Document:-
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**Summary record of the 2094th meeting**

Topic:
**Other topics**

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## 2094th MEETING

*Friday, 29 July 1988, at 10 a.m.*

*Chairman*: Mr. Leonardo DÍAZ GONZÁLEZ

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

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### Draft report of the Commission on the work of its fortieth session (*concluded*)

**CHAPTER VIII.** *Other decisions and conclusions of the Commission* (concluded) (A/CN.4/L.430)

**E. International Law Seminar** (*concluded*)

Paragraph 52 (*concluded*)

1. The CHAIRMAN recalled that an amended text for paragraph 52 had been proposed at the previous meeting (see 2093rd meeting, para. 73).

2. Mr. TOMUSCHAT said that, in his view, the problems that had arisen in 1988 were the result of the fact that, in the past, the International Law Seminar had been able to use the conference services intended for the Commission and the fact that, at the current session, the Commission had used those services 100 per cent. If the Seminar was to have its own interpretation services, an allocation for that purpose would have to be included in the United Nations programme budget. That was the purpose of the proposed amendment, which did not, moreover, contradict the original text of paragraph 52. If he was not mistaken, General Assembly resolution 42/207 C applied only to meetings included in the calendar of conferences and that was not the case of the International Law Seminar.

3. Mr. KALINKIN (Secretary to the Commission) said that, as far as the Commission's secretariat was concerned, the original text of paragraph 52 was sufficiently clear. No interpretation services had been made available to the Seminar at the current session because the administration of the Seminar had not made the necessary arrangements for that purpose. If it had applied in time to the Office of Legal Affairs, that Office would certainly have ensured that the Seminar was included in the calendar of conferences.

4. With regard to the proposed amendment, he pointed out that, when a proposal was made to the Fifth Committee of the General Assembly to include an allocation in the ordinary budget for an activity normally financed by voluntary contributions, as was the case of the International Law Seminar, agreement by Governments of Member States was far from unanimous.

5. Mr. CALERO RODRIGUES said that the administration of the Seminar was not to be reproached in any way and that the Commission should be trying not to identify those responsible for the problem, but only to find a solution to it. The original text of paragraph 52 would therefore suffice, since the second sentence contained an appeal to all persons of goodwill in the Secretariat to provide the Seminar with adequate services at future sessions. It was for the Secretariat to decide how that was to be done.

6. The CHAIRMAN, speaking as a member of the Commission, said that he found the original text of paragraph 52 satisfactory, since it highlighted the concerns of some members of the Commission about discrimination in favour of English during the International Law Seminar. There was no need to go any further.

7. Mr. KOROMA said that he shared Mr. Calero Rodrigues's view. What the Commission wanted was for the Seminar to be able to continue to benefit, as in the past, from interpretation services in all languages. That was what should be stated in paragraph 52 and, if the text was amended along those lines, he would be prepared to accept the paragraph as originally proposed.

8. After an exchange of views in which Mr. ARANGIO-RUIZ, Prince AJIBOLA and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that the Commission should adopt the original text of paragraph 52, on the understanding that it would be amended along the lines proposed by Mr. Koroma.

*It was so agreed.*

*Paragraph 52 was adopted.*

9. Mr. EIRIKSSON, welcoming the fact that the Commission had solved the problem in a positive spirit, said that members were all grateful to the Secretariat for the assistance it regularly provided to the International Law Seminar.

*Section E, as amended, was adopted.*

*Chapter VIII of the draft report, as amended, was adopted.*

**CHAPTER IV.** *Draft Code of Crimes against the Peace and Security of Mankind* (concluded)* (A/CN.4/L.426 and Add.1)

**C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind** (A/CN.4/L.426/Add.1)

10. Mr. McCAFFREY said that the texts of the draft articles provisionally adopted so far by the Commission should be reproduced at the beginning of section C. The various chapters of the Commission's report should, moreover, all be presented in the same way.

11. The CHAIRMAN said that the Rapporteur and the Commission's secretariat would take those comments into account.

Paragraph 85

*Paragraph 85 was adopted.*

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* Resumed from the 2092nd meeting.

*Commentary to article 4* (Obligation to try or extradite)

Paragraph (1)

12. Mr. CALERO RODRIGUES requested the Secretariat to revise the entire English text of the commentary in order to bring it into line with the original French text. In the first sentence of paragraph (1), for example, the English translation of the words *assurer une répression efficace* and *confier la répression aux juridictions nationales* left something to be desired and would have to be revised.

13. Mr. Sreenivasa RAO said that he agreed with Mr. Calero Rodrigues. The word "repression", in particular, had a very negative meaning in English and was not an adequate translation of the French word *répression*.

14. He also noted that the purpose of the commentaries in general was to indicate the overall trend in the Commission and the reasons why it had chosen a particular concept or term rather than another. Far too much coverage therefore seemed to have been given to the summary of individual opinions and that might not only lead to unnecessary repetition of other parts of the same chapter, but could also reopen the discussion.

15. Mr. BARSEGOV, supporting Mr. Calero Rodrigues's comments concerning translation, said that the Secretariat should take a close look at all the language versions of the commentary in order to remove some particularly awkward mistakes. He noted, for example, that in the first sentence of paragraph (1), where the French text stated that one possibility would be to *confier la répression* to national courts, the English text stated that national courts could be made "responsible for repression". The Russian text went even further, since it referred to the possibility of "trusting" those courts.

16. Mr. THIAM (Special Rapporteur) assured members that the Secretariat would revise the various language versions in order to bring them into line with the French text. In reply to Mr. Sreenivasa Rao's comment, he suggested that, wherever the words "One member stated that" were used, they should be replaced by "According to one opinion" or "According to one school of thought".

17. In the last sentence of the French text of paragraph (1), the words *à ce stade* should be replaced by *pour le moment* in order to avoid unnecessary repetition.

18. Mr. TOMUSCHAT proposed that, in the last sentence of paragraph (1), the words "needed for the actual implementation of the code" should be inserted after the words "the formulation of more specific rules", since it had been decided that article 4 would enunciate only general principles which would have to be given concrete shape and that it could not, as such, serve as a basis for trial or extradition.

19. Mr. ARANGIO-RUIZ said that he agreed with the idea behind Mr. Tomuschat's proposed amendment, but not with its wording, which would somewhat restrict the rules which were to be formulated and were intended to expand on and explain the general principles.

20. Mr. EIRIKSSON said he had intended to propose that the last sentence should become a separate paragraph, but that would not be necessary if Mr. Tomuschat's amendment were adopted. The sentence could simply be divided into two, placing a full stop after the words "jurisdiction and extradition".

21. Mr. BEESLEY said that paragraph (1) referred to three possibilities for the repress on of crimes, although he himself had referred to a fourth possibility, namely a mixed solution consisting in adding to national courts judges from other States. Perhaps the Special Rapporteur could reproduce the text from the Commission's report on its thirty-ninth session in which that idea had been mentioned.[1]

22. Mr. THIAM (Special Rapporteur) proposed that the following text should be inserted at the end of the first sentence: "and a fourth possibility was to enforce the code through national courts to which would be added a judge from the jurisdiction of the accused and/or one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question". He also accepted the amendments proposed by Mr. Tomuschat and Mr. Eiriksson.

*The amendments by Mr. Tomuschat, Mr. Eiriksson and the Special Rapporteur were adopted.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

23. Mr. THIAM (Special Rapporteur) said that the dashes in the first sentence of the French text should be replaced by commas.

24. Mr. EIRIKSSON said that the first sentence of the English text should be brought into line with the original French text.

25. Mr. RAZAFINDRALAMBO suggested that the dates of the Conventions referred to in paragraph (2) should be given.

26. Mr. TOMUSCHAT supported the proposal by Mr. Razafindralambo and further suggested that references for those instruments should be provided in footnotes.

*The amendments by Mr. Razafindralambo and Mr. Tomuschat were adopted.*

27. Mr. TOMUSCHAT proposed that the words "place where the crime was committed", in the fifth sentence, should be replaced by "country where the crime was committed".

28. Mr. CALERO RODRIGUES, referring to the jurisdiction of courts under the Convention on Genocide and the Convention on *Apartheid*, said that those two instruments did in fact provide for the jurisdiction of an international criminal court, which coexisted with that of the court of the place where the crime was committed. The second instrument went even further, since it recognized the jurisdiction of the courts of any State party. He therefore proposed that, in the fifth sentence of paragraph (2), the words "the court of

[1] *Yearbook . . . 1987*, vol. II (Part Two), p. 10, para. 35, *in fine*.

the place were the crime was committed" should be replaced by "national courts".

*It was so agreed.*

29. Mr. BARSEGOV said he did not think that the statement made in the first sentence was really true.

30. Mr. McCAFFREY proposed that the word "repression", in the sixth sentence, should be replaced.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

31. Mr. SEPÚLVEDA GUTIÉRREZ proposed that, in the third sentence of the Spanish text, the words *indicios excesivamente frágiles* should be replaced by *meros indicios.*

32. Mr. TOMUSCHAT, referring to the same sentence, said that the words "flimsy evidence" were not an accurate translation of the wording used in the original French text.

33. Mr. Sreenivasa RAO, also referring to the third sentence, said that the words "an individual alleged to have committed a crime" should be defined on the basis of the principle that a person was presumed innocent until proved guilty.

34. Mr. THIAM (Special Rapporteur) said that it was not the principle of the presumption of innocence that was in question: the point was simply to prevent a person from being regarded as having committed a crime on the basis of an unfounded allegation.

35. Mr. CALERO RODRIGUES agreed with the Special Rapporteur. The third sentence was clear and reflected what had been stated in the Commission, namely that the procedure for extradition or trial should be set in motion only on the basis of reliable facts.

36. Mr. McCAFFREY said he had pointed out that the words "an individual alleged to have committed a crime" should be defined because, as soon as it became an obligation for a State to try or extradite, the basis for that obligation had to be specified. It thus had to be indicated where the allegation came from and of what it must consist. The words "flimsy evidence" might be replaced by "unfounded allegations".

37. Mr. Sreenivasa RAO said that, although he was satisfied with the explanations provided, he wondered whether it might not be possible to state more directly that, in order for extradition or trial to take place, there had to be a *prima facie* case.

38. Mr. RAZAFINDRALAMBO, supported by the CHAIRMAN, proposed that the words "relevant facts", in the third sentence, should be replaced by "sufficiently serious and reliable facts".

39. Mr. THIAM (Special Rapporteur) proposed that the end of the third sentence should be amended to read: ". . . on the basis of relevant facts, not on the basis of unfounded allegations or fragile evidence".

*It was so agreed.*

40. After an exchange of views in which Mr. BEESLEY, Prince AJIBOLA and Mr. MAHIOU took part, Mr. TOMUSCHAT proposed that the last sentence of paragraph (3) should be amended to read: "The Commission also agreed that the word 'try' was intended to cover all the stages of prosecution proceedings."

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

41. Mr. THIAM (Special Rapporteur) said that, for stylistic reasons, the word *établirait*, in the second sentence of the French text, should be replaced by *indiquerait.*

42. Mr. CALERO RODRIGUES said that he did not understand the purpose of the word "and" in the last part of the penultimate sentence. It seemed to mean that some members would have liked to see "a more clear-cut enunciation of the principle of territoriality" at the same time as the "establishment of a more definite order of priorities in respect of extradition". Those were, however, two different positions that had been defended by two separate groups. He therefore suggested that the word "and" should be replaced by "or".

43. Mr. BARSEGOV said that, although he had belonged to the group in favour of the establishment of a definite order of priorities in respect of extradition, he did not think there was any real difference between the two opinions.

44. Mr. OGISO said that, in his opinion, one view expressed during the discussion had not been reflected in the draft report and proposed that the following sentence should be added to paragraph (4): "It was also pointed out that the principle of giving preference to the State in whose territory the crime was committed would give rise to practical difficulties, in particular in the case of the crime of *apartheid.*"

*It was so agreed.*

45. Mr. Sreenivasa RAO proposed that the following sentence should be inserted after the fifth sentence: "The view was also expressed that the principle of territoriality of jurisdiction was without prejudice to the principle of jurisdiction being given to the country where the crime actually produced, or was intended to produce, its effects."

46. Mr. BARSEGOV, referring to the fifth sentence, said he did not think that the words "some members . . . were of the opinion that paragraph 2 should give preference to extradition" accurately reflected the discussion. In fact, the majority had been in favour of the criterion of territoriality. In order to avoid accentuating the contrast between the two positions reflected in the fifth and sixth sentences, particularly since one had been the majority position, he suggested that wording other than "some members" and "other members" should be used. In any event, the words *une certaine préférence* in French were rather doubtful: the word *préférence* would be enough.

47. Mr. THIAM (Special Rapporteur) said that it would be possible to use more impersonal wording, such as "it was maintained that" and "it was nevertheless stated that".

48. Mr. MAHIOU, speaking on a point of order, said that he objected to the trend towards the inclusion in the report of the opinion of every member of the Commission. The report was a collective text and the positions of all members, however respectable, did not have to be reflected in it. He was alarmed that a trend which certainly did not meet the General Assembly's expectations was taking increasingly firmer shape every year. He invited the Commission to give serious thought to its methods of work at its next session.

49. Mr. YANKOV endorsed Mr. Mahiou's remarks. What was of interest to the reader of the report was what the Commission thought collectively. Only the general opinion carried any weight and authority. If there was no general opinion, it would be enough simply to say so.

50. Mr. GRAEFRATH said that he supported the view expressed by Mr. Mahiou and Mr. Yankov.

51. Mr. BARSEGOV said that he also shared that point of view. In his opinion, a choice had to be made between two solutions: that of reflecting the Special Rapporteur's interpretation of the discussions held in plenary meetings and that of reflecting the Commission's view, in other words the view shared by several members. He, too, invited the Commission to give some thought to its methods of work.

52. Prince AJIBOLA said that he had recently made a comment along the same lines as that made by Mr. Mahiou and had been told that all members were entitled to have their views reflected in the report. Members' positions were, however, already reflected in the summary records. The Commission should decide on a rule and abide by it.

53. Mr. TOMUSCHAT said that he, too, agreed with Mr. Mahiou, but pointed out that, at present, the Commission was considering the commentaries to articles which were still in the draft stage. That task was an ongoing one and the important thing now was to highlight the points of view on the basis of which the provisions under consideration had been discussed.

54. Mr. Sreenivasa RAO said that, since he shared the concerns expressed by the previous speakers, he would withdraw the amendment he had just proposed.

55. Mr. PAWLAK said he agreed with Mr. Barsegov that the words *une certaine préférence* should be avoided. He therefore proposed that the last part of the fifth sentence should be amended to read: ". . . many members of the Commission were of the opinion that paragraph 2 should embody the principle of extradition to the State where the crime was committed".

56. Mr. MAHIOU said that that new wording was too peremptory. He would prefer to retain the shade of meaning introduced by the words *une certaine préférence*.

57. Mr. PAWLAK said that he would withdraw his proposal, provided the words "some members" were replaced by "many members".

*It was so agreed.*

58. Mr. McCAFFREY said it was regrettable that the commentary did not reflect the position of the members of the Commission who had stated that they were opposed to the principle of universal jurisdiction. The last sentence of paragraph (4) did, of course, state that some of them "reserved their position with regard to the future formulation by the Commission of rules on extradition". That was not enough, however, and he proposed that the following new sentence should be added: "Some members could not accept the general applicability of the principle of universal jurisdiction to the draft code".

59. Mr. THIAM (Special Rapporteur) said that that sentence should be included at the end of paragraph (6) of the commentary.

*Paragraph (4), as amended, was approved.*

Paragraph (5)

60. Mr. MAHIOU noted that the words *cour, tribunal* and *juridiction* were used indifferently in the French text of the commentary. He suggested that it would be better to use only one term, preferably *tribunal*, which was used in the text of article 4.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

Paragraph (6)

61. The CHAIRMAN recalled that the Special Rapporteur had suggested adding the new sentence proposed by Mr. McCaffrey during the consideration of paragraph (4) (see paras. 58-59 above) at the end of paragraph (6).

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

*The commentary to article 4, as amended, was approved.*

*Commentary to article 7* (Non bis in idem)

Paragraph (1)

62. Mr. CALERO RODRIGUES said that the words "in internal law", in the second sentence, did not have the same meaning as the words *dans le cadre du droit interne* in the French text. He also did not think that the words "as a result of the establishment of relations between several national courts", at the end of the last sentence, were an accurate translation of the words *la mise en jeu des relations entre plusieurs juridictions internes* in the French text.

63. Mr. MAHIOU said that, in his view, the second sentence contradicted the third.

64. Mr. THIAM (Special Rapporteur) said it could happen that two or even more States might claim to have jurisdiction to try a particular individual. In such a case, referred to in the last sentence, the problem would

be one of the relations between the courts of those States.

65. Mr. GRAEFRATH said that the first problem to which Mr. Calero Rodrigues had referred might be solved by using the words "within a national legal system" to translate the words *dans le cadre du droit interne.*

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

66. Mr. McCAFFREY and Mr. CALERO RODRIGUES said that the words "dismissal of proceedings", at the end of the paragraph, were not a good translation of the term *non-lieu* in the French text.

67. Prince AJIBOLA suggested that the words "discharge of proceedings" should be used instead.

*It was so agreed.*

68. Mr. TOMUSCHAT said that he had been surprised by the words "a group of individuals of different nationalities who set themselves up as a court", at the end of the sixth sentence. In his view, such a case would be unlikely to occur and, on the basis of the seventh sentence, he thought that what had been meant was "a court set up by a small group of States". If the words in question were not amended along those lines, they should be deleted.

69. Mr. THIAM (Special Rapporteur) suggested that the whole of the sixth sentence, as well as the word "therefore" at the beginning of the seventh sentence, should be deleted.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

70. Mr. TOMUSCHAT, referring to the fourth sentence, said that, in his view, the *non bis in idem* principle was a rule of international law that applied to proceedings before national courts. Moreover, the problem was not one of recognizing the validity of a judgment pronounced in a foreign State, but rather one of recognizing the judgment itself. He therefore proposed that the fourth sentence should be amended to read: "In theoretical terms, it was noted that this principle governed criminal proceedings before domestic courts and that its external application give rise to the problem of respect by one State of final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State." He also pointed out that the *non bis in idem* rule was embodied in the International Covenant on Civil and Political Rights (art. 14, para. 7).

71. Mr. THIAM (Special Rapporteur) said that he would insist on the retention of the term "rule of internal law", which was, as the law now stood, fully justified. If the Commission made the *non bis in idem* rule a rule of international law, it would be engaging in the progressive development of the law.

72. Mr. MAHIOU said that, in his view, the *non bis in idem* rule could be regarded as one of the general principles of law. The concept of a general principle of law was, however, difficult to define and related both to internal law and to international law. The meaning of the fourth sentence might thus be made clearer by indicating that that principle was a rule of internal law, although, as a general principle of international law, it was also part of international law. The best course would nevertheless be to avoid taking a stand on the question.

73. Mr. CALERO RODRIGUES suggested that the words "a rule of internal law" should be retained, with the addition of the words "governing criminal proceedings before national courts", and that the words "not a rule of international law" should be deleted.

74. Mr. ARANGIO-RUIZ said it must be borne in mind that there were not only general principles, but also rules which were universally applicable to human rights. He supported Mr. Tomuschat's amendment, particularly since, in addition to the International Covenant on Civil and Political Rights, which embodied the *non bis in idem* rule, most legal writers considered that human rights formed part of general international law.

75. Mr. Sreenivasa RAO said that, in the fifth sentence, the word "protect" was inappropriate. He would suggest wording along the following lines: "provide a shield for an individual".

*It was so agreed.*

76. Mr. McCAFFREY said that he shared Mr. Tomuschat's view and supported his amendment, but, if it was not acceptable to the other members of the Commission, he would endorse Mr. Calero Rodrigues's proposal.

77. Mr. BENNOUNA proposed that the fourth sentence should be replaced by the following text:

> "In theoretical terms, it was noted that this principle was a rule of internal law and that its application in relations between States gave rise to the problem of respect by one State of final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State."

78. Mr. THIAM (Special Rapporteur) said that he could accept Mr. Bennouna's amendment, although he thought it would be useful to reopen the discussion of the question at a later stage, since legal writers did not unanimously agree on it. He also recalled that the Commission had objected to his suggestion that the general principles of law should be referred to in the draft code. Accordingly, the *non bis in idem* principle could relate only to internal law.

79. Mr. TOMUSCHAT said that, in the text proposed by Mr. Bennouna, it would be better to refer to "a rule applicable in internal law".

80. Mr. BENNOUNA said that he agreed with that change and further suggested that the words "its application" in the text he had proposed should be replaced by "its implementation".

81. Mr. GRAEFRATH said he thought that the *non bis in idem* principle was a rule of internal law and that it did not apply in the context under consideration. It was only because of treaties concluded by certain States that it was respected in the case of foreign judgments. The International Covenant on Civil and Political Rights recognized it only in so far as it related to the internal legal order and did not require recognition of judgments handed down in a foreign State.

82. Mr. BARSEGOV said that, in comparing the English, French and Russian texts of paragraphs (3) (*a*) and (4) of the commentary, he had noted that, although the expression "an act . . . tried . . . as an ordinary crime" was very clear in English, the Russian text referred to acts tried on the basis of customary law. How should the words *droit commun* in the French text be interpreted? Did they refer to rules based on custom?

83. Mr. THIAM (Special Rapporteur) said that the words *droit commun* had nothing to do with custom. The Russian text should be amended.

*It was so agreed.*

84. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the amendment to the fourth sentence proposed by Mr. Bennouna, as further amended by Mr. Tomuschat and Mr. Bennouna

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

85. Mr. BENNOUNA said that national courts should be referred to first, since the words "international criminal court" appeared only in square brackets in the text of article 7. He therefore proposed that the first sentence of paragraph (4) should begin: "It should also be noted that, according to paragraph 3, a national court may again try and punish acts already tried by a court of another State, if the acts . . .". The last sentence was unnecessary and should be deleted.

86. Mr. THIAM (Special Rapporteur) said that he agreed with the idea of deleting the last sentence, but pointed out, with regard to Mr. Bennouna's first proposal, that paragraph (4) was merely based on the structure of article 7.

87. Mr. MAHIOU noted that paragraph (4) explained the words in square brackets, while the question of national courts was dealt with in paragraph (3). He, too, thought that the last sentence should be deleted.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

*Paragraph (5) was approved.*

*The commentary to article 7, as amended, was approved.*

*Commentary to article 8* (Non-retroactivity)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

88. Mr. GRAEFRATH suggested that the last sentence should be deleted, since it was not entirely correct. The Nürnberg Tribunal had never really based its judgments on the general principles of law.

*It was so agreed.*

89. Mr. TOMUSCHAT proposed that the word *lege*, in the second sentence, should be replaced by *lex*.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

90. Mr. BENNOUNA suggested that, at the end of the second sentence, it should be specified that what was meant was "customary international law", as opposed to treaty law.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 8, as amended, was approved.*

*Commentary to article 10* (Responsibility of the superior)

Paragraph (1)

91. Mr. THIAM (Special Rapporteur) said that the following phrase should be added at the end of the paragraph: "for example article 86 (para. 2) of Additional Protocol I to the 1949 Geneva Conventions".

*Paragraph (1), as amended, was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

Paragraph (3)

92. Mr. THIAM (Special Rapporteur) said that paragraph (3) could be deleted.

*Paragraph (3) was deleted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were approved.*

Paragraph (6)

93. Mr. CALERO RODRIGUES said that the translation of the French words *possibilités* and *possibilité* as "opportunities" and "opportunity" should be revised.

*Paragraph (6) was approved on that understanding.*

*The commentary to article 10, as amended, was approved.*

*Commentary to article 11* (Official position and criminal responsibility)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

*The commentary to article 11 was approved.*

*Commentary to article 12* (Aggression)

Paragraph (1)

94. Mr. CALERO RODRIGUES proposed that the fourth sentence should be deleted, since it was not clear.

95. Mr. THIAM (Special Rapporteur), drawing attention to a mistake in the fourth sentence, said that the word "Governments" should be replaced by the words "government officials". He also noted that the question raised in that sentence had been discussed at length in the Commission.

96. Mr. BENNOUNA said that, if the words "under article 3" were added at the end of the first sentence, the last three sentences of the paragraph could be deleted. He also proposed that the second sentence should be amended to read: "Paragraph 1 has been adopted provisionally and will have to be reviewed at a later stage in the elaboration of the code."

97. Mr. BEESLEY proposed that the end of the first sentence should be amended to read: ". . . and the individuals who are subject to criminal prosecution and punishment for acts of aggression".

98. Mr. THIAM (Special Rapporteur) said that, although he agreed with the amendments to the first sentence proposed by Mr. Bennouna and Mr. Beesley, he could not accept Mr. Bennouna's proposal to delete the last three sentences of the paragraph, since many members of the Commission, including himself, were not convinced of the need for article 12, paragraph 1.

99. Mr. PAWLAK suggested that the words "of some members", in the first sentence, should be deleted because the idea expressed in that sentence reflected the concern of the Commission as a whole.

100. Mr. GRAEFRATH said that he supported the proposals by Mr. Beesley and Mr. Pawlak.

*The amendments to the first and second sentences by Mr. Bennouna, Mr. Beesley and Mr. Pawlak were adopted.*

101. Mr. RAZAFINDRALAMBO said that the fourth sentence, whose deletion had been proposed by Mr. Calero Rodrigues, was clearer in English than in French, and that the latter should be amended to read: *Il faudra décider s'il s'agit, non seulement des gouvernants, mais aussi d'autres personnes ayant une responsabilité politique ou militaire et ayant participé . . .*

102. Mr. CALERO RODRIGUES said that he supported Mr. Razafindralambo's proposal.

*Mr. Razafindralambo's amendment was adopted.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

103. Mr. BENNOUNA proposed that the last part of the second sentence should be amended to read: ". . . certain members of the Commission who felt that an instrument intended to serve as a guide for a political organ such as the Security Council could not be used as a basis for criminal prosecution before a judicial body".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

104. Mr. THIAM (Special Rapporteur) said that, in the last sentence, the words "in that it does not reproduce the whole of resolution 3314 (XXIX)" should be deleted.

105. Mr. GRAEFRATH proposed that the following sentence should be inserted after the penultimate sentence: "The advocates of that school of thought therefore wished to retain the words 'In particular' in paragraph 4 and to delete paragraph 5." The last sentence would then read: "The text of article 12 provisionally adopted reflects these two trends . . ."

106. Mr. BEESLEY, noting that paragraph (3) dealt with cases in which the Security Council determined the existence of aggression, proposed that the following text should be inserted before the last sentence: "A number of members addressed the question whether a tribunal would be free to consider allegations of the crime of aggression in the absence of any consideration or finding by the Security Council. One member suggested that this point should be put squarely to Governments." If the second part of his proposed text gave rise to any objections, however, he would not press for it, since it merely expressed his personal opinion.

107. Mr. BARSEGOV said that he supported Mr. Graefrath's proposal, which made the meaning of the penultimate sentence clearer. Paragraph (3) was, however, not well balanced and, in order to take account of the opinion of another group of members, it should include the following text: "In the opinion of some members of the Commission, releasing national criminal courts from the requirement that they should be guided by decisions of the Security Council determining the existence or non-existence of aggression could lead to a juxtaposition of the decisions of the court and those of the Security Council and to the replacement of the Security Council by the court; and that, in the final analysis, could lead to a revision of the Charter of the United Nations."

108. Mr. KOROMA said that Mr. Barsegov's proposed amendment had convinced him that article 12, paragraph 5, did not belong in the draft code. He therefore proposed that the eighth sentence of paragraph (3), beginning with the words "In particular, the judge should not be bound . . .", should be deleted. Although he was not opposed to Mr. Barsegov's amendment, which implied that the Commission was divided on the role of the Security Council in the matter, he would invite Mr. Barsegov to tone down the wording in order better to reflect the problems that had been discussed. In fact, it was not the role of the Security Council that was at issue: the problem was only the result of the fact that the court dealt with criminal matters, while the Security Council dealt with political matters.

109. Mr. BARSEGOV said that he would not like to give the impression that the Commission was divided, but the fact was that there had been statements and amendments which had been submitted unilaterally and which showed that members of the Commission would like the court not to be bound by the decisions of the Security Council, on the grounds that the Council might not take any decision at all. However, if the summary of the point of view that was contrary to his own were deleted and if it were not stated that the court was free and could act independently of the Security Council, his

point of view would not have to be reflected. To that end, he suggested the deletion of the seventh sentence, beginning with the words "According to that same school of thought . . .", as well as the eighth sentence, which Mr. Koroma had also proposed deleting. If the Commission accepted that suggestion, he would not press for his own amendment.

110. Mr. KOROMA said that he supported Mr. Barsegov's proposal.

111. Mr. THIAM (Special Rapporteur) said that he accepted the proposals by Mr. Beesley, Mr. Koroma and Mr. Barsegov.

112. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (3) with the amendments by Mr. Graefrath, the first sentence of Mr. Beesley's amendment, and the amendments by Mr. Barsegov and Mr. Koroma deleting the seventh and eighth sentences.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were approved.*

Paragraph (6)

113. Mr. THIAM (Special Rapporteur) said that, in the first sentence, "paragraph (2)" should read "paragraph (3)".

114. Mr. GRAEFRATH proposed that the beginning of the third sentence should be amended to read: "Other members thought that a determination made by the Security Council on the basis of Chapter VII of the Charter of the United Nations was binding . . .".

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

Paragraph (7)

115. Mr. THIAM (Special Rapporteur) said that the second sentence should be deleted.

*Paragraph (7), as amended, was approved.*

*The commentary to article 12, as amended, was approved.*

*Section C, as amended, was adopted.*

116. Mr. CALERO RODRIGUES said that chapter IV of the report should include a paragraph suggesting questions on which the General Assembly's discussion of the draft code might focus.

117. Mr. THIAM (Special Rapporteur) said that, although he did not think that the General Assembly had to be asked any questions, he would have no objection if the Commission drew the Assembly's attention to particular points, such as the question of an international criminal court.

118. Mr. CALERO RODRIGUES said he still believed that what the Commission's report should include was not questions to the General Assembly, but an indication of problems on which the views of Governments and the General Assembly would be useful for the Commission's future work. He deplored the fact that the Commission was giving the impression of paying no attention to a General Assembly resolution, namely resolution 42/156.

*Chapter IV of the draft report, as amended, was adopted.*

*The draft report of the Commission on the work of its fortieth session as a whole, as amended, was adopted.*

## Closure of the session

119. After an exchange of congratulations and thanks, the CHAIRMAN declared the fortieth session of the International Law Commission closed.

*The meeting rose at 1.40 p.m.*