or coasts of a State by the armed forces of another State;

(*d*) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(*e*) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(*f*) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(*g*) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(*h*) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

24. Article 12 was the first article in chapter II of the draft code, which contained the catalogue of crimes against the peace and security of mankind, and part I of which dealt with crimes against peace. The Drafting Committee had borne in mind the wish expressed by many members of the Commission that each crime should form the subject of a separate article, and thus article 12 related solely to aggression. The Committee had also been mindful of the view of several members that a linkage should be established between the act of a State and action by an individual entailing the criminal responsibility of physical persons under the code. It had therefore included at the beginning of article 12 a paragraph 1 which, although it did not provide a definitive solution to the problem, signalled the need to deal with it at some future stage in relation not only to aggression, but probably also to other crimes under the code. The paragraph was tentative and would be reviewed when sufficient progress had been made on the definition of crimes.

25. The text of article 12, although it drew extensively on the 1974 Definition of Aggression,[6] omitted any direct reference to it, thereby taking into account the opinion of some members that mention of a non-binding instrument intended to serve as guidance for a political organ, namely the Security Council, would be out of place in a criminal code to be implemented by the courts. Using the Definition of Aggression as a basis for its work, the Drafting Committee had taken into account that the Definition, in accordance with article 8 thereof, was an indivisible whole. Most of its elements had therefore been retained in the text now submitted to the Commission.

26. Paragraph 2 was identical to article 1 of the Definition of Aggression, except for the words "as set out in this Definition" and the explanatory note, which the Drafting Committee had deleted as being unnecessary in the context of the code. Paragraph 3 reproduced article 2 of the Definition.

27. The introductory clause of paragraph 4 began with the words "In particular", which had been placed in square brackets to indicate a basic divergence of views. Some members objected to the words because they considered it unacceptable to confer on national courts the power to expand the list of acts constituting aggression. Other members wished to preserve the freedom of the judge to qualify as aggression acts not included in the list, such as an air blockade.

28. The list of acts in subparagraphs (*a*) to (*g*) was identical to that contained in article 3 of the Definition of Aggression. The Drafting Committee had, however, inserted an additional subparagraph, subparagraph (*h*), which took into account the power of the Security Council under Article 39 of the Charter of the United Nations—a power which was referred to in article 4 of the Definition of Aggression—to determine that other acts constituted aggression under the provisions of the Charter. That power of the Security Council had not been questioned by any member of the Drafting Committee.

29. Paragraph 5 had been placed in square brackets to indicate a second divergence of views within the Drafting Committee. It should be stressed that the scope of the paragraph was limited to national courts and that the question of the relationship between the Security Council and an international criminal court was reserved. Furthermore, the phrase "Any determination . . . as to the existence of an act of aggression" was intended to encompass both positive and negative determinations, a point that would be elaborated on in the commentary. In support of paragraph 5, some members had argued that determinations by the Security Council under Chapter VII of the Charter were binding on States Members of the United Nations and therefore on their courts. Advocating the deletion of the paragraph, other members had maintained that to tie the implementation of the code to the functioning of the Security Council would make the code meaningless.

30. Paragraphs 6 and 7 reproduced articles 6 and 7 of the Definition of Aggression with no substantive change.

31. On the whole, disagreement had persisted with regard to only one important issue, namely the distribution of powers as between the Security Council and

[6] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

national courts called upon to implement the code, disagreement that was reflected by two passages being placed in square brackets. Otherwise, the Drafting Committee had been unanimous in the view that the Definition of Aggression should be followed as closely as possible, and had reproduced it faithfully, except for the explanatory note and those elements which were relevant to inter-State relations alone.

32. Lastly, paragraph 1, constituting the introductory part of article 12, had been adopted provisionally by the Drafting Committee, on the understanding that it would be revised later when a general article was drafted to indicate clearly under what conditions an individual could be held responsible for a crime which, in the first instance, was an internationally wrongful act committed by a State. Any individual responsible for an act of aggression committed by a State was liable to be tried and punished for a crime against peace. There was a linkage between aggression, which was a wrongful act in relations between States, and the role of those individuals within an aggressor State to whom responsibility was to be attributed.

Mr. Mahiou, Second Vice-Chairman, took the Chair.

33. The CHAIRMAN suggested that, in view of the length of article 12, it should be considered paragraph by paragraph.

Paragraph 1

34. Mr. EIRIKSSON said that paragraph 1 was unnecessary and perhaps even dangerous. It contained nothing that was not already in article 1 of the Definition of Aggression, and stated simply that a crime defined in part I of chapter II had been committed. Besides, paragraph 1 of article 3 (Responsibility and punishment), provisionally adopted at the previous session,[7] clearly stated: "Any individual who commits a crime against the peace and security of mankind is responsible for such crime . . ." He accordingly proposed that paragraph 1 of draft article 12 be deleted as redundant, although the general thought could, of course, be included in the commentary.

35. Prince AJIBOLA said that the words "for a crime against peace" were not sufficient. They should be expanded to read: "for a crime against the peace and security of mankind". In some cases, a group of people was stronger than a State and the actions of such groups should be covered.

36. Mr. BEESLEY said it had been explained that paragraph 1 was a kind of holding paragraph, pending agreement on the crimes to be covered by the code. For his part, he supported the inclusion of the paragraph, which was important because of the message it contained.

37. Mr. BENNOUNA said that he agreed with Mr. Beesley. Paragraph 1 was necessary, despite the provision in article 3 quoted by Mr. Eiriksson. A link had to be established between the individuals responsible and the crimes against peace covered by the code. The problem arose also in respect of crimes other than aggression, for example intervention, which was a crime of the State.

38. The provision in paragraph 1 lay at the heart of the topic. The code was intended to deal with crimes of considerable importance committed in inter-State relations and individuals were to be held responsible for those crimes. Hence the concept of attribution contained in paragraph 1, which spoke of an individual to whom acts constituting aggression were "attributed under this Code". True, article 12 was provisional because it would have to be reviewed and also because another place might have to be found for it as the introductory provision to chapter II. Again, it would have to be supplemented. The concept of attribution must be clarified so as to indicate how the crime was attributed and which individuals would be involved. In the Drafting Committee, several notions had been suggested—the individuals who ordered a crime, those who organized it, and so on—but it was still too early to codify those notions. Attention would also have to be paid later to certain related concepts, such as those of complicity and attempted crime, which indirectly concerned paragraph 1. For the time being, however, the paragraph made it possible to establish a link between the code and the State crimes covered by the Definition of Aggression.

39. Paragraph 1 rightly spoke of "a crime against peace" and not a crime against the peace and security of mankind. Article 12 was concerned solely with crimes against peace, an approach that was the only way to make it clear that the article fully reproduced the provisions of the 1974 Definition of Aggression without at the same time mentioning that Definition. It had to be made plain to the General Assembly that the objective of the code was different from that of the 1974 Definition, in other words to attribute responsibility to individuals and not to States.

40. Mr. FRANCIS said that he agreed with Mr. Eiriksson. In its present form, paragraph 1 had no place in article 12. In the general debate (2059th meeting), he had stressed that the Commission should bring up to date the basic principles derived from the judgment of the Nürnberg Tribunal, namely that crimes under international law were committed not by abstract entities but by individuals, and that only by punishing those individuals could the rules of international law be enforced. He had gone on to suggest that article 19 of part 1 of the draft articles on State responsibility[8] made it quite clear that criminality could be attributed to States, a point that was rightly made in paragraph 2 of draft article 12.

41. He had further suggested that two things were needed in the code. The first was a principle reversing the Nürnberg principle that States could not commit crimes. One aspect, however, of the Nürnberg principles had not changed: States could not be tried for crimes attributed to them. Accordingly, he had suggested that the code should amend the first principle derived from the Nürnberg judgment. The second step would then be, in the substantive body of the code, for example in article 11, to attribute to individuals crimes that were committed by States but initiated by individuals. In article 12, what was required was not an outright attribution to individuals of the crime of aggression: that point was already covered by article 3. A paragraph

[7] *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

[8] See 2053rd meeting, footnote 17.

should be inserted immediately after paragraph 2 of article 12 attributing to individuals not crimes as such, but acts constituting crimes by States. Hence paragraph 1 would have to take another form. For those reasons, he fully supported Mr. Eiriksson's comments and intended to make a formal proposal on the subject at the next session.

42. Mr. McCAFFREY said that he had great doubts regarding paragraph 1 and agreed with Mr. Eiriksson, Mr. Francis and Mr. Bennouna in many respects.

43. Mr. Beesley had been right to say that some provision was necessary as a link with the Definition of Aggression, namely a provision to demonstrate how that Definition could be applicable to individuals. Paragraph 1 of draft article 12 was, however, too vague to be properly placed in a criminal code. The language used was also rather confusing. The phrase "Any individual to whom . . . are attributed" gave the impression that the acts were being performed by someone else. The language was reminiscent of article 10 (Responsibility of the superior) of the draft code and suggested some kind of agency relationship under which one person's acts were attributed to another because of some legal relationship. That was not the position at all in article 12.

44. A much more precise formulation was to be found in Principle VI of the Nürnberg Principles,[9] subparagraph (*a*) of which stated:

> The crimes hereinafter set out are punishable as crimes under international law:
>
> (*a*) Crimes against peace:
>
> (i) Planning, preparation, initiation or waging of a war of aggression . . .;
>
> (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

That provision constituted a much more specific way of describing how an individual could commit an act of aggression. It was troubling that the acts of an abstract entity could be attributed to an individual without any conduct on his part. Even more troubling was the vagueness of draft article 12, paragraph 1, which should be placed between square brackets so as to indicate that the Commission was trying to tie in the Definition of Aggression with an act by an individual. As now drafted, paragraph 1 was unacceptable. He was not at all certain of its intent and could not understand why the term "attributed" had been used at all. It was a confusing collection of words and was a step backwards by comparison with the Commission's formulation of the Nürnberg Principles in 1950.

45. Mr. EIRIKSSON said that he agreed with Mr. Bennouna's remarks on the idea behind paragraph 1, but considered that the form of language employed did not achieve the intended purpose. He strongly supported the suggestion to place the paragraph in square brackets so as to indicate that the Special Rapporteur would deal with the matter in detail later, and he hoped that the commentary would reflect the discussion fully.

46. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that it had been the general understanding of all members of the Drafting Committee that the formulation in paragraph 1 was provisional and that an article was needed to specify in detail the types of acts which rendered an individual responsible for aggression. After all, aggression was committed by States and the question arose as to how to attribute it to individuals. It had been agreed that a specific article, covering all crimes against peace, was necessary. Of course, for that purpose the Commission would draw on the Nürnberg Principles, which referred to the "planning, preparation, initiation or waging of a war of aggression". It had none the less been agreed that the matter had to be examined very carefully; the Drafting Committee had not had time to prepare an article on the subject at the present session. For the time being, however, it had to be stated that a link existed between the act committed by a State and the individual responsible for aggression.

47. The CHAIRMAN thanked the Chairman of the Drafting Committee for his explanation, which showed that the disagreement related not to the idea embodied in paragraph 1 but to the way of formulating it.

48. Mr. CALERO RODRIGUES said that he agreed with the explanations given by the Chairman of the Drafting Committee and could accept paragraph 1 on an interim basis. Generally speaking, part I of chapter II of the draft code could only define the crimes. It was not necessary in every article to include an introduction affirming that the act in question constituted a crime. The Drafting Committee had agreed to have a general introduction to part I, but it had not been possible to formulate such an introduction and the Committee had fallen back on the provisional formula embodied in paragraph 1 of article 12. Article 3, referred to earlier (para. 34 above), began with the words: "Any individual who commits a crime against the peace and security of mankind". The part of the draft now under consideration, however, dealt with crimes like aggression, which could be committed only by States but were attributed to individuals as leaders or organizers. The problem was one of participation.

49. Admittedly, the terms of paragraph 1 were vague, and greater precision would be needed. Indeed, in the future a general article along the following lines would have to be inserted:

> "The articles in the present part define the crimes against peace for which an individual may be held responsible and liable to punishment when he has instigated, ordered, authorized or taken a leading part in the planning or commission of the act which characterizes the crime."

For the time being, something was required as an introduction and paragraph 1 was the best that could be done. For his part, he found nothing unacceptable in it. The commentary to article 12 should explain that the paragraph was very provisional in character.

50. Mr. BARSEGOV said that he fully shared the views of the Drafting Committee and the arguments put forward by its Chairman as well as by Mr. Bennouna and Mr. Calero Rodrigues. Paragraph 1 had been the subject of lengthy and careful consideration by the Committee, which had decided that, at the present stage, it was not possible to do without it. It was fully realized that its provisions would later have to be sup-

[9] *Ibid.*, footnote 8.

plemented and, in addition, made applicable to other crimes as well. Without paragraph 1, it would be difficult for the General Assembly to understand the remainder of article 12. In any case, there was nothing controversial in the terms of the paragraph. The Committee had considered placing it in square brackets, but the idea had been abandoned because the Sixth Committee would no doubt have found it very strange to see a self-evident statement placed in square brackets. In any event, the provisional nature of the introductory statement in paragraph 1 would be stressed in the commentary.

51. Mr. GRAEFRATH said that he agreed with the Chairman of the Drafting Committee and Mr. Calero Rodrigues and urged that paragraph 1 should be left as it stood.

52. Mr. FRANCIS pointed out that the greater part of article 12 was not in dispute at all, since it was drawn from the 1974 Definition of Aggression.

53. Mr. THIAM (Special Rapporteur) said that, except for the fact that two passages had been placed in square brackets, article 12 simply reproduced the Definition of Aggression.

54. Mr. McCAFFREY said that article 3 of the draft code covered the case of an individual who had committed a crime against the peace and security of mankind. Article 12, however, envisaged not the crime of an individual but the crime of the State committing aggression. The individual carried out the planning or preparation—not the actual crime—of aggression, which was committed by the State itself. Accordingly, paragraph 1 of article 12 would be much clearer if it were couched in the following terms: "Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable . . .", because it was the responsibility, not the act itself, that was attributed to the individual. In its present form, paragraph 1 made no sense at all.

55. Mr. THIAM (Special Rapporteur) said that the Drafting Committee had rejected that proposal by Mr. McCaffrey because all the English-speaking members had been opposed to using the term "responsibility". If the debate were reopened on that point, there would be no end to it. He recalled that, in the Drafting Committee, Mr. Bennouna had proposed another formula to avoid using the term "responsibility".

56. Mr. BENNOUNA said that the point of concern not only to himself, but also to some other members of the Drafting Committee, was that responsibility could be attributed solely by a court. So long as a court had not ruled on the question, it was not possible to speak of attribution of responsibility. The planning or conduct of certain acts, on the other hand, could be attributed to an individual. It would then be for the court to decide on the question of responsibility. That idea was not very far removed from the one expressed by Mr. McCaffrey. The phrase "liable to be tried and punished" was even more striking in French (*passible de poursuite et de jugement*), for the judicial decision came after the attribution of responsibility.

57. Mr. Sreenivasa RAO said that he was in favour of paragraph 1 as it stood, in view of the explanations given by the Chairman of the Drafting Committee and by other speakers. At the same time, he found Mr. McCaffrey's proposal acceptable.

58. "Responsibility" was used as a general term in the present context and the phrase "tried and punished" covered the question of determining guilt. Accordingly, he had no objection to the term "responsibility". Paragraph 1 could be adopted as a compromise, subject to an adequate explanation in the commentary and to the understanding that the provision would be reviewed on second reading.

59. The CHAIRMAN said that if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 1 as amended by Mr. McCaffrey (para. 54 above).

It was so agreed.

Paragraph 1 was adopted.

60. Mr. EIRIKSSON said that the change of wording had not made him any more satisfied with paragraph 1.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

61. Mr. BARSEGOV said that he had no objection to paragraph 4. However, the fact that the opening words, "In particular", had been placed in square brackets reflected the differences of view in the Drafting Committee. Some members had deemed it necessary to uphold the right of the court freely to characterize as acts of aggression acts that were not covered by the list contained in the definition of aggression. He felt strongly that a criminal court was not empowered to determine that whole categories of acts could be considered as aggression. It was called upon to decide on the issue of the criminal responsibility of an individual in accordance with the law: it had no power to create legal rules for application in inter-State relations. It was true that the list of acts of aggression set forth in subparagraphs (*a*) to (*g*) was not absolutely exhaustive, but only the Security Council could supplement the list, as indicated in subparagraph (*h*). As far as a criminal court was concerned, however, the list in subparagraphs (*a*) to (*g*) had to be considered exhaustive.

62. He failed to see how a criminal court—even an international criminal court—could expand the 1974 Definition of Aggression[10] adopted after so many years of effort in the General Assembly. The court had the duty to apply legal rules but must not attempt to create them, particularly in such a sensitive area of inter-State relations as the issue of the definition of aggression. That point had to be taken into account at an early stage so as not to undermine the very idea of an international criminal court.

63. No court, whether international or national, could perform the functions of the Security Council. In that connection, the differences in the Drafting Committee regarding the inclusion of paragraph 5, reading: "Any determination by the Security Council as to the ex-

[10] See footnote 6 above.

istence of an act of aggression is binding on national courts", were logically connected with those relating to the words "In particular" in paragraph 4.

64. Mr. McCAFFREY said he agreed with Mr. Barsegov and believed that the list should be an exhaustive one as far as the court was concerned. Therefore, he was not at all certain that the language used in article 3 of the Definition of Aggression[11] was sufficiently precise. All it said was: "Any of the following acts . . .", wording which did not make the list exclusive. He had no proposal to make, but would have preferred paragraph 4 of draft article 12 to begin simply with the words: "The following acts . . .", eliminating the words "any of" and, *a fortiori*, the words "In particular" in square brackets.

65. The remainder of the introductory clause of paragraph 4 differed from the corresponding provision of the Definition of Aggression, namely article 3, which contained the words "subject to and in accordance with the provisions of article 2". That article 2 corresponded to paragraph 3 of draft article 12. He was somewhat mystified by the words "due regard being paid to paragraphs 2 and 3 of this article", which had been introduced in paragraph 4 to replace the words "subject to and in accordance with the provisions of article 2" contained in the Definition of Aggression. The proposed language did not provide firm enough guidance for a court seized of proceedings under the code. The proposed wording would seem to mean that paragraphs 2 and 3 of article 12 would control subsequent provisions, such as those contained in paragraph 4; but that point was not clear and should be made more precise.

66. Mr. RAZAFINDRALAMBO said that he endorsed the remarks made by Mr. Barsegov and Mr. McCaffrey. He was strongly opposed to any suggestion to give any court, whether international or national, the right to establish that acts not already included in the list set forth in paragraph 4 constituted acts of aggression. Such an idea was an application of the unacceptable method of creating crimes by analogy, on the basis of similarity with those specifically sanctioned by criminal law.

67. Mr. FRANCIS said that his views were substantially the same as those expressed by the three previous speakers. The definition of aggression in article 12 should be identical to that adopted by the General Assembly in 1974. He was in favour of article 12 to the extent that it reflected completely the 1974 Definition and he was opposed to any departure from that established text.

68. Mr. REUTER said that he shared the views of Mr. Barsegov and Mr. McCaffrey regarding the words "In particular". Naturally there was a connection with subparagraph (*h*) of paragraph 4 and also with paragraph 5. The commentary to article 12 should state that nothing in the article affected the powers of the ICJ concerning questions of aggression. The matter was of practical importance because there were cases pending before the ICJ on the question of aggression. The Commission could not deal with that question now, but it was essential for the commentary to include a reference to the problem, since it would not be dealt with in the article itself.

69. Mr. EIRIKSSON said that his opinion on the relationship between the code and possible action by the Security Council depended on the Commission's approach in adopting article 12, more particularly in connection with the role of an international tribunal. His initial reaction, however, was that paragraph 2 sufficed as a definition of aggression. Accordingly, both paragraph 3 and paragraph 4 were unnecessary, unless any of the acts mentioned in paragraph 4 (*a*) to (*g*) could conceivably be considered as anything other than acts of aggression, which he did not believe to be the case. The inclusion of the words "In particular" in square brackets made his sentiment even stronger on that question. The same applied to the presence of subparagraph (*h*), on the possibility of the Security Council expanding the categories of acts in a list which was merely illustrative.

70. Mr. BEESLEY said that he associated himself with those members who had expressed strong reservations regarding the inclusion of the words "In particular".

71. Mr. BENNOUNA said that the reason for introducing the words "In particular" was that the question of the possible jurisdiction of the courts had not yet been clarified. There was still some discussion as to the impact of Security Council action under the Charter of the United Nations, particularly where the Council did not arrive at a decision. It was an important matter, because an act mentioned in paragraph 4 of article 12 might not be sufficiently serious to warrant a court—or indeed the Security Council itself—deciding that an act of aggression had been committed. However, paragraph 4 would be appropriate in affording the court some leeway to interpret the list without actually adding anything to it. A margin of interpretation had to be allowed for the general definition set forth in paragraph 2. With that approach, article 12 could be retained as it stood, on the understanding that the commentary would clarify its content, especially the question of the relationship with the Security Council.

72. Mr. ROUCOUNAS said that the Chairman of the Drafting Committee had been right to point to the provisional character of the Commission's work on article 12, in view of the fact that the questions of jurisdiction and of the establishment of an international criminal court had not yet been settled. The Commission should not give the impression that it wished to open the door to the possibility for national courts to expand the list of acts of aggression on the basis of the words "In particular". For that reason, those words should be deleted, bearing in mind that the question of aggression might ultimately fall within the jurisdiction of an international criminal court.

73. Mr. CALERO RODRIGUES said that the words "In particular" should be retained in order to give some leeway to the courts in the interpretation of what constituted aggression. The list of acts contained in paragraph 4 was not really exhaustive, for according to subparagraph (*h*) the Security Council could add to it. Actually, if the list was to be exhaustive, the definition of aggression would not be necessary. Since paragraph 1

[11] *Ibid.*

stated that any individual responsible for acts constituting aggression was liable to be tried and punished, the court should be given an opportunity to see if aggression existed on the basis of acts other than those included in the list. After all, the list had been prepared for the purpose of giving concrete shape to the concept of aggression defined in paragraph 2. Hence the possibility of the court finding that some other acts also constituted aggression should not be ruled out.

74. Much had been said about national courts, but no decision had yet been taken on a possible international criminal court, which should not be bound exclusively by the list in paragraph 4. In a given case, such a court might well find that other acts constituted aggression. That was the position he, together with some other members, had expressed in the Drafting Committee, and it was his reason for favouring retention of the words "In particular". Opinions were divided, however, and he could agree to placing the words in square brackets, on the understanding that his views would be placed on record.

75. Mr. AL-BAHARNA said that paragraph 4 should be retained as it stood, with the opening words "In particular".

76. Mr. SEPÚLVEDA GUTIÉRREZ said that he wholeheartedly endorsed the views expressed by Mr. Calero Rodrigues.

77. Mr. SHI said that the list of crimes in paragraph 4 should be exclusive. No court, whether national or international, should have the power to extend it. However, opinions diverged and he could agree to placing the words "In particular" in square brackets, leaving the matter to be decided at a later stage.

78. Mr. KOROMA said that the presentation of article 12 by the Chairman of the Drafting Committee met with his approval, except in so far as paragraph 4 (*h*) was concerned. The primacy of the Security Council for the maintenance of international peace and security was unquestioned. However, some members of the Commission held that the Security Council dealt with aggression as it affected States, whereas article 12 dealt with crimes committed by individuals. To introduce the role of the Security Council as was done in paragraph 4 (*h*) would tend to negate the Commission's efforts to prevent individual acts of aggression. For that reason, paragraph 4 (*h*) should be deleted.

79. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 4, on the understanding that the differing opinions on the words "In particular", as well as Mr. Koroma's views on subparagraph (*h*), would be placed on record.

It was so agreed.

Paragraph 4 was adopted.

Paragraph 5

80. Mr. BARSEGOV said that he could not object to placing paragraph 5 in square brackets as a temporary compromise solution, due to the substantial differences of opinion, although he personally would have preferred to delete the brackets now. However, he could not agree to any suggestion to delete the paragraph, since, if that were done, it would appear as though Security Council decisions were binding on States but not on their criminal courts.

81. The Chairman of the Drafting Committee had advanced the view that to tie the implementation of the relevant provisions of the code to the functioning of the Security Council would make the code meaningless. The idea put forward was that the Security Council was not always effective and that national courts might not be able to try cases of aggression because of the Security Council's inability to reach a decision. That view was tantamount to denying the binding force on national courts of any resolution of the Security Council. In connection with paragraph 4, it had been suggested that an international or national court could be empowered to create legal rules as to the determination of acts constituting aggression. In connection with paragraph 5, it was now being suggested that national or international courts should be given the right not to take into consideration the decisions of the Security Council. Such an approach would not only constitute a fundamental departure from the 1974 Definition of Aggression, it could even amount to a revision of the Charter of the United Nations.

82. Mr. BENNOUNA said he believed that there would be no substantial opposition to paragraph 5 without the square brackets. Mr. Barsegov's remarks reflected the present state of the law. When the Security Council took action on the basis of Chapter VII of the Charter and made a determination as to the existence of an act of aggression under Article 39, its decision was binding on all States and therefore on the organs of those States, including the courts. It was simply a question of restating a principle of law stemming from the Charter, and it was difficult to see how that restatement could be disputed.

83. In his opinion, the opposition to paragraph 5 could be ascribed to a different cause: it was based on the idea that, if the Security Council did not arrive at a determination as to the existence or non-existence of an act of aggression, something that was fairly common, the court should then have some leeway in reaching a decision. The point was to avoid a situation in which no decision was made because the Security Council failed to reach a determination. Actually, in the absence of a determination on aggression, the court could freely exercise its full jurisdiction. It might be of interest if the Chairman ascertained informally how many members were opposed to paragraph 5 and how many wished to place it in square brackets.

84. Mr. McCAFFREY said that, without paragraph 5, the whole of article 12 would be unacceptable. The Commission was not merely duplicating a definition of aggression made within the United Nations: it was elaborating a code that would be applied by the courts. Although it was not yet certain which courts would apply the code, there was a distinct possibility that it would be the national courts. In view of that possibility, a provision along the lines of paragraph 5 was essential, and obviously he could not agree to the idea of placing it in square brackets.

85. The main point had been made by Mr. Bennouna. There was nothing in paragraph 5 that would in any way inhibit national courts in the absence of a determination by the Security Council. The paragraph was artfully drafted so as to give the courts freedom except in cases where the Security Council had taken action. In view of Article 25 of the Charter, it was unthinkable that a national court could act inconsistently with a Security Council determination, in other words that it could find aggression where the Security Council had found none, or vice versa.

86. Mr. CALERO RODRIGUES said he, too, thought that paragraph 5 should be retained. He could accept the square brackets around it because there were differences of opinion, but he believed that a Security Council determination must be binding on any court that applied the code.

87. Prince AJIBOLA said that paragraph 4 (*h*) dealt adequately with the question of what should be left to the decision of the Security Council.

88. Nobody doubted the binding character of Security Council decisions. However, any court worthy of the name had two tasks, the first being to conduct a fair trial, and the second to decide on the facts placed before it. If the court had to abide by any Security Council determination and could not look into the facts of the case, it was in danger of becoming a mere rubber stamp. Hence he was apprehensive about the consequences of paragraph 5, which was unnecessary and should be deleted. If not, it should at least be placed between square brackets.

89. Paragraph 4 itself stood in need of a number of drafting improvements, for the present wording was quite inelegant. The introductory clause should be reworded along the following lines: "With regard to paragraphs 2 and 3, any of the following acts, regardless of a declaration of war, constitutes an act of aggression:"

90. Mr. FRANCIS said that he had no objection to paragraph 5 without the square brackets. There could be no doubt that the courts applying the code would be bound by a determination by the Security Council. Nevertheless, since paragraph 5 was connected with the competence of the courts, it should be placed after paragraph 7. Alternatively, it could form a separate article, as could paragraph 1.

91. Mr. BEESLEY said that paragraph 5 could be considered redundant simply because it stated a rule of law pursuant to the Charter of the United Nations. Nevertheless, in order to avoid any doubts, he shared the view that the paragraph should be retained and that the square brackets should be removed in due course. It would be noted that paragraph 5 referred only to national courts: he did not wish to raise at the present stage the question of what the situation would be with respect to an international criminal court.

92. The reference in paragraph 5 to "Any determination . . . as to the existence . . ." and the explanations given by the Chairman of the Drafting Committee showed that the provision covered both positive and negative findings. Later, the Commission would have to tackle the matter of whether a national court, or an international court, would be free to hear a case concerning an allegation of aggression where no finding whatsoever had been made by the Security Council. It was an issue of sufficient importance to be placed squarely before States in the Sixth Committee of the General Assembly and perhaps eventually in questions put to Governments.

93. Mr. Sreenivasa RAO said that paragraph 5 was an important element of article 12. It did not solve many problems, but it stated an obvious point of law of the Charter, namely that Security Council decisions were binding on all Member States. Indeed, in the case of the Definition of Aggression, even non-member States were supposed to co-operate in connection with such decisions. Paragraph 5 dealt with the power and competence, as between the Security Council and the national courts, to judge the matters and the evidence relating to certain crimes. The supremacy of Security Council decisions was unquestionable, but so too, in national systems, was the supremacy, impartiality and objectivity of the courts. Those two positions were easily reconciled. The Security Council determined an act of aggression only with respect to a State and did not go into the question of who committed it or the guilt of individuals. In other words, there could be a Security Council determination that a particular country had committed aggression and it would then be for the courts, in accordance with paragraph 5, to find the individuals who could be held responsible. The impartiality of the courts was safeguarded, for they could look at the evidence and even find the individual not guilty.

94. Other issues were not covered by paragraph 5, and hence it should remain in square brackets, pending further reflection on those issues. One of them was what a national court should do in the absence of a determination on the question of aggression. Another was that of ascertaining the impact court actions would have on any later determination by the Security Council. For example, a court might rule that there was no aggression and discharge the individual brought before it; subsequently, the Security Council might find that aggression had in fact been committed.

95. Mr. AL-BAHARNA pointed out that the text of paragraph 5 was not to be found in the 1974 Definition of Aggression. In the Sixth Committee of the General Assembly, he had observed differences of view on whether to include such a provision, as well as on whether to place it between square brackets. The problem differed to some extent from that concerning paragraph 4 (*h*). In his opinion, paragraph 5 should remain in square brackets.

96. Mr. PAWLAK said that he strongly supported the inclusion of paragraph 5, bearing in mind the fundamental importance of the international legal order established by the Charter, the provisions of which must be binding on States and on their courts, as well as on any international courts that were established. He was opposed to the use of square brackets; but since there was no other way of obviating the differences of opinion, he was prepared to accept the brackets as a device whereby the paragraph could be adopted by the Commission.

97. Mr. YANKOV said that paragraph 5 dealt with an important issue having political and legal implications, for it stated that a Security Council determination as to the existence of an act of aggression was binding on national courts. Article 25 of the Charter of the United Nations was relevant in that connection, as was Article 39, on the competence of the Security Council. Paragraph 5 commanded his full support, since it constituted in a sense the development of United Nations law. The square brackets were unnecessary, for adequate explanations would be given in the commentary and members' views would be set out in the summary records. If, however, the majority wished to retain the square brackets, he would be prepared to accept such a course for the purpose of indicating that there had been differences of opinion.

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 5 with the square brackets.

It was so agreed.

Paragraph 5 was adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Article 12 was adopted.

99. Mr. BARSEGOV said that the text of article 12 did not contain any reference to the binding force of relevant General Assembly resolutions. The reason was that some members of the Commission were opposed to such a reference. In the course of the debate, the view had been expressed that General Assembly resolutions must be regarded as political texts from a political body, so that it was inappropriate to speak of them in a criminal code, which constituted a legal text.

100. He did not share the view that the 1974 Definition of Aggression was a purely political text devoid of legal content. Such a view would mean that any determination by the Security Council, and any steps it took on the basis of that Definition, would be without legal meaning. It would also open the door to justifying the refusal to observe Security Council decisions on the grounds that they were based on a purely political text and not on a legal instrument.

101. Prince AJIBOLA noted that paragraph 2 of article 12 used the expression "Charter of the United Nations" in full, and said that the same form should be used in all the other paragraphs that referred to the Charter.

The meeting rose at 1.10 p.m.

2086th MEETING

Monday, 25 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter III.

CHAPTER III. ***The law of the non-navigational uses of international watercourses*** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

A. Introduction (A/CN.4/L.425)

Paragraphs 1 to 15

2. Mr. YANKOV said that, rather than repeat the background to the topic every year, it might be more rational simply to give a brief summary. A detailed history of the work could be provided when consideration of the topic was completed. That was true for all the Commission's reports and he would therefore revert to the matter during consideration of the part of the draft report on the Commission's working methods and documentation.

Paragraphs 1 to 15 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.425)

Paragraphs 16 to 25

Paragraphs 16 to 25 were adopted.

Paragraph 26

3. Mr. RAZAFINDRALAMBO asked why the Commission's discussion on article 15 was summarized in only one paragraph, whereas much greater space was given to the consideration of the other articles, on pollution.

4. Mr. McCAFFREY (Special Rapporteur) said that it was the Commission's practice not to include a summary of the discussion on draft articles adopted in the course of the session, probably because the commentaries to the articles performed the same function. It was true, however, that paragraph 26 could be expanded a little, for example by adding a sentence indicating that the text of article 15 had been provisionally adopted at the present session on the recommendation of the Drafting Committee and that it now constituted articles 10 and 20.

It was so agreed.

Paragraph 26, as amended, was adopted.

Paragraphs 27 to 31

Paragraphs 27 to 31 were adopted.