

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1996

Volume I

*Summary records
of the meetings
of the forty-eighth session
6 May-26 July 1996*

UNITED NATIONS



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UNITED NATIONS
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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the forty-eighth session of the Commission (A/CN.4/SR.2426-A/CN.4/SR.2473), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/1996

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MEMBERS OF THE COMMISSION

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First Vice-Chairman: Mr. Robert ROSENSTOCK
Second Vice-Chairman: Mr. Mochtar KUSUMA-ATMADJA
Chairman of the Drafting Committee: Mr. Carlos CALERO RODRIGUES
Rapporteur: Mr. Igor IVANOVICH LUKASHUK

Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General; and Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 2426th meeting, held on 6 May 1996:

1. Organization of work of the session.
2. State responsibility.
3. Draft Code of Crimes against the Peace and Security of Mankind.
4. International liability for injurious consequences arising out of acts not prohibited by international law.
5. The law and practice relating to reservations to treaties.
6. State succession and its impact on the nationality of natural and legal persons.
7. Programme, procedures and working methods of the Commission, and its documentation.
8. Cooperation with other bodies.
9. Date and place of the forty-ninth session.
10. Other business.

ABBREVIATIONS

FAO	Food and Agriculture Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IMF	International Monetary Fund
IMO	International Maritime Organization
MERCOSUR	South American Common Market
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization on Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
WTO	World Trade Organization

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<i>I.C.J. Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	<i>PCIJ, Collection of Judgments (Nos. 1-24: up to and including 1930)</i>
<i>P.C.I.J., Series A/B</i>	<i>PCIJ, Judgments, Orders and Advisory Opinions (Nos. 40-80: beginning in 1931)</i>

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In the present volume, the ‘‘International Tribunal for Rwanda’’ refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994; and the ‘‘International Tribunal for the Former Yugoslavia’’ refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

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NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

**MULTILATERAL INSTRUMENTS
cited in the present volume**

	<i>Source</i>
HUMAN RIGHTS	
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
Convention on the Political Rights of Women (New York, 31 March 1953)	Ibid., vol. 193, p. 135.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (23 March 1976)	Ibid.
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (15 December 1989)	<i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49</i> , resolution 44/128, annex.
American Convention on Human Rights (San José, 22 November 1969)	United Nations, <i>Treaty Series</i> , vol. 1144, p. 123.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51</i> , resolution 39/46, annex.
International Convention against Apartheid in Sports (New York, 10 December 1985)	Ibid., <i>Fortieth Session, Supplement No. 53</i> , resolution 40/64, annex.
Inter-American Convention on Forced Disappearance of Persons (Belen, 9 June 1994)	OAS, <i>Treaty Series</i> , No. 80.
European convention on the exercise of children's rights (Strasbourg, 25 January 1996)	Council of Europe, <i>European Treaty Series</i> , No. 160.
NATIONALITY AND STATELESSNESS	
Convention on the Reduction of Statelessness (New York, 30 August 1961)	United Nations, <i>Treaty Series</i> , vol. 989, p. 176.
Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963)	Ibid., vol. 634, p. 221.

PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973) *Ibid.*, vol. 1035, p. 167.

ENVIRONMENT AND NATURAL RESOURCES

- Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (Bamako, 30 January 1991) *International Legal Materials* (Washington, D.C.), vol. XXX, No. 3 (May 1992), p. 775.
- United Nations Framework Convention on Climate Change (New York, 9 May 1992) Document A/AC.237/18 (Part II)/Add.1 and Corr.1, annex I.
- Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) United Nations Environment Programme, *Convention on Biological Diversity* (Environmental Law and Institution Programme Activity Centre), June 1992.
- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 14 October 1994) Document A/49/84/Add.2, annex, appendix II.

LAW OF THE SEA

- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (Sales No. E.83.V.5), p. 1.

LAW APPLICABLE IN ARMED CONFLICT

- Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907) J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition (New York, Oxford University Press, 1918), p. 100.
- Treaty of Versailles (Versailles, 28 June 1919) *British and Foreign State Papers, 1919* (London, His Majesty's Stationery Office, 1922), vol. CXII, p. 1.
- London Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945) United Nations, *Treaty Series*, vol. 82, p. 279.

Source

- Inter-American Treaty of Reciprocal Assistance (Rio Treaty) (Rio de Janeiro, 2 September 1947) Ibid., vol. 21, p. 77.
- Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (San José, 26 July 1965) OAS, *Treaty Series*, Nos. 46 and 61.
- Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) United Nations, *Treaty Series*, vol. 75, pp. 31 et seq.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977) Ibid., vol. 1115, pp. 3 and 609.

LAW OF TREATIES

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) Ibid., vol. 1155, p. 331.
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10).
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) Document A/CONF.129/15.

LIABILITY

- Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, D.C., 29 March 1972) United Nations, *Treaty Series*, vol. 961, p. 187.
- Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993) Council of Europe, *European Treaty Series*, No. 150.

DISARMAMENT

- Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976) United Nations, *Treaty Series*, vol. 1108, p. 151.

PEACEFUL SETTLEMENT OF DISPUTES

Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965) Ibid., vol. 575, p. 158.

GENERAL INTERNATIONAL LAW

Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979 World Intellectual Property Organization, publication No. 287 (E), 1992.

Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994) *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 49*, resolution 49/59, annex.

Inter-American Convention against Corruption (Caracas, 29 March 1996) OAS.

CHECK-LIST OF DOCUMENTS OF THE FORTY-EIGHTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/472 and Add.1	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fiftieth session of the General Assembly	Mimeographed.
A/CN.4/473	Provisional agenda	Mimeographed. For agenda as adopted, see p. ix above.
A/CN.4/474 [and Corr.1]	Second report on State succession and its impact on the nationality of natural and legal persons, by Mr. Vaclav Mikulka, Special Rapporteur	Reproduced in <i>Yearbook . . . 1996</i> , vol. II (Part One).
A/CN.4/475 [and Corr.1] and Add.1 [and Corr.1]	Twelfth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem.</i>
A/CN.4/476 and Add.1	Eighth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem.</i>
A/CN.4/477 [and Corr.2] and Add.1 [and Corr.1]	Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/478	<i>Idem</i> , annex I: Bibliography	<i>Idem.</i>
A/CN.4/L.522 and Corr.1	Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee on second reading at the forty-seventh and forty-eighth sessions	See summary record of the 2437th meeting (para. 7).
A/CN.4/L.523		[Symbol not used.]
A/CN.4/L.524 and Corr.2	State responsibility. Part one of the draft articles adopted by the Commission on first reading at its thirty-second session in 1980 and titles and texts of parts two and three of the draft articles as provisionally adopted by the Drafting Committee on first reading at the forty-eighth session in 1996	See summary record of the 2452nd meeting (para. 5).
A/CN.4/L.525 and Add.1	Draft report of the International Law Commission on the work of its forty-eighth session: chapter IV (State succession and its impact on the nationality of natural and legal persons)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10)</i> . The final text appears in <i>Yearbook . . . 1996</i> , vol. II (Part Two).
A/CN.4/L.526	<i>Idem</i> : chapter I (Organization of the session)	<i>Idem.</i>
A/CN.4/L.527 and Add.1 [and Add.1/Corr.1], Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 [and Corr.1] and Add.11	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.528 [and Corr.1] and Add.1-3 [and Add.3/Corr.1]	<i>Idem</i> : chapter III (State responsibility)	<i>Idem.</i>
A/CN.4/L.529	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.530	<i>Idem</i> : chapter VI (The law and practice relating to reservations to treaties)	<i>Idem.</i>
A/CN.4/L.531 [and Corr.1 and 2], Add.1/Rev.1	<i>Idem</i> : chapter VII (Other decisions and conclusions of the Commission)	<i>Idem.</i>

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.531/Add.2-4		[Symbol not used.]
A/CN.4/L.531/Add.5-6	Draft report of the International Law Commission on the work of its forty-eighth session: chapter VII (Other decisions and conclusions of the Commission)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10)</i> . The final text appears in <i>Yearbook . . . 1996</i> , vol. II (Part Two).
A/CN.4/L.531 [and Corr.1 and 3]	Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Commission at its forty-eighth session	Reproduced in <i>Yearbook . . . 1996</i> , vol. II (Part Two).
A/CN.4/L.533 and Add.1	International liability for injurious consequences arising out of acts not prohibited by international law. Report of the Working Group	Mimeographed. For the text see <i>Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10)</i> . The final text appears in <i>Yearbook . . . 1996</i> , vol. II (Part Two), annex I.
A/CN.4/L.534	Draft report of the International Law Commission on the work of its forty-eighth session: report of the Working Group on the long-term programme of work	<i>Idem</i> , annex II.
A/CN.4/SR.2426- A/CN.4/SR.2473	Provisional summary records of the 2426th to 2473rd meetings	Mimeographed. The final text appears in the present volume.
ILC(XLVIII)/DC/CRD.3	Draft Code of Crimes against the Peace and Security of Mankind. Document by Mr. Christian Tomuschat	Reproduced in <i>Yearbook . . . 1996</i> , vol. II (Part One).

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-EIGHTH SESSION

Held at Geneva from 6 May to 21 July 1996

2426th MEETING

Monday, 6 May 1996, at 3.10 p.m.

Acting Chairman: Mr. Pemmaraju Sreenivasa RAO

Chairman: Mr. Ahmed MAHIU

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada.

Opening of the session

1. The ACTING CHAIRMAN declared open the forty-eighth session of the International Law Commission. He welcomed members to Geneva and expressed his wishes for the success of the session.

2. As to the various meetings at which the Commission had been represented since the end of its forty-seventh session, in August 1995, Mr. de Saram had represented it at the Inter-American Juridical Committee, which had expressed its interest in the Commission's work and the hope that cooperation and communication between the two bodies would be strengthened.

3. He himself had represented the Commission at the fiftieth session of the General Assembly of the United Nations which had marked its fiftieth anniversary. In the discussions in the Sixth Committee, emphasis had been

placed on the need for an ongoing review of the Commission's working methods with a view to deriving the most benefit from its meetings and to ensuring that the documents that resulted from its work were fully appreciated and, if possible, adopted without undue difficulty. Members might wish to refer in that connection to Assembly resolution 50/45, entitled "Report of the International Law Commission on the work of its forty-seventh session", and in particular to paragraph 9 thereof.

4. During the fiftieth session of the General Assembly, he had taken part in the usual meeting of legal advisers of the Ministries of Foreign Affairs of States Members of the United Nations.

5. He had been invited to the meeting of the European Committee on Legal Cooperation in December 1995, but very much regretted that budgetary considerations had prevented him from attending.

6. He said that Mr. Idris had represented the Commission at the meeting of the Asian-African Legal Consultative Committee held in Manila in March 1996. The Committee had devoted three meetings to a detailed consideration of the establishment of an international criminal court. Discussions had also been held on the environment and the law of the sea in particular.

7. As the headquarters of the Asian-African Legal Consultative Committee was in New Delhi, there had been no difficulty for him in representing the Commission at a number of its meetings and in particular at a seminar on the establishment of an international criminal court and at a seminar on the fiftieth anniversary of ICJ, which Mr. Weeramantry, a Judge at the Court, had also attended.

8. Other important events in which he or other members of the Commission had participated included the celebration of the fiftieth anniversary of ICJ in The Hague in April 1996. Along with Messrs. Al-Khasawneh, Crawford and Pellet, he had contributed to that event, which had afforded an opportunity for detailed consideration of the Court's future role, ways of making its jurisdiction more widely acceptable, and a

possible adjustment of its working methods and procedure to facilitate the efforts of parties and thus obtain the best possible result.

9. He thanked all members of the Commission for their cooperation and trust and also expressed appreciation to the officers of the Bureau and to the secretariat. He informed members that Ms. Dauchy had retired, and emphasized the valuable contribution she had made to the work of the codification and progressive development of international law. He introduced Mr. Lee to the Commission, who succeeded her as Secretary to the Commission.

10. He suggested that the meeting should be suspended to enable members to hold consultations on the election of officers.

The meeting was suspended at 3.50 p.m. and resumed at 4.35 p.m.

Election of officers

Mr. Mahiou was elected Chairman by acclamation.

Mr. Mahiou took the Chair.

11. The CHAIRMAN expressed his thanks to the members of the Commission for their trust and for the honour they had conferred upon him. He looked forward to their cooperation, in the hope that the final year of the quinquennium would be as productive as possible and that the Commission could achieve the objectives the General Assembly had set for it.

Mr. Rosenstock was elected First Vice-Chairman by acclamation.

Mr. Kusuma-Atmadja was elected Second Vice-Chairman by acclamation.

Mr. Calero-Rodrigues was elected Chairman of the Drafting Committee by acclamation.

Mr. Lukashuk was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/473)

12. The CHAIRMAN suggested that the provisional agenda (A/CN.4/473) should be adopted on the understanding that it would in no way prejudice the order in which the various items were taken up.

It was so agreed.

The agenda was adopted.

Organization of work of the session

[Agenda item 1]

13. The CHAIRMAN suggested that, in accordance with established practice, the Enlarged Bureau should

meet to consider the organization of work of the session. He drew attention to General Assembly resolution 50/45, to which the Acting Chairman had referred, and pointed out that, at its forty-seventh session, the Commission had decided to allow for at least three weeks' intensive work in the Drafting Committee at the beginning of its forty-eighth session. He invited the Chairman of the Drafting Committee to hold the necessary consultations on the appointment of members to the Drafting Committee as soon as possible, so that it could start its work without delay. He addressed the same request to the First Vice-Chairman in his capacity as Chairman of the Planning Group.

The meeting rose at 5.15 p.m.

2427th MEETING

Tuesday, 7 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada.

Organization of work of the session (continued)

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau had recommended that the Drafting Committee should in principle devote the first three weeks of the session to the topic of the draft Code of Crimes against the Peace and Security of Mankind. The Planning Group would also be able to meet during the first three weeks, but without interpretation if its meetings clashed with those of the Drafting Committee. The Commission would also meet in plenary from time to time during the first three weeks to hear brief progress reports by the Chairmen of the Drafting Committee and the Planning Group.

2. In view of the availability of Mr. Tomuschat, Chairman of the working group on the issue of wilful and severe damage to the environment (art. 26) under the topic of the draft Code,¹ who had submitted a document on

¹ See *Yearbook . . . 1995*, vol. II (Part Two), para. 141.

that issue (ILC(XLVIII)/DC/CRD.3),² the working group might also meet, provided that it did not interrupt the work of the Drafting Committee.

3. The second report of the Special Rapporteur, Mr. Mikulka, on State succession and its impact on the nationality of natural and legal persons (A/CN.4/474)³ should be available on 21 May. A meeting of the Commission might be planned for the introduction and discussion of the report from 28 May.

4. At the end of the first three weeks and in the light of the progress of work and the availability of documents, the Commission might meet to consider the work of the Drafting Committee on the draft Code. The Drafting Committee might take up the topic of State responsibility from 24 May, and the Enlarged Bureau would meet as needed to adopt recommendations on the programme of work for the second half of the session.

5. He suggested that the secretariat should schedule plenary meetings on Tuesday and Friday mornings during the first three weeks. Those meetings would be immediately followed by meetings of the Drafting Committee.

6. Mr. IDRIS said that he took it that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was not a priority topic for the session and would be taken up only as time allowed.

7. The CHAIRMAN said that the Commission was to give priority to its second reading of the draft Code and completion of its first reading of the draft articles on State responsibility. Any remaining time would be devoted to the other topics before the Commission. The Commission must bear in mind the budgetary constraints which he had mentioned at the previous meeting; it might be difficult to have all the reports on all the topics available for discussion in time.

8. Mr. VILLAGRÁN KRAMER said that Mr. Idris was right to bring up the topic of international liability for injurious consequences arising out of acts not prohibited by international law, to which the Commission had devoted little attention in the past two years. He suggested that time should be found in June for discussion of the topic, which was more than ready for a first reading.

9. The CHAIRMAN said that the recommendations of the Enlarged Bureau covered the programme of work for the first half of the session, until mid-June. It could of course decide that changes were needed in that programme and it would meet at a later date to consider the programme of work for the second half of the session.

10. In reply to a question from Mr. Crawford, he said that the Commission would have before it the second report by the Special Rapporteur, Mr. Mikulka, on State succession and its impact on the nationality of natural and legal persons (A/CN.4/474), the second report by the

Special Rapporteur, Mr. Pellet, on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478)⁴ and the twelfth report by the Special Rapporteur, Mr. Barboza, on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/475 and Add.1).⁵

11. Mr. THIAM (Special Rapporteur on the topic of the draft Code of Crimes against the Peace and Security of Mankind) pointed out that the time allocated for consideration of the draft Code in the Drafting Committee—until 23 May—was considerably shorter than three weeks.

12. The CHAIRMAN said that the arrangements were flexible and more time would be found if necessary.

13. Mr. HE said that, in addition to the time allocated for work in the Drafting Committee, sufficient time must be made available for discussion of the various topics by the Commission in plenary. If there was no consensus on a set of draft articles, a vote would be needed and minority views would have to be stated and recorded. He reminded the Commission that there were substantial differences of opinion on the topics in question both in the Commission and in the Sixth Committee.

14. He also wished to point out that little time was usually found for discussion of the commentaries to draft articles. The view had been expressed in the Sixth Committee that commentaries should be shorter and drafted in accordance with article 20 of the Commission's statute.

15. The CHAIRMAN said that, after the first three weeks of the session, when priority would be given to the work of the Drafting Committee, the Commission would resume its normal schedule of plenary meetings. He suggested that the Special Rapporteurs should try to have their commentaries ready for consideration in good time.

16. Mr. ARANGIO-RUIZ (Special Rapporteur on the topic of State responsibility) said that his eighth report on the topic (A/CN.4/476 and Add.1)⁶ was basically concerned with parts two and three, where some of the articles already adopted had some minor defects. The Drafting Committee must at least complete its consideration of the so-called acts characterized as crimes in article 19 of part one,⁷ on which he felt it was his duty to offer some comments. There was probably no need for his report to be considered by the Commission in plenary before being passed to the Drafting Committee, and he suggested that the report should be split into two parts, so that at least one would be ready by 24 May.

17. Mr. GÜNEY asked whether the Commission would meet in plenary automatically on Tuesday and Friday mornings or whether the scheduling of the meetings would depend on the progress of work in the Drafting Committee. He supported the implicit suggestion by

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ *Yearbook* . . . 1976, vol. II (Part Two), pp. 95 et seq.

² Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

³ Ibid.

the Special Rapporteur on the draft Code that the Drafting Committee would need three full weeks for consideration of the draft Code.

18. The CHAIRMAN said that the plenary meetings had already been scheduled: it was necessary for members who did not attend the Drafting Committee or Planning Group to have regular opportunities to meet.

19. Mr. de SARAM said that, while all members of the Commission were mindful that the importance of the work of the Drafting Committee at the session, the eighth report of the Special Rapporteur on State responsibility must certainly be considered by the Commission in plenary, even if briefly, before being passed to the Drafting Committee.

20. Mr. VILLAGRÁN KRAMER said that all members of the Commission had the greatest respect for the reports submitted by the Special Rapporteur on State responsibility. However, the draft articles were now complete and no further reports should be needed unless the Commission or the Drafting Committee so decided. He wondered therefore whether the eighth report of the Special Rapporteur was necessary as he had kept the Commission in a legal limbo on the question of countermeasures for three years. Just one draft article was still awaiting adoption—because of fundamental differences of opinion between the Special Rapporteur and some other members. The Commission must try to complete its adoption of the draft articles at the current session. He therefore requested clarification from the Special Rapporteur as to whether his report contained new draft articles or merely further thoughts on controversial points.

21. The CHAIRMAN said he was sure that the purpose of any new report was to help the Commission to make progress in its work.

22. Mr. MIKULKA said that the Commission was wasting its time by discussing what to do with a report which did not yet exist. Everyone was agreed that the report should first be submitted to the Commission, and that was enough for the time being.

23. Mr. ARANGIO-RUIZ (Special Rapporteur on the topic of State responsibility) said that he agreed with Mr. Mikulka. The brief document in question was his eighth report and contained no new draft articles. It must of course be viewed first by the Commission, but a substantive debate would not be necessary. He was suggesting some minor drafting changes for consideration in the Drafting Committee. As to the matter of the Commission's spending three years in a legal limbo, it was entirely up to the Commission and the Drafting Committee to do what they pleased with the draft article in question.

24. The CHAIRMAN, replying to a question from Mr. PELLET, said that article 26 of the draft Code (Wilful and severe damage to the environment)⁸ had already been discussed by the Commission and had been passed to the Drafting Committee. Mr. Tomuschat's document

(ILC(XLVIII)/DC/CRD.3) was on that issue and should be considered by the Drafting Committee.

25. Mr. PELLET said that the Commission had not taken a firm decision to send article 26 to the Drafting Committee.

26. Mr. ARANGIO-RUIZ noted that Mr. Mikulka had made a point about wasting the Commission's time. The Commission had originally been conceived as a commission of scholars who would discuss legal topics. Now members were continually asking technical questions about the status of documents, whether they would be discussed in the Commission or in the Drafting Committee, whether firm decisions had been taken, and so forth. That was indeed a waste of the Commission's time.

27. The CHAIRMAN said that the Commission did need information about the status of documents and the time and place of their discussion. He urged the Commission to bring the present discussion to a close.

28. Mr. TOMUSCHAT suggested that members should first read his document and then decide whether it should be discussed by the Commission or in a working group.

29. Mr. ROSENSTOCK (Chairman of the Planning Group) said that so far the Planning Group consisted of Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Idris, Mr. Pellet, Mr. Sreenivasa Rao, and Mr. Yamada.

30. The CHAIRMAN said that Mr. Güney and Mr. Kusuma-Atmadja were also candidates for the Planning Group.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, for the draft Code, the Drafting Committee would consist of Mr. de Saram, Mr. Fomba, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Rosenstock, Mr. Tomuschat and Mr. Yamada.

32. For the topic of State responsibility, the Drafting Committee would consist of Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. He, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer and Mr. Yamada. Mr. Tomuschat and Mr. Yamada were willing to withdraw if necessary.

33. The CHAIRMAN said that minor changes might be made in the composition of the Drafting Committee and the Planning Group when the other members of the Commission had arrived in Geneva. In any event, meetings of the Planning Group were normally open-ended.

34. Mr. PELLET said that he was not a member of the Drafting Committee on the draft Code and was still worried about what action the Drafting Committee was going to take on the topic. With regard to article 26, at its preceding session the Commission had decided to send the draft articles on four of the crimes to the Drafting Committee.⁹ However, the Commission had not decided

⁸ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

⁹ See *Yearbook . . . 1995*, vol. I, 2387th meeting, para. 1.

to set up a working group on the environment. If the Drafting Group were to take up other subjects in addition to the four crimes, such subjects must first be considered by the Commission.

The meeting rose at 11 a.m.

2428th MEETING

Friday, 10 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada.

Organization of work of the session (continued)

[Agenda item 1)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), reporting to the Commission on the status of the work of the Drafting Committee, said that it had made considerable progress in its consideration of the articles contained in part two of the draft Code of Crimes against the Peace and Security of Mankind,¹ which dealt with the definition of the crimes. It had completed its consideration of article 22 on war crimes² and had established a small working group, led by the Special Rapporteur and Mr. Bowett, to consider the wording of a proposal submitted by the Special Rapporteur concerning article 15, on aggression.³ The Drafting Committee had also begun work on article 21, on crimes against humanity,⁴ and had already agreed on a number of acts which should be included in that category of crimes. On completion of its consideration of article 21, it would take up the *chapeau* to the articles.

¹ See 2327th meeting, footnote 8.

² For the new text of the draft article proposed by the Special Rapporteur in his thirteenth report, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 57.

³ *Ibid.*, footnote 40.

⁴ *Ibid.*, footnote 52.

2. The Drafting Committee was thus working to schedule within the time-limits set, but without too much haste. A number of questions remained to be settled and all the articles would have to be reviewed before submission to the Commission, but he hoped that the Drafting Committee would be able to conclude its second reading of the draft articles within the three weeks allocated to it for that purpose.

3. Mr. ROSENSTOCK (Chairman of the Planning Group) said the Planning Group had concluded that it would in fact be useful, as already envisaged, to consider the Commission's practices and procedures with a view to improving their effectiveness and that recommendations might be made to that end. It had therefore decided to set up a small working group, consisting of Mr. Bowett, Mr. Crawford, Mr. Idris, Mr. Pellet and Mr. Sreenivasa Rao, to study the question in depth and submit a report on the basis of which the Planning Group would make recommendations to the Commission. He believed that the working group had made good progress and therefore hoped that the Planning Group would be reporting to the Commission on the subject quite soon. The Planning Group would then be able to move on to examine other matters such as the future programme of work.

4. The CHAIRMAN thanked the Chairmen of the Drafting Committee and the Planning Group, respectively, for their very useful reports on the work done in the Drafting Committee and the Planning Group.

5. He said that at the forty-seventh session, the Commission had decided to establish a working group to meet at the beginning of the current session to consider the possibility of taking up the question of wilful and severe damage to the environment within the framework of the draft Code and it had reaffirmed at the same time its intention, in any event, to complete the second reading of the draft Code at the forty-eighth session.⁵ The working group would consist, of course, of Mr. Thiam Special Rapporteur on the topic, together with Mr. Tomuschat, who had submitted a document on the question (ILC(XLVIII)/DC/CRD.3),⁶ Mr. Kusuma-Atmadja, Mr. Szekely and Mr. Yamada, who were willing to take part in it. The working group would consider that document and decide whether it should be submitted to the Commission. It would therefore have to report to the Commission, at an early date, on the outcome of its discussions.

The meeting rose at 10.25 a.m.

⁵ *Ibid.*, para. 141.

⁶ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

2429th MEETING

Tuesday, 14 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

Organization of work of the session (continued)

[Agenda item 1]

1. The CHAIRMAN said that, as agreed, the Commission was meeting in order to be informed of the progress of the work of the Drafting Committee. He invited the Chairman of the Drafting Committee, Mr. Calero Rodrigues, to give a brief report.
2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) announced that Mr. Szekely and Mr. Yankov had joined the Drafting Committee. The number of members had increased, but was still below the customary number of 14.
3. The Drafting Committee had completed consideration of article 22 (War crimes) of the draft Code of Crimes against the Peace and Security of Mankind,¹ which divided war crimes into three categories: (a) acts committed against persons or property protected under international humanitarian law; (b) violations of the laws or customs of war; and (c) crimes that might be committed in armed conflicts not of an international character. As to crimes against humanity, the list of crimes in article 21² was nearly complete, and the Committee would next turn its attention to the *chapeau*. It would then briefly revert to article 15 (Aggression),³ for which the proposal by the Special Rapporteur was being considered by a small group. The Committee's intention was to draw a clear distinction between aggression as usually understood, that is to say, as an act of State, and aggression as an act by an individual that might be considered a crime against the peace and security of mankind.
4. The Committee's work on the draft Code was proceeding normally, and he expected it to be concluded by the end of the following week.
5. Mr. IDRIS suggested that Mr. Tomuschat should give a brief indication of the contents of his document on the issue of wilful and severe damage to the environment (ILC(XLVIII)/DC/CRD.3),⁴ in order to provide the Commission with something of substance. Similarly, the Chairman might indicate what subjects would be discussed at the plenary meeting on 21 May. For planning purposes, he would also like to know whether any dates had been set for the issue of reports still pending.
6. The CHAIRMAN, replying to Mr. Idris' first point, said that it might be preferable for Mr. Tomuschat's document to be considered first by the working group on the issue of wilful and severe damage to the environment (art. 26) for which it was intended, in accordance with the usual procedure. Concerning the second point, by 21 May the working group would have completed its discussion of Mr. Tomuschat's document, and the Commission would thus have a substantive matter for discussion. He invited the Secretary to the Commission to indicate the status of reports.
7. Mr. LEE (Secretary to the Commission) said that the second report of the Special Rapporteur, Mr. Mikulka, on State succession and its impact on the nationality of natural and legal persons (A/CN.4/474)⁵ would be available on 21 May, the eighth report of the Special Rapporteur, Mr. Arangio-Ruiz, on State responsibility (A/CN.4/476 and Add.1)⁶ on 28 May and the twelfth report of the Special Rapporteur, Mr. Barboza, on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/475 and Add.1)⁷ on 9 June. No date had yet been scheduled for the second report of the Special Rapporteur, Mr. Pellet, on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).⁸
8. Mr. CRAWFORD, referring to a remark by Mr. Pellet (2427th meeting), asked whether, apart from article 26, there were any articles of the draft Code that had not been referred to the Drafting Committee.
9. The CHAIRMAN said that some articles had been referred to the Drafting Committee but, with the exception of article 26, the Drafting Committee was free to decide how it wished to proceed in connection with the other articles.
10. Mr. THIAM (Special Rapporteur on the topic of the draft Code of Crimes against the Peace and Security of Mankind) expressed concern at the suggestion regarding Mr. Tomuschat's document. The Commission did not have the time to enter into a debate on damage to the environment, an issue which it had already discussed when considering previous reports on the draft Code.
11. The CHAIRMAN said it was his understanding that Mr. Idris had not asked for a general debate. In any event, it would be preferable for the report of the working group on the issue of wilful and severe damage to

⁴ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

¹ See 2427th meeting, footnote 8 and 2428th meeting, footnote 2.

² See 2428th meeting, footnote 4.

³ *Ibid.*, footnote 3.

the environment to be considered by the Commission in plenary on 21 May.

12. Mr. PELLET pointed out that, pursuant to the decision taken by the Commission at the previous session, four articles had been referred to the Drafting Committee.⁹ It was understood that in its formulations, the Committee might use elements from outside those four articles, but under no circumstances should it take up separately any of the other articles of the draft Code. It should not, for example, create a fifth article, something that would be contrary to what the Commission had clearly decided.

The meeting rose at 10.30 a.m.

⁹ See 2427th meeting, footnote 9.

2430th MEETING

Friday, 17 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (continued)

[Agenda item 1]

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), reporting on the progress of work in the Drafting Committee, said that it was keeping to its schedule. It had practically completed consideration of the outstanding articles in part two of the draft Code of Crimes against the Peace and Security of Mankind, namely, article 21 on crimes against humanity¹ and article 22 on war crimes,² and had reconsidered article 15 on the crime of aggression.³ In that part, it had only to complete the *chapeau* or introductory clause to the articles

¹ See 2428th meeting, footnote 4.

² *Ibid.*, footnote 2.

³ *Ibid.*, footnote 3.

which should, in so far as possible, be the same for all articles. It still had to consider articles 3, 7 and 14 of chapter II (General principles) of part one, which the Commission had left aside pending a definition of crimes.

2. The Drafting Committee should complete its work on the draft Code the following week and might possibly hold one or two additional meetings to refine the text to be adopted on second reading.

Draft Code of Crimes against the Peace and Security of Mankind⁴ (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC (XLVIII)/DC/CRD.3⁵)

[Agenda item 3]

3. The CHAIRMAN invited Mr. Tomuschat to introduce the draft proposals, reproduced below, which had been agreed upon by the working group on the issue of wilful and severe damage to the environment⁶ on the basis of his document (ILC(XLVIII)/DC/CRD.3):

“Article 22. War crimes

“2 (a) (iii) (bis). Employing methods or means of warfare which are intended or may be expected to cause such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced;

“Article 21. Crimes against humanity

“2 (h) (bis). Wilfully causing such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced;

or

“Article 26. Wilful and severe damage to the environment

“An individual who wilfully causes such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced, shall, on conviction thereof, be sentenced to”

4. Mr. TOMUSCHAT said that the working group had concluded that crimes against the environment should be incorporated into the draft Code either as a war crime and a crime against humanity or as an autonomous offence, the choice in that regard being left to the Commission.

5. The working group had to a large extent taken as its basis article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions of 12 August 1949. But, having

⁴ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

⁵ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

⁶ See 2427th meeting, footnote 1.

noted that breaches of the rule set forth in that provision were not characterized as grave under the terms of article 85 of the Protocol, it had felt that it could, in the light of recent experiences, go one step further and raise the threshold so as to make damage to the environment a crime comparable to other war crimes and crimes against humanity.

6. For that purpose, damage to the environment must meet two criteria. The first was a two-tiered objective criterion in that the harm had to be, on the one hand, "widespread, long-term and severe"—to borrow the wording of article 35, paragraph 3, and article 55, paragraph 1, of Additional Protocol I—and, on the other, inasmuch as the draft Code was supposed to deal not with crimes against the environment as such, but with the human beings who were its victims, such that the health or survival of an entire population was gravely prejudiced. The second criterion was that of intention, recklessness and negligence being excluded. That characterization, of course, fell outside the context—armed conflict or otherwise—in which the harm was caused.

7. The working group felt that, if the Commission agreed to incorporate crimes against the environment into the draft Code, the text it had prepared should probably be referred to the Drafting Committee for consideration.

8. The CHAIRMAN invited comments on the working group's proposals.

9. Mr. PELLET suggested that the Commission should first take a decision on the actual principle of including wilful and severe damage to the environment in the draft Code and then, if it endorsed that principle, on the working group's draft proposals.

10. The CHAIRMAN, agreeing with Mr. Pellet's suggestion, asked whether the Commission supported the idea of including crimes against the environment in the draft Code.

11. Mr. IDRIS, endorsing Mr. Pellet's suggestion, said he considered that members should be allowed time to study carefully the draft proposal just placed before them. He doubted whether the Commission could reach an agreement on such a difficult and delicate subject at such a late stage in its work on the draft Code.

12. He would like to know whether the working group had considered any specific examples of the use of methods or means of war that might be expected to cause widespread, long-term and severe damage to the natural environment. His own view was that the proposed text was unclear and too broad.

13. Mr. EIRIKSSON expressed his support for the results of the work of the working group. In his view, provisions dealing with crimes against the environment should be included in the draft Code, preferably as separate provisions or, failing that and in the interests of compromise, under the heading of war crimes and crimes against humanity. So far as any delay was concerned, the Commission had already considered the matter and it was never too late to save the environment.

14. Mr. BOWETT said that, while he was not opposed to the working group's draft proposals, he did find the wording unduly restrictive. One of the criteria by which to judge whether harm to the environment was a crime was that the health or survival of a population would be gravely prejudiced. That meant, first, that serious conduct—such as the damage done by Iraq to Kuwaiti oil wells—would not be deemed to be a crime, since, serious though that conduct had been and widespread though the damage had been, there had been no real threat to the health or survival of a population. Secondly, the words "a population" meant "an entire population", according to Mr. Tomuschat. Consequently, when it came to large countries with vast and widely dispersed populations, like China, the United States of America and the Russian Federation, there was very little likelihood that damage to the environment could seriously threaten the health or survival of the entire population. It would therefore never be possible to establish that a crime against the environment had been committed in the case of such countries.

15. Mr. VILLAGRÁN KRAMER said that, while he welcomed the work of the working group and its draft proposals, major legal issues were involved and, like Mr. Idris, he thought that the Commission should be allowed time to ponder the matter.

16. Mr. PELLET said that he was opposed to the adoption of a separate provision on crimes against the environment and to the inclusion of the proposed provisions in the draft Code. In the first place, under the national legislation of States, serious offences against the environment were not treated as a crime or even as a serious offence, even though there was a move in that direction. Secondly, as Mr. Tomuschat had candidly pointed out, Additional Protocol I to the Geneva Conventions of 12 August 1949 did not treat damage to the environment as a serious offence. Thirdly, as Mr. Tomuschat had noted in paragraph 33 of his document (ILC(XLVIII)/DC/CRD.3), international environmental law was itself an uncertain edifice and the bases of the exercise in which the Commission intended to engage were also entirely uncertain. Fourthly, the working group had attempted a quadruple back flip: it adopted the basic assumption that an offence under national law was a crime and concluded from that alleged crime under national law that an offence was established under international law; it assimilated that offence to a crime, without any kind of basis, and without proving that there was any *opinio juris* whatsoever to that effect in the international community; and it transformed an international crime into a crime against the peace and security of mankind.

17. His conclusion was that the time had not come to incorporate crimes against the environment into the draft Code—though he was not opposed to the idea, which was probably defensible politically, but not in law, of making serious and wilful offences against the environment a crime.

18. The document prepared by Mr. Tomuschat should be circulated, perhaps as an annex to the report of the Commission to the General Assembly, in so far as such a legal fiction reflected the intellectual wishes of some members of the Commission. For his own part, he found

no evidence of the existence in that respect of a crime against the peace and security of mankind or even of an international crime. By trying to mix together crimes which had been clearly and soundly established, namely, the four major crimes referred to the Drafting Committee, with such uncertain offences, the Commission would undermine the credibility and interest of the draft Code, as well as the special legal quality of those other crimes which were undoubtedly crimes that were separate from "ordinary" international crimes.

19. Mr. YANKOV said that he had always wanted the Commission to move ahead and be forward looking. He was confirmed in his view by recent world events and by the danger to mankind posed by severe, wilful damage to the environment. He had, moreover, always been in favour of the inclusion in the draft Code of separate provisions on the question of wilful and severe damage to the environment, although the Commission had discussed that matter at great length.

20. He agreed with Mr. Bowett that the population factor was not the only important aspect of the environment to be taken into consideration. The effects of environmental damage on the population were often felt only decades later and they could be serious enough to be regarded as crimes against the peace and security of mankind, particularly when they had global ramifications. He therefore suggested that the working group's restrictive approach should be somewhat modified.

21. The draft proposals by the working group, which were well designed in form and substance, should be forwarded to the Drafting Committee, particularly as it would be the last opportunity to do so before the end of the Commission's mandate in its current form. He hoped that States would make known their views on the inclusion of the issue in the draft Code, which would not be comprehensive if it did not include damage to the environment.

22. Mr. LUKASHUK said that the draft Code would be incomplete if it did not include crimes against the environment. In response to the question by Mr. Idris whether there were any examples of such crimes, he mentioned the means of destruction that were used in time of war and that his own country, which had had to strengthen the protection of nuclear, chemical and other installations, was facing in Chechnya.

23. At first glance, it was clear that crimes against the environment were serious crimes and that, as such, they should be included in the draft Code. The draft proposals by the working group were well founded and could be forwarded to the Drafting Committee for consideration and specific proposals without being discussed in plenary.

24. Mr. CRAWFORD said that he was in favour of referring the draft proposals by the working group to the Drafting Committee for consideration and of including provisions of that type in the draft Code.

25. In reply to comments made by Mr. Pellet, he said that the fact that internal law did not criminalize environmental damage was not definitive: if such crimes were serious, they should be included in the draft Code. Addi-

tional Protocol I to the Geneva Conventions of 12 August 1949 covered a wider range of conduct and it would be up to States to decide whether the draft proposals by the working group should be expanded. It was true that international environmental law was still in the process of development, but it was not in such an embryonic state as Mr. Pellet seemed to think and the Commission could easily take the step which had been proposed. With regard to the lack of *opinio juris* and the juridical purity of the category of crimes against the peace and security of mankind, he did not regard those crimes as a juridically pure category as such. The question was to determine what conduct was severe enough to be described as a crime against the peace and security of mankind. If the answer to that question involved the progressive development of international law, that was not a new thing for the Commission.

26. Mr. Bowett's example of the destruction of oil wells in Kuwait deserved consideration, but it might also be the case that the act in question had been an attempt to commit an international crime, which had failed because the consequences had been less serious than had been feared. In addition, he had a few comments to make on the actual text of the draft proposals. Under the heading of war crimes, article 22, paragraph 2, subparagraph (a) (iii) (*bis*), dealt with employing methods or means of warfare which were intended or might be expected to cause such widespread, long-term and severe damage to the natural environment that the health or survival of a population would be gravely prejudiced. As a result, the subparagraph focused on the possible effects of such acts, and that was not its intent. A way must be found to make it clear that the reference was, rather, to the use of the environment as a means of warfare against populations. That idea was clear in the second proposal, which dealt with crimes against humanity, since the reference there was to damage to the health or survival of a population as a result of damage to the environment rather than to crimes against the environment as such. He wondered whether the expression "natural environment" was justified since it might be a question of damage to the built environment, for example, dams, which could have the same consequences. He also found the use of the word "wilfully" in article 21, paragraph 2 (*h*) (*bis*), to be rather equivocal and felt that the Drafting Committee should reconsider the wording of those proposals.

27. Mr. SZEKELY said that, after having participated in the work of the working group, he was more than ever convinced that it was essential to include the question of wilful and severe damage to the environment in the draft Code. It was, of course, possible that the threshold of damage had been set too high and that the proposed provisions were too anthropocentric. It was normal for that to be the case, however, since the context was not that of environmental law but of the Code, whose goal was to ensure the protection of mankind. The problem was simply one of drafting, which the Drafting Committee might be able to solve, but the important thing was to stress the link between damage to the environment and the survival of mankind. While it was certain that what had occurred during the Gulf war had been more an attempted crime than a real crime against the environment, it was nevertheless true that it had contributed to an increase in the concentration of atmospheric pollutants, even though

the survival of the population had not been seriously affected.

28. In reply to the argument by certain members of the Commission that environmental crimes were not "ready" to be covered in a code, he noted that the provisions in question were essentially of a preventive and dissuasive nature, as, moreover, were all the provisions of criminal law, including those relating to the environment. Of what use was the Code if not to discourage criminal behaviour, whether it was a question of crimes against the environment or of other crimes? There had even been talk of a "legal fiction", perhaps with the implication that the working group had been unrealistic. But it did not seem any more realistic to believe that it was unnecessary to anticipate crimes against humanity committed through environmental damage in view of the potential for the use of the environment as a weapon against mankind. It had also been said that international environmental law was insufficiently developed, but, in fact, that law had made far more progress than might be thought, as was shown by the intense discussions to which it gave rise at the regional, subregional and bilateral levels. Nevertheless, the important thing was to recognize that the environment had become a means of blackmail and of exerting pressure on mankind at the very time when mankind was becoming increasingly aware of the need to protect that environment, a fact which was, in itself, the source of its vulnerability. He therefore considered that, if the Commission decided to forward the draft proposals to the Drafting Committee, the Committee's main task would be to set a lower threshold of seriousness than that of the current text.

29. Mr. ROSENSTOCK said that he shared the doubts which had been expressed by Mr. Pellet and which were increased by the scarcity of realistic examples of crimes of that kind that were not already covered by existing law. He found it difficult to imagine that acts such as those covered in the draft proposals could be committed without committing crimes against civilian populations, which fell within the ambit of other instruments. He therefore wondered whether it was really necessary to embark on such a project at the risk of impeding the acceptance of the existing provisions on war crimes.

30. Moreover, he found it unlikely that environmental damage should be committed in peacetime by a Government against its own population. He therefore wondered why that issue should be included among the crimes against humanity and concluded that there was no solid basis for the idea. If, however, an article absolutely must be drafted on the matter, it must be clear that the crime in question was one committed intentionally. He was nevertheless convinced that the Commission should not embark on that project.

31. Mr. BENNOUNA said that he did not really know what to make of, and was puzzled by, the draft proposals. Obviously, any method employed to prejudice the survival of a population was a crime—whether a war crime or another kind of crime—and would come within the scope of other instruments. The question was to determine whether the very fact of modifying the environment, namely, the elements that combined to create and perpetuate life, constituted a crime and so to set the

threshold above which any such modification actually became a crime. In point of fact, damage was constantly being done to the environment in all countries. The problem was therefore essentially one of threshold and he did not agree with the approach whereby the problem could be avoided by including damage to the environment among war crimes, since it was ambiguous and led nowhere. It would be better to treat a crime against the environment as a separate crime and the subject of a separate article. That crime, however, still had to be defined, and that was particularly difficult if it was not to form part of environmental law or existing substantive law. Yet without a definition, such an article would be too ambiguous. While the proposals submitted would not in his view provide any solution, the Commission might wish to study further the possibility of treating a crime against the environment as an independent crime. He remained sceptical, however, about the outcome of such an exercise.

32. Mr. Sreenivasa RAO said that a decision on the draft proposals, which dealt with an extremely important issue, could not be taken in haste. The fact that at the fiftieth session of the General Assembly the large majority of States had spoken in favour of including a provision on crimes against the environment in the draft Code did not mean that the actual position of States could be gauged. The reservations and objections entered by some of those most concerned should also be examined. The ideas put forward by Mr. Tomuschat were certainly very useful and deserved support, particularly the one regarding the use as a criterion of the wilful nature of the act committed, but his views were somewhat ambivalent. He had said, on the one hand, that the fact that the act committed came within the scope of the internal law of the country where it had been committed did not preclude its incorporation in the Code and, in that connection, had referred to human rights, and had proposed, on the other hand, that the threshold above which damage to the environment became a crime should be raised so as to prevent any act that could result in damage to the environment, of whatever kind and wherever it occurred, from immediately becoming a crime; his aim was therefore to limit the scope of the article to make it acceptable to all those who might have opposed it. All such questions should, in his own view, be studied more carefully.

33. It was also apparent from the discussion that views differed as to the analysis of the examples supplied. Some members of the Commission had emphasized the restrictive nature of the draft proposals. It was obvious too, that modern-day environmental problems could not be ignored. In his view, therefore, the Commission should allow the Drafting Committee to proceed with its work and should then revert to the question when it took up the draft Code in plenary. It would be premature for him to take an immediate decision on those proposals.

34. Mr. HE said that he was not very much in favour of devoting a separate article to serious damage to the environment, since the time was not ripe for drafting a specific environmental law which was still at the developmental stage. On the other hand, serious damage to the environment could, in his view, justifiably be listed under war crimes and crimes against humanity, the latter embracing crimes committed in times of war and in

times of peace. A proposal to that effect should therefore be referred to the Drafting Committee.

35. Mr. THIAM (Special Rapporteur) said that, at a given moment, one always had to choose between what was desirable—in the event, making serious damage to the environment a crime under the Code—and what was feasible. When the draft Code had been examined on first reading, damage to the environment had in fact been treated as a crime under war crimes and under crimes against humanity. After reading the comments and observations received from Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session,⁷ however, he had realized that it was extremely difficult, if not impossible, to draft a provision that was acceptable to everybody and he had proposed to the Commission a certain number of crimes on which there had been general agreement and which it was technically possible to formulate. The Commission, having kept four categories of crimes on second reading,⁸ had planned to include other crimes such as apartheid for which it had not wanted to make a separate provision. One member of the Commission had then again taken up the bright idea of referring in the Code to the environment, which, in his own view, was a very sensitive matter, technically speaking.

36. As matters stood, the difficulties of the task and the time available must be taken into account. It would already be a good thing if serious damage to the environment could be included in the category of war crimes, but that it would be a far more difficult exercise in the case of crimes against humanity. He would like to hear the views of the Chairman of the Drafting Committee on that point.

37. The questions raised dealt among other things with the difficulties involved in the degree of seriousness, the determination of the threshold, and the wilful element. He was convinced that to establish wilfulness in strict terms would limit the subject, since negligence would always be invoked. Even in internal law, there was what was known as “serious fault” [*faute lourde*], which constituted an offence and sometimes even a crime.

38. He would urge the Commission, which, as a body of experts, had discussed the question for years without finding a technically acceptable solution, to proceed with the utmost caution.

39. Mr. ELARABY said that he wished at the outset to state his support for the inclusion of severe damage to the environment in the Code and for referral of the issue to the Drafting Committee.

40. With regard to article 55 of Additional Protocol I, he pointed out that the Protocol had been adopted almost 20 years earlier in order to bring up to date the Geneva Conventions of 12 August 1949, which had been adopted a further 20 years earlier. There was therefore no point in arguing that the Protocol did not embrace all

the dimensions of the current discussion. Contrary to what some people asserted, the environment did not belong to the realm of science fiction or even of legal fiction. It was a reality of the twenty-first century. Everyone remembered the Gulf war, but it was also possible to envisage the use of nuclear wastes in hostilities between two countries. Serious damage to the environment must therefore be included in the Code so that it would be a forward-looking instrument, but the text must be examined more closely in order to achieve greater legal precision and a balance which reflected the facts of the times.

41. Mr. FOMBA said that, at the internal level, at least in the African countries of the subregion to which his own country belonged, having long disregarded the phenomenon of environmental damage, people were now gradually becoming aware of it and national policies were being introduced. The issue was part of the power relationship between the countries of the North and the countries of the South. The African countries were profoundly concerned about damage to the environment. For example, there were the Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of Their Transboundary Movements within Africa and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. For the African countries, therefore, it was undoubtedly desirable to have wilful and severe damage to the environment classified as a crime against the peace and security of mankind. The problem was how to translate that “desirable” into law.

42. Some members had commented that *lex lata* was insufficient, and he endorsed Mr. Pellet’s analysis of that point. However, the question was whether a step might be taken in the direction of *lex ferenda*. The issue warranted further study, but he also endorsed Mr. Benouna’s idea of separating it from the limited framework of war and seeking in some way, sticking closely, of course, to substantive law, to deal in general terms with wilful and severe damage to the environment as such. He would agree to the Commission’s sending the proposed text to the Drafting Committee for it to study that possibility.

43. Mr. MIKULKA said he agreed that extensive, lasting and severe damage to the natural environment could be considered within the framework of war crimes. However, he shared the doubts and endorsed the arguments of Mr. Pellet and Mr. Rosenstock. Such an approach would necessarily cause some duplication of work, since the scope of environmental damage was already covered by other provisions of the article on war crimes. The explanation was simple: the end target of damage to the environment and, therefore, of environmental protection was the civilian population, and damage to the environment—natural or otherwise—constituted only one of the possible means of attack. Even with respect to armed conflicts, therefore, the Commission could only take note that there was no basis for an independent crime of environmental damage.

44. Consideration of the question outside the framework of armed conflicts would be a purely academic and speculative exercise, for the existence of such a crime in

⁷ *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/448 and Add.1.

⁸ See *Yearbook* . . . 1995, vol. II (Part Two), para. 140.

peace time was quite hypothetical. The Commission could, of course, invent law and give free reign to its imagination, but in that case it might as well include, for example, genetic mutations among the crimes against humanity. Furthermore, if damage to the environment was established as an independent crime, there would be implications for the internal balance of the Code, with respect to the crime of institutionalized racial discrimination, for example, which the Commission had decided not to establish as an independent crime precisely because of its theoretical nature.

45. It would also be impossible to reconcile that approach with the Commission's decision to concentrate on the "crimes of crimes", on the four categories of crime representing more or less what was already contained in positive international law. That decision, as noted in the report of the Commission to the General Assembly on the work of its forty-seventh session,⁹ had obtained the support of the Sixth Committee and it provided the basis for the hope that the draft Code would be adopted by consensus. It also allowed people to regard the Code as a statement of customary international law which would be authoritative and therefore applicable by international courts. On the other hand, if the Commission wanted to make environmental damage a crime *de lege lata*, it would necessarily have to produce a text in the form of a convention, since the Code would then consist partly of positive law and partly of the development of the law. The Drafting Committee should be asked to examine means of incorporating environmental damage in the existing article on war crimes.

46. Mr. de SARAM said that, emotionally, everybody was for the environment and against damage to it. The difficulty was to translate emotions into precise legal language, especially in view of the need to produce wording capable of commanding a consensus.

47. First of all, he wondered how the express limitation to the "natural" environment could be justified and, secondly, whether the notion of environmental damage should be restricted to the relatively narrow category of war crimes or crimes against humanity. In theory, the notion would warrant at least a separate article in the Code.

48. In any event, the Commission must acknowledge that the topic was a broad one and involved specific problems in a field where perhaps not all of its members had a perfect grasp of all the scientific or technical aspects. Furthermore, the Commission must ensure that the provisions which it adopted were consistent with the law applicable elsewhere. Referring the matter to the Drafting Committee would therefore be an unfortunate decision at the crucial stage which the Commission had reached, that is to say the end of its second reading of the draft Code, although it still had to review the whole set of draft articles.

49. For those general and practical reasons, he suggested that the Commission should mention in its report to the General Assembly the points on which it had reached a consensus. The other issues, including the environment, might be dealt with in additional protocols which he hoped would subsequently expand the scope of

acts regarded as crimes against the peace and security of mankind.

50. Mr. YAMADA said that it was technically correct to argue that, although the acts specified in the text proposed by the working group for inclusion in article 22 (War crimes), a text taken from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949, had not been defined as a serious violation of the Protocol, the magnitude and severity of the crimes in question justified the text's inclusion in article 22 of the draft Code. It was, of course, also possible to take the view that those crimes were already covered by some provisions of article 22, but the constituent elements of those provisions were somewhat different from those of the text proposed by the working group and that difference was indeed one of the reasons why Additional Protocol I contained a provision—in article 55—separate from the provisions of article 85 of the Protocol.

51. With regard to the classification of crimes against the environment as crimes against humanity, it seemed preferable to include them in article 21 of the draft Code, notwithstanding the importance of the protection of the environment. In view of the need to complete the second reading of the draft Code, the working group's proposals should be sent as quickly as possible to the Drafting Committee and the members of the Commission would then be able to give their final opinions when the Drafting Committee had reported on the matter.

52. The CHAIRMAN, speaking as a member of the Commission, said that the wording of the text proposed by the working group was much more specific than that of the original language of article 26, which was too broad and vague, so that the problem did warrant further thought.

53. Speaking as Chairman, he summed up the range of opinions expressed during the discussion and suggested that the working group's proposals should be sent to the Drafting Committee with the request that it should examine all the arguments put forward and determine whether it was possible to draft provisions for inclusion in the Code. The Commission could then have a substantive discussion and take a decision, by consensus or otherwise.

54. Mr. PELLET said that it was for the Commission to decide in the first place whether the proposed provisions should be included in the draft Code, for the Drafting Committee's task, as its name indicated, was to put the finishing touches to the texts submitted to it. For his part, he would be willing at the very most to agree to referring the text proposed for inclusion in article 22 to the Drafting Committee, provided that the two other proposed texts were abandoned.

55. Mr. ROSENSTOCK and Mr. BENNOUNA said that they were of the same opinion as Mr. Pellet.

56. Mr. THIAM (Special Rapporteur) said that the structure of the draft Code included war crimes, on the one hand, and crimes against humanity, on the other. Accordingly, those two elements could also be separated in the proposals under consideration. The provision to be included under war crimes did not appear to give rise to any major objection, whereas its inclusion among the crimes against humanity was causing such difficulties that even a decision to that effect might be taken by only

⁹ Ibid.

a tiny majority and, therefore, have only very limited authority. Accordingly, the most reasonable solution seemed to be to send to the Drafting Committee only the proposal concerning article 22.

57. Mr. EIRIKSSON said that the working group's proposals constituted a whole. However, the independent provision (art. 26) gave rise to very strong objections, but the referral only of the text to be included in article 22 was also encountering some opposition. Nevertheless, there was nothing to prevent both the text for inclusion in article 22 and the one for article 21 being sent to the Drafting Committee.

58. Mr. TOMUSCHAT said that decisions to send texts to the Drafting Committee were traditionally taken by consensus, but there was no obligation to do so. The question of crimes against the environment was not a new one, for such crimes had already been included in the draft Code adopted in 1991.¹⁰ The Commission might in fact give itself an extra week before reaching a decision, but the working group's proposals would then have to be referred to the Drafting Committee.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he concluded from the discussion that the inclusion of crimes against the environment in the category of war crimes was quite acceptable. It would in reality merely make explicit what was already implicit. Assimilation to a war crime would even render superfluous the condition that the health or survival of the population was affected, although the expansion of the scope of that provision proposed by Mr. Bowett was also acceptable. But inclusion in the category of crimes against humanity remained more problematical, and the formula of a separate article (art. 26) seemed to be excluded.

60. The Commission had an irritating tendency to automatically send to the Drafting Committee the texts proposed by special rapporteurs or working groups, at the risk of transferring to the Committee, which was not necessarily representative, discussions which should properly be conducted by the Commission in plenary. Perhaps it would in fact be wiser to take an extra week, which would have the additional advantage of not disturbing the three weeks of intensive work planned for the Drafting Committee.

61. Mr. SZEKELY said that the issues raised by the working group's proposals were very important and that the Commission should not therefore take a decision, come what may, when members still had much to say on the subject.

62. The CHAIRMAN suggested that the Commission should leave aside draft article 26 and take a decision at the following meeting on referral to the Drafting Committee of the text to be included in article 22 and then on referral of the text to be included in article 21, in that order.

The meeting rose at 1.10 p.m.

¹⁰ See 2427th meeting, footnote 8.

2431st MEETING

Tuesday, 21 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIU

Present: Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC (XLVIII)/DC/CRD.3²)

[Agenda item 3]

1. The CHAIRMAN said that the Commission should take a decision on the question of wilful and severe damage to the environment. On the basis of the proposals of the working group on the issue of wilful and severe damage to the environment,³ he suggested that the members should consider whether to refer the issue to the Drafting Committee in the context of article 22 (War crimes), or in the context of article 21 (Crimes against humanity). He said that if he heard no objection, he would take it that the Commission agreed to consider each option separately.

It was so agreed.

2. The CHAIRMAN invited members to decide by a vote whether to refer the issue of wilful and severe damage to the environment to the Drafting Committee in the context of article 22.

3. Mr. LUKASHUK said that he had given much thought to the matter and, the more he had thought, the darker his thoughts had become. Indeed, nature itself seemed to have been pouring tears over defenceless Geneva. Protection of the environment had come to the forefront of the tasks facing homo sapiens in recent years, and the Commission was therefore bound to face up to the challenge. It was unlikely that anyone could explain to ordinary mortals why misuse of the Red Cross flag was considered to be a serious crime while damage to the environment was not so high up the list—jurists had their own logic.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

³ See 2430th meeting, paragraph 3.

4. The CHAIRMAN said that Mr. Lukashuk's remarks were interesting, but the Commission was in the process of taking a decision. Perhaps Mr. Lukashuk might explain his vote following the vote.

5. Mr. LUKASHUK said that his first point had been precisely that crimes against the environment should be included among war crimes. He would take up his second point following the vote.

6. Mr. THIAM (Special Rapporteur) reminded members that crimes against the environment had been under discussion for years. There was no point in reopening a general debate.

The suggestion by the Chairman to refer the issue of wilful and severe damage to the environment to the Drafting Committee in the context of war crimes was adopted by 12 votes to 1, with 4 abstentions.

7. Mr. SZEKELY said that the working group's draft had contained three proposals, the third being an alternative formulation whereby wilful and severe damage to the environment would be dealt with in a separate article, namely article 26. Members should be afforded the opportunity to vote on all three proposals.

8. The CHAIRMAN said that his suggestion had clearly referred only to the first formulation of the working group's second proposal. In other words, the issue would be covered by crimes against humanity, in article 21.

9. Mr. SZEKELY said that, as members had spent the weekend reflecting on the working group's proposals, they should be allowed to take a decision on the proposals as a whole.

10. Mr. PELLET said that the consensus at the previous meeting had been to disregard the working group's alternative formulation. It was extraordinary that the question was being raised when a vote had already been taken. Had he known that was to happen, he would have voted against the proposal.

11. Mr. THIAM (Special Rapporteur) said that he was opposed to crimes against the environment being treated in a separate article.

12. Mr. ROSENSTOCK said that the Chairman's suggestion had clearly referred to article 22 and article 21, and not article 26. Procedurally speaking, a decision had been taken. Mr. Pellet's abstention and his own, which must be considered as a *beau geste* to limit division in the Commission, had been predicated on that situation. For the situation to be altered, the Chairman's ruling must be challenged and overturned, failing which the Commission was committed to its decision.

13. Mr. VILLAGRÁN KRAMER said that he had understood the Chairman's suggestion as referring to both formulations of the working group's second proposal. He would like the record to show that he did not believe a procedural issue should prevent the Drafting Committee from examining the options that were in the best interests of mankind.

14. The CHAIRMAN said that he believed the suggestion had been quite clear—there had been no mention of article 26. He invited the members to vote on whether to refer the issue of wilful and severe damage to the environment to the Drafting Committee in the context of article 21.

There were 9 votes in favour, 9 against and 2 abstentions.

The suggestion by the Chairman to refer the issue of wilful and severe damage to the environment to the Drafting Committee in the context of crimes against humanity was not adopted.

The meeting rose at 10.45 a.m.

2432nd MEETING

Friday, 24 May 1996, at 10.55 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (continued)*

[Agenda item 1]

1. The CHAIRMAN, welcomed Mr. Corell, Under-Secretary-General, the Legal Counsel, representative of the Secretary-General, who would address the Planning Group, which was to meet immediately after the plenary meeting. He said that the Enlarged Bureau had met earlier to draw up a programme of work for the three-week period from 28 May to 14 June 1996. He then read out the Enlarged Bureau's proposals which had also been determined by technical constraints and, in particular, by the fact that the Drafting Committee's report on the draft Code of Crimes against the Peace and Security of Mankind would not be available in all the official languages before 6 June. If there was no objection, he would take it

* Resumed from the 2430th meeting.

that the Commission agreed to approve the Enlarged Bureau's proposed programme of work.

It was so agreed.

The meeting rose at 11.15 a.m.

2433rd MEETING

Tuesday, 28 May 1996, at 10.15 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN invited Mr. Schade, observer for the European Committee on Legal Cooperation, to address the Commission.
2. Mr. SCHADE (Observer for the European Committee on Legal Cooperation) said that, with the recent addition of the Russian Federation, the former Yugoslav Republic of Macedonia and Ukraine, the Council of Europe currently had 38 member States. Croatia was expected to join in late 1996, Armenia, Belarus and Bosnia and Herzegovina had applied for full membership, and Armenia, Azerbaijan and Georgia had been invited to participate as observers in the work of the European Committee on Legal Cooperation (CDCJ) of the Council of Europe. The development and consolidation of democratic security in the countries of central and eastern Europe were the principal activities of the CDCJ Demo-Droit and Themis programmes.
3. The final text of the draft European convention on nationality should be adopted at the next meeting of the Committee of Experts on Nationality in July 1996 and by CDCJ in late 1996. The Committee of Ministers of the Council of Europe would probably open the conven-

tion for signature in the first half of 1997. The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality was still in force, but numerous developments in western Europe had affected nationality, *inter alia*, labour migrations between States, the need for integration of permanent residents, the growing number of mixed marriages, freedom of movement between European Union member States, and nationality in the context of State succession. The new convention incorporated the existing principles and rules and dealt with all major aspects of nationality, including acquisition, loss, recovery, procedural rights, multiple nationality, military obligations for multiple nationals, nationality in the context of State succession and cooperation between States parties. It did not, however, cover conflicts of law, nor did it deal with matters of private law, because the rules were too complex and it was impossible to achieve consensus. The draft convention allowed for the fact that, while the countries of western and central Europe tended to tolerate multiple nationality, the citizenship legislation of eastern Europe did not. The convention neither prevented nor favoured multiple nationality, leaving the choice to States.

4. With regard to State succession and nationality, the draft covered all cases of legal State succession and State restoration. There had been considerable discussion of whether to include restored States, and a recent compromise had resulted in the decision that the convention should deal with all issues defined by international law but should leave it to public international law, and to bodies like the United Nations and the Commission, to cover the situations of specific countries, such as the Baltic States. The major purpose of the new convention was to avoid statelessness in cases of transfer of territory. Successor States were encouraged to settle nationality issues by agreement and were required to take account of the rule of law and of human rights in granting or retaining nationality and to bear in mind the wishes of the people concerned. Nationals of a predecessor State who had become non-nationals and permanent residents of the successor State would be given equal treatment with nationals in regard to social and economic rights, so that they could lead a normal life as they had done before the succession of States had occurred. The drafting group on the new convention had taken into account the first report on State succession and its impact on the nationality of natural and legal persons¹ of the Commission's Special Rapporteur, Mr. Mikulka, and looked forward to the continued work of the Commission in that area.

5. Since the forty-seventh session of the Commission in 1995, the CDCJ and the Committee of Ministers of the Council of Europe had adopted the European Convention on the exercise of children's rights, which had been opened for signature on 25 January 1996 and had been signed by seven countries to date. Although the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment had been opened for signature in 1993, it had yet to enter into force and had been signed by only eight countries. The

¹ *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/467.

chances of eventual failure or entry into force were about equal.

6. The Committee of Experts on Family Law would be holding a colloquium on European law in Malta in 1997 on legal problems relating to parentage. Following a decision of the Committee of Ministers in December 1994, a group of specialists on incapacitated and other vulnerable adults had been created to deal with the protection of such adults against human rights abuses.

7. In January 1996, the Committee of Ministers had authorized the Multidisciplinary Group on Corruption to elaborate a draft convention and also a framework convention on corruption. The framework convention set out the major principles in the fight against corruption and covered bribery of foreign officials, tax deductibility of bribes paid abroad, international cooperation and measures to be taken at the national and international levels. The two draft conventions could be viewed either as alternatives or as complementary to one another. The Multidisciplinary Group was also considering a European code of conduct for civil servants, which would be voluntary rather than binding.

8. The Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe held two annual meetings and was regularly attended by Mr. Eiriksson, a member of the Commission. It had discussed the draft statute for an international criminal court, particularly the definition of the core crimes: genocide, serious violations of the laws and customs applicable in armed conflict and crimes against humanity, and the possibility of including the crime of aggression. The question of the complementarity of national courts and an international criminal court and of the latter court's potential jurisdiction, along with the role of the Security Council, would be considered further. The CAHDI hoped that the final text of the draft statute would be adopted at a diplomatic conference as soon as possible.

9. The CAHDI welcomed the Commission's work on reservations to treaties, in particular human rights treaties. It had invited all its delegations to consider the topic, including reservations to the human rights instruments of the Council of Europe, and planned to hold discussions on the matter at its meeting in September 1996.

10. The CHAIRMAN thanked the Observer for CDCJ and said that the work of CDCJ was of great interest to the Commission. International law must take account of regional developments, which might be more advanced than those at the broader international level. Indeed, the Council of Europe seemed to be ahead of the Commission with regard to issues of nationality, the environment and corruption.

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

11. The CHAIRMAN invited Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

12. Mr. TANG Chengyuan (Observer for the Asian-African Legal Consultative Committee) said that the

Committee had been pleased to welcome Mr. Idris to its thirty-fifth session in Manila in March 1996 and it looked forward to the Chairman's presence at its meeting of the Legal Advisers of member States of the Asian-African Legal Consultative Committee (AALCC) during the next session of the General Assembly.

13. The items on the Commission's agenda were of particular interest to the Governments of Africa and Asia. At its thirty-third session in 1994, AALCC had welcomed the Commission's decision to take up reservations to treaties and State succession and its impact on the nationality of natural and legal persons. The international climate for consideration of those topics was propitious.

14. It was to be hoped that the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility would be completed at the current session and that the Commission would include in its agenda the topic of diplomatic protection and initiate a feasibility study on the law of the environment, as proposed by the Commission at its previous session. An item on the report on the work of the International Law Commission at its forty-eighth session would be considered at the thirty-sixth session of AALCC in 1997.

15. Substantive items under consideration by the Committee included one on the Decade of International Law, which had been on its agenda since it had been proclaimed by the United Nations General Assembly.² The same item also formed part of the Committee secretariat's current programme of work. He would forward to the United Nations Legal Counsel as soon as possible a summary of the activities undertaken by the Committee with a view to achieving the objectives laid down for the current phase of the Decade.

16. At its thirty-fifth session, the Committee had considered developments relating to the law of the sea, and in particular the work of the Assembly of the International Sea-Bed Authority (ISBA), the meeting of States parties to the United Nations Convention on the Law of the Sea, the United Nations Conference on Straddling Fish Stocks³ and Highly Migratory Fish Stocks and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.⁴ It had also taken note with satisfaction of the entry into force in November 1994 of the United Nations Convention on the Law of the Sea, the establishment of ISBA, and the decision on the establishment of the International Tribunal for the Law of the Sea. A mark of the significance the Committee attached to the law of the sea was that it urged full participation by member States in ISBA in order to safeguard the legitimate interests of the developing countries and to ensure the development of the principle of the common heritage of mankind. The Committee had reminded member States of the need to adopt a common policy for

² General Assembly resolution 44/23.

³ A/CONF.164/38.

⁴ A/CONF.164/37.

the interim period before commercial exploitation of deep sea-bed minerals became feasible. The Committee secretariat would continue to cooperate with international organizations competent in ocean and marine affairs and would endeavour to assist member States in their representation at ISBA.

17. AALCC had been one of the first regional organizations to examine the question of the status and treatment of refugees. In that connection, it had decided to organize, in Bangkok towards the end of 1996 and with the financial and technical assistance of the United Nations High Commissioner for Refugees, a seminar on the status and treatment of refugees to commemorate the thirtieth anniversary of the Principles concerning treatment of refugees, adopted at the Committee's eighth session, held in Bangkok in 1966. The model legislation on the status and treatment of refugees and the question of the establishment of safety zones for displaced persons in their country of origin remained on the secretariat's programme of work.

18. In January 1996 the AALCC secretariat had organized a seminar on the work and role of ICJ, in cooperation with the Indian Society of International Law and the International Jurists Organization, Asia. The Seminar had been inaugurated by the Chief Justice of India, Mr. Ahmadi, and had been attended by participants from 22 member States of AALCC and representatives from 9 non-member States. The twin objectives of the Seminar had been to commemorate the fiftieth anniversary of ICJ and to promote the United Nations Decade of International Law. Mr. Weeramantry, a judge of ICJ had delivered the keynote address.

19. Also at its thirty-fifth session, the Committee had organized a special meeting on the establishment of an international criminal court, which had provided a forum for an informal exchange of views on the articles of the draft statute for an international criminal court as adopted by the Commission⁵ and on the work of the Ad Hoc Committee on the Establishment of an International Criminal Court.⁶ The proceedings of the special meeting had been transmitted to the Chairman of the Preparatory Committee on the Establishment of an International Criminal Court in March 1996.

20. Work was in progress on a wide variety of other subjects, including the deportation of Palestinians as a violation of international law and in particular of the Geneva Conventions of 12 August 1949; the legal protection of migrant workers; the United Nations Conference on Environment and Development and its follow-up;⁷ the extradition of fugitive offenders; the debt burden of developing countries; and international trade law matters. At its thirty-fifth session, AALCC had been requested to consider a secretariat study on WTO as a framework agreement and code of conduct for world trade. All those items would also be considered at its thirty-sixth session, to be held in Tehran in 1997.

21. Over the years AALCC had become a major forum for international cooperation, and its programme had been attuned to the needs of its expanding membership. At the thirty-fifth session it had approved a proposal to commemorate the fortieth anniversary of its Constitution in November 1996 by organizing a seminar that would be relevant to the objectives of the United Nations Decade of International Law. In that connection, the secretariat proposed to issue a special publication and he would request scholars, officials from member States of AALCC and international organizations to contribute articles on international law. He trusted that his appeal for such articles would be heard.

22. On behalf of AALCC, he extended an invitation to the Chairman of the Commission to attend the Committee's next session, in Tehran in 1997.

23. The CHAIRMAN, thanking the observer for the European Committee on Legal Cooperation and the observer for Asian-African Legal Consultative Committee for their statements, said he could assure them that the Commission was making good progress towards completing its work on a number of topics with which it had been dealing for some time. It was apparent from both statements that a considerable amount of material awaited codification and it should provide the Commission and the Planning Group with food for thought.

24. Mr. VILLAGRÁN KRAMER said that he had been struck by the extent to which the work done by the European Committee on Legal Cooperation, on the one hand, and the Commission, on the other, coincided. Accordingly, there should be a much speedier feedback of information about the remarkable work being done at the Council of Europe, particularly on nationality and on reservations to treaties, and in general greater interaction between regional legal committees and the Commission when they covered the same subjects.

25. He had also been struck by the expanding membership of the Council of Europe and by the fact that an extraordinary number of countries had accepted the rules laid down when the Council of Europe had been established. It was indicative of a very high degree of commitment, of a radical change of structure at the international level, and of the wish of European countries to reinforce the primacy of the rule of law. The rest of the world should be aware of the great strides being made by Europe, particularly in the legal field.

26. It was particularly gratifying to see that the concept of nationality was undergoing a fundamental change in the European scheme of things. For Europeans, nationality was not a strait-jacket, whereas in Latin America nationality was attributed *ipso jure*, on the basis of *jus soli* and *jus sanguinis*, and that was an end to it. Latin America allowed only for dual nationality, while Europe was contemplating the new concept of multiple nationality. Reality showed that, in the modern world, there was indeed room for such a concept and he would be grateful if the observer for the European Committee on Legal Cooperation could provide him with a draft of what had already been achieved in that area so that he could transmit it to the Inter-America Juridical Committee for examination.

27. While reservations to treaties still caused considerable concern in Europe, the matter had long since been

⁵ See *Yearbook . . . 1994*, vol. II (Part Two), p. 26, para. 91.

⁶ See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22)*).

⁷ Held at Rio de Janeiro, Brazil, from 3 to 14 June 1992.

settled in Latin America. Nonetheless, he trusted that developments in Europe would lead to a wider understanding of the European approach and to the ultimate conviction, among Latin Americans, that useful work was being done.

28. Equally gratifying was the work being carried out by AALCC. Not only did lawyers from ministries of foreign affairs but also ministers of justice participate in the Committee's meetings. When persons of that rank engaged in legal analysis it was bound to vest the particular problem with special relevance and to ensure that the legal aspects were taken into account in the decision-making process. In examining the draft statute for an international criminal court at such a level, AALCC demonstrated that it was not just a United Nations draft but one of vital importance to the world at large. The numerous items on the Committee's agenda were indicative of a firm resolve to solve the many acute problems of international law.

29. Mr. LUKASHUK said that there was unanimous support for the Commission's collaboration with the European Committee on Legal Cooperation and AALCC, which worked in many of the same areas. At the same time, it was important for the Commission and other legal bodies working on the codification of international law not to lose sight of one of the main problems, namely, customary international law and of the colossal changes that law had undergone in recent decades. Those changes had come about because the hopes once placed in multilateral conventions had not been realized and the functions of contemporary international law therefore now relied on custom. Moreover, the actual mechanism of forming custom had changed, with the centre of gravity moving away from practice to *opinio juris*. Norms of general international law, of a *jus cogens* nature, were created and adopted by the international community as a whole, which meant that the unanimous agreement of all States was not necessary and that a representative majority was enough. All of that was evidence that custom had become extremely important and that very significant changes had taken place in the way it was formed and applied. Now that cooperation had been organized between the Commission and the European, Asian and African regions, it should be possible to deal successfully with the codification of those norms involving the formation and implementation of custom.

The meeting rose at 11.25 a.m.

2434th MEETING

Friday, 31 May 1996, at 10.15 a.m.

Chairman: Mr. Robert ROSENSTOCK

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson,

Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (continued)*

[Agenda item 1]

1. The CHAIRMAN, speaking as Chairman of the Planning Group, said that it had received an excellent report from the working group convened by Mr. Crawford. It had considered four of the topics dealt with in the report, so that the working group would be able to review the corresponding part of the text in the light of the comments made. It would be a good thing if the Planning Group could complete the first reading of the document rapidly in order to be able to report back to the Commission. That might involve a slight change in the proposed schedule of work for the next two weeks.

2. Mr. ARANGIO-RUIZ (Special Rapporteur on State responsibility) stressed that the proposed change in schedule should not entail a reduction in the number of Drafting Committee meetings to be spent on the topic of State responsibility. In that connection, he explained that part of the eighth report (A/CN.4/476 and Add.1)¹ dealt with international crimes of States or, in other words, with draft articles 15 to 20 of part two which were referred to the Drafting Committee at the preceding session.² Another part of the report dealt with relatively minor problems relating to draft articles which were "pending"—articles 11 and 12—and would contain some considerations on fault, satisfaction and the question of proportionality covered by draft article 13.³ Other draft articles, such as so-called article 5 *bis*,⁴ were pending in the Drafting Committee, but had not been discussed in the eighth report.

3. That meant that, even before the eighth report on State responsibility was introduced to the Commission, the Drafting Committee could begin its work on the topic by drawing up a schedule and possibly starting to consider article 5 *bis*, as well as articles 15 to 20 proposed in the seventh report.⁵

4. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), reporting on the progress of the Drafting Committee's work, said that the second-reading *toilettage* of the draft Code of Crimes against the Peace and Security of Mankind was practically finished.

* Resumed from the 2432nd meeting.

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² See *Yearbook . . . 1995*, vol. II (Part Two), paras. 236-237.

³ *Ibid.*, paras. 340-343.

⁴ *Ibid.*, para. 235.

⁵ See *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2.

5. He recalled that the Drafting Committee would have a different composition for the consideration of the draft articles on State responsibility.

The meeting rose at 10.45 a.m.

2435th MEETING

Tuesday, 4 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State succession and its impact on the nationality of natural and legal persons (A/CN.4/472/Add.1, sect. B, A/CN.4/474¹)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. MIKULKA (Special Rapporteur), introducing his second report on State succession and its impact on the nationality of natural and legal persons (A/CN.4/474), said that the object of the report was to enable the Commission to complete the preliminary study of the topic and thus comply with the request contained in paragraph 6 of General Assembly resolution 49/51 and reiterated in paragraph 4 of Assembly resolution 50/45. The Commission had decided to reconvene the Working Group on State succession and its impact on the nationality of natural and legal persons at the current session² and, having already explored in some detail the question of the nationality of natural persons, the Working Group currently had before it the task of considering—still, of course, in a preliminary fashion—the nationality of legal persons, the choices open to the Commission when it came to embark on the substantive study of the topic, and a possible timetable. The second report was designed to facilitate that task.

2. He said that, in accordance with the intention he had expressed when summing up the debate at the previous session, the report contained three substantive sections, not counting the introduction. Chapter I, on the nationality of natural persons, attempted to summarize the results of work already done on that aspect of the topic, to classify the problems in broad categories and to suggest material for analysis at a later stage of the Commission's work. Since the chapter took up the recommendations made by the Working Group at the previous session,³ there was no reason for the Working Group to consider the subject-matter at the current one.

3. In his view, the Working Group should currently focus principally on the question of the nationality of legal persons, dealt with in chapter II of the second report. He hoped that, as at the previous session, the Working Group would discuss in an open atmosphere the advantages and drawbacks of considering that side to the topic and, as a result, be in a position to make concrete suggestions. He none the less wished to emphasize that it was not his intention to discourage immediate comments by members of the Commission on that part of the report; on the contrary, opinions expressed in plenary meetings would be of great value to the Working Group.

4. In response to criticisms on the first report,⁴ he had thought it useful to give a broad picture of State practice with regard to nationality in the context of State succession. Examples of such practice accounted for almost one half of the second report. In choosing them he had tried to maintain a certain balance between those of nineteenth century practice, of the period between the two world wars, of the decolonization period and of more recent years. He had also endeavoured to find examples of practice relating to different types of territorial changes and to all continents. The task had not been easy and he did not claim that the results were exhaustive; any further examples that shed light upon the problem would be most useful. While collecting instances of State practice, he had refrained from analysing them, believing that such an exercise would form part of the substantive study the Commission would undertake if invited to do so by the General Assembly.

5. The reactions in the Sixth Committee, where the Commission's progress on the topic at its previous session had been generally welcomed, were discussed in the relevant parts of the second report. In that connection, he wished to thank all Governments which had responded to the Secretary-General's invitation to submit documentation concerning State succession and its impact on the nationality of natural and legal persons, in accordance with the request contained in General Assembly resolution 50/45.

6. With regard to chapter I, he again stressed the importance he attached to the views expressed in the Sixth Committee on each of the specific issues discussed in section B. On the first of those issues—the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State succession—delegations

¹ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

² See *Yearbook* . . . 1995, vol. II (Part Two), para. 147.

³ *Ibid.*, annex.

⁴ *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/467.

in the Sixth Committee had generally welcomed the Working Group's position that negotiations should be aimed at the prevention of statelessness. Doubts had none the less been raised as to whether the simple obligation to negotiate was sufficient to ensure that the relevant problems would actually be resolved. For some delegations, the main problem had seemed to be the source of the obligation in question and its legal nature, the view being expressed that, however desirable such an obligation might be, it did not appear to be incumbent upon States under positive general international law. In that connection, he drew attention to the European convention on nationality currently being drafted in the Council of Europe.

7. The preliminary comments in the Sixth Committee on the second issue—granting of the nationality of the successor State—were briefly summarized in chapter II, section B, of the report. Some representatives had explicitly or implicitly supported the fundamental assumption that the successor State was under an obligation to grant its nationality to a core body of its population, but it had not been easy for him to draw more specific conclusions. On the third issue—withdrawal or loss of the nationality of the predecessor State—some delegations had endorsed the Working Group's preliminary conclusion that the nationality of a number of categories of individuals should not be affected by State succession. On the other hand, no comments had been made on the right of the predecessor State to withdraw its nationality from certain categories of persons and the conditions in which such withdrawal could be made. The Sixth Committee's more wide-ranging debate on the fourth issue, that of the right of option, was briefly summarized in chapter II, section B. Some representatives had considered that contemporary international law recognized such a right, whereas others had held that the concept lay in the realm of progressive development.

8. As to the fifth issue, that of criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option, one representative in the Sixth Committee had commented that too much attention had been given to categorization. Actually, the classification used by the Working Group more or less coincided with that most frequently used in State practice. Divergent opinions had been expressed in the Sixth Committee about the preference to be given to the various criteria. For example, one delegation had emphasized the advantages, in the case of a federal predecessor State composed of entities which attributed a secondary nationality, of applying the criterion of such nationality. Other representatives had stressed the importance of habitual residence in the successor State. Indeed, the debate both in the Sixth Committee and in the Commission sometimes showed a tendency to confuse two different things, namely the question of using a particular criterion as an analytical tool to check certain hypotheses and the question of whether or not it was desirable for a particular criterion to be used by States in their practice. The distinction was an important one and should be maintained.

9. On the sixth issue, that of non-discrimination, representatives in the Sixth Committee had agreed with the Working Group's preliminary conclusion that the appli-

cation of criteria such as ethnicity, religion or language in refusing to grant nationality to categories of persons who would otherwise be entitled thereto was a discriminatory practice and therefore unacceptable. Lastly, on the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality, members of the Sixth Committee had expressed the view that the question whether any relevant principles could be invoked by individuals or whether the debate should concentrate solely on the question of State responsibility merited further consideration.

10. It could generally be inferred that, as far as the problem of nationality of natural persons was concerned, his first report, the report of the Working Group⁵ and the debates in the Commission and the Sixth Committee provided all the elements necessary to complete a preliminary study of that aspect of the topic.

11. That was not yet the case with the other aspect, that is to say the nationality of legal persons. In chapter II, section A, of his second report, he had attempted to outline the scope and characteristics of the matter, which was further complicated by the many forms that legal persons could take. Generally speaking, the problem of the nationality of legal persons arose mainly in the areas of conflicts of laws, the law on aliens, diplomatic protection and in relation to State responsibility. Only the last subsection of section A dealt with the impact of States succession on the nationality of legal persons and thus had a direct bearing on the topic under consideration; the other subsections were intended to present the problem as whole in general terms and to bring out its many and considerable complexities. The comments of members on the various points raised in chapter II, section A, would be particularly appreciated.

12. In 1995, the reactions of the Commission and of the Sixth Committee had been somewhat varied. Whereas some had been in favour of a more in-depth consideration of that facet of the issue, others had been more hesitant. At that session, he had expressed his own preference for putting that area of the problem aside and for focusing on the nationality of natural persons, but as the Commission had requested more information for the debate, he had felt compelled to respond accordingly, and it was to be hoped that the Working Group currently had sufficient material for study and could present more detailed proposals to the Commission.

13. With regard to chapter III, containing recommendations concerning the future work on the topic as a whole, and assuming that no other proposals were forthcoming from the Working Group, he suggested dividing the subject into two parts. He would focus first on the nationality of natural persons, and the Commission might then turn to the rule of the continuity of nationality at a later date in the framework of the topic of diplomatic protection, especially as it was considering proposing that topic as a future agenda item.

14. Concerning working methods, he had nothing to add to what he had already said in his first report with regard to the balance between codification and progres-

⁵ See footnote 3 above.

sive development of international law on the subject, terminology used, categories of State succession and the scope of the problem. When the Working Group did its work on legal persons, it could review those elements and make proposals to the Commission.

15. As to the form which the outcome of the work might take, he had already indicated that he was in favour of elaborating a declaratory instrument made up of articles together with commentaries. If the Commission opted for such an instrument, it might give more time to the subject at the next session, particularly as there would be fewer items on the agenda. In view of the international community's current interest in the subject, it would not be wise for consideration to drag on for too long. The Commission might be able to finish its first reading of all the articles and the commentaries in the course of a single year and would then be able to submit them to the General Assembly. That possibility might be discussed in the Working Group.

16. In preparing the second report, in which connection he expressed his appreciation to the secretariat for its support, he had been encouraged by the progress made on the question of nationality in the Council of Europe and UNHCR. It was heartening to see that the Commission's work had met with a response in other international bodies.

17. Mr. BENNOUNA, thanking the Special Rapporteur for his excellent and well-documented second report, said he agreed on the need to aim for a declaratory instrument. The Commission was in an area which, despite the criticism levelled at the term, consisted of "soft law", namely a general framework and a set of guidelines for States. The Special Rapporteur was right to say in his report that a question of human rights was involved; natural persons who were the victims of changes in the territorial configuration of States should not be left without a nationality.

18. It was much less clear, on the other hand, to understand the value of venturing into the area of the nationality of legal persons and succession. The Special Rapporteur had focused more on nationality than on succession, leaving out a number of issues which had an enormous impact on the subject, for example the protection of investments and agreements on dispute settlement in that regard, not to mention the Convention on the settlement of investment disputes between States and nationals of other States. Nor had he touched on the succession of States to assets or debts. One could cite as an example the case of a company that had debts towards a State which no longer existed or which had split in two. The Special Rapporteur had actually raised one point: the impact of the change of the nationality of natural persons on the structure of legal persons. Personally, however, he saw no interest in touching upon succession for legal persons, which came under another framework and which, in fact, was very easy to settle. Either the headquarters were in the successor State in the event of secession or, in the case of two States that merged, in the new State, he did not see where the problem was? In any event, a company, which, unlike natural persons, was not bound by emotional ties, could change its headquarters at any time. Furthermore, transnational corporations

were so interlocked and complex that it was difficult to imagine how criteria could be set in that area.

19. In his view, it would be wiser to focus solely on natural persons. Once finished with that issue, the Commission could then decide whether or not it wished to move on to the question of legal persons.

20. Mr. Sreenivasa RAO, joining Mr. Bennouna in congratulating the Special Rapporteur on an excellent report, said he tended to agree that an effort should be made to achieve as much progress as possible at the next session on what was a topical subject, although it might not be possible to cover the entire set of articles at one go. The topic should focus on resolving issues of succession with an impact on nationality. Nationality per se was not a matter that concerned the Commission. There was no need to embark upon the intractable question of nationality as conferred by States on persons they considered as their citizens. Accordingly, he hoped that the Working Group would confine itself to the subject of State succession, and not nationality.

21. Mr. de SARAM, thanking the Special Rapporteur for an illuminating report, said that he was not sure whether the impact of State succession on the nationality of natural persons was limited to consideration of whether the nationality of a natural person had been lost or changed or whether it also extended to the consequences which flowed from such a loss or change and, if so, whether it was a matter with which the Commission needed to deal.

22. A second, somewhat less troubling aspect, was not so much the criteria to be taken into account in determining what particular nationality should be accorded to a natural person in the event of loss or change of nationality because of State succession as State practice in that regard was sufficient. He was unclear as to whether, in the absence of treaty provisions, the Commission could conclude *de lege lata* that there was an obligation on one State to consult another. Consultations always took place in context, and sometimes the context was a very difficult one. Although he saw the necessity in particular situations for consultations to take place, he was not certain it could be said as a rule that, in the absence of a treaty agreement, there was a general obligation to consult. The Special Rapporteur had raised that point and had said that if it was not a *de lege lata* provision, one could move into progressive development; he had no quarrel with that. The answer to that question would determine to a large extent the ultimate form of the instrument being prepared and also touched on a question that the Special Rapporteur had rightly raised, that of State responsibility for not pursuing a particular course of action. It was to be hoped that the Working Group would be able to shed some light on his questions.

23. Mr. IDRIS, thanking the Special Rapporteur for an exceptionally lucid report, said he wondered whether the title of the topic was well chosen. The Commission was not discussing State succession per se, but the impact of State succession on the nationality of natural and legal persons. The Working Group would therefore need to clarify whether the topic was State succession and its impact or whether the Commission should be focusing on the impact on the nationality of natural and legal persons

arising out of State succession. In his view, the first "and" in the title was misleading.

The meeting rose at 11.15 a.m.

2436th MEETING

Wednesday, 5 June 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his eighth report on State responsibility (A/CN.4/476 and Add.1), said that he proposed to focus his statement on two closely interrelated issues with regard to which a further effort of clarification seemed indispensable before the Drafting Committee took up draft articles 15 to 20 referred to it at the forty-seventh session in 1995.² The first issue was the relationship between the law of State responsibility, on the one hand, and the law of collective security, on the other; the second, that of the comparative merits of article 4 of part two³ and draft article 20.⁴ It was essential that the Commission should clearly indicate its position on those two issues, which pertained to the most crucial aspect of the development and codification of the law of State responsibility with regard not only to crimes, but also to ordinary interna-

tionally wrongful acts or, in other words, also with regard to delicts.

2. Before taking up those two problems, he wished to revert to the question of the Commission's competence to interpret the Charter of the United Nations. While it was true that the Commission was no more entitled than any other principal or subsidiary organ of the United Nations to produce Charter interpretations *ex professo*, it was bound to take Charter interpretation problems into account in the performance of its duties whenever the solution of such problems was relevant to the solution of the issues before it. Thus, Charter interpretation had rightly been called for when the Commission had debated the issue whether an international criminal court could be established by a resolution of a United Nations organ such as the General Assembly or the Security Council. It was therefore correct for the Commission to interpret the Charter also in the context of the consideration of the institutional aspects of the consequences of crimes. To his mind, there was not the shadow of a doubt that the two issues he had indicated involved problems of Charter interpretation; those who denied that fact were either disregarding legal logic or simply using a very poor pretext to thwart the discussion of important issues. In that connection, he referred the members of the Commission to the report of the Commission on the work of its forty-seventh session,⁵ which showed that some of the participants in the previous year's debate had gone well beyond a mere interpretation of the Charter. They had referred to, and had approved without reservation, extensive interpretations of the Charter implied in the practice of a political organ. By wondering whether, given the Council's liberal interpretation of a "threat to the peace" there was anything left for the Commission to consider in connection with the consequences of crimes, those members had admitted a fortiori that it would be perfectly appropriate for the Commission to deal with Charter interpretation in order to solve a problem that was before it.

3. Turning to the first of the two issues he had mentioned, namely, the relationship between the law of State responsibility and the law of collective security, he said that he was convinced of the necessity to keep them distinct. Considering the lack of institutionalization of the law of State responsibility and the relatively advanced degree of institutionalization, however imperfect, of the law of collective security, to bundle the two together *de lege lata* or *de lege ferenda* would inevitably lead to the subjection of the former to the latter. It would simply lead to the provisions and procedures relating to the maintenance of international peace and security being extended to the area of State responsibility.

4. At the forty-sixth and forty-seventh sessions, it had become clear that some members of the Commission were opposed to the preservation of article 19 of part one⁶ because they considered that the consequences of international crimes of States simply should not be covered by the draft on State responsibility. Their most important argument seemed to be that the acts qualified as examples of crimes in article 19 of part one were of such

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² See 2434th meeting, footnote 2.

³ For the text of the draft articles of part two provisionally adopted by the Commission, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53-54.

⁴ For the text, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 113.

⁵ *Yearbook . . . 1995*, vol. II (Part Two), paras. 271 and 272.

⁶ See 2427th meeting, footnote 7.

a nature as to fall into one or other of the situations envisaged in Article 39 of the Charter of the United Nations as conditions for Security Council action under Articles 40 and the following. In other words, the identification of crimes and their substantive and procedural consequences would fall totally under the provisions of Chapter VII of the Charter. Consequently, to provide for crimes in a convention on State responsibility would, according to that theory, be superfluous and contrary to the Charter. That would apply, although not exclusively, to any procedures, and most particularly to any institutional procedures, that a future convention might introduce for the determination of the existence or attribution of a crime or the consequences thereof. Such had been the reasoning of certain members who considered that article 19 of part one should not have been adopted or that any provisions following up that article in parts two and three, including in particular draft articles 15 to 20 as proposed in the seventh report, should be rejected or should be considered only at the stage of second reading. That would obviously imply the subjection of the rights and obligations of States under the law of State responsibility, not only to the power of recommendation of the Council and the General Assembly under Chapter VI and Articles 10 and the following of the Charter, but also to any powers vested in the Council under Chapter VII and related provisions or any powers of decision with which the Assembly might be found to be endowed other than the power of recommendation provided for in articles 10 and the following. That would, for example, be the possible impact on the rights and obligations of States of the establishment by the Assembly, in conformity with a suggestion made by one member of the Commission, of an international criminal court as a subsidiary body—an act which, in his own view, would be utterly *ultra vires*. Consequently, as already stated, bundling together those two branches of the law would lead inevitably to subjecting the rights and obligations of States deriving from the law of State responsibility to the power of political organs—something that would, in his opinion, be contrary to *lex lata* and completely inappropriate *de lege ferenda*.

5. So far as *lex lata* was concerned, he deemed it indispensable to reject once more the argument that the law of State responsibility should not deal with international crimes of States because that matter belonged to Chapter VII of the Charter and, as such, to the exclusive competence of the Security Council. That was tantamount to saying that the powers of the Council were unlimited.

6. It would, of course, not be proper or possible at present for the Commission to try to determine exactly where the boundary of those powers lay. He was firmly convinced, however, that those powers did not reach far enough to cover completely the rights and obligations of States in the area of State responsibility.

7. First of all, the Charter of the United Nations made the well-known distinction between the Security Council's role under Chapter VI and its role under Chapter VII. Any issues between States relating to the rights and obligations deriving from an internationally wrongful act, obviously including, first and foremost, the issues of the existence and attribution of such an act, pertained to Chapter VI. Since any action of the Council under that

Chapter was merely recommendatory and non-binding, it could not affect any rights and obligations deriving from the law of State responsibility. Any alteration, termination or suspension of such rights could therefore be done only by mutual agreement between the interested parties or through binding third-party procedures.

8. Chapter VII of the Charter was, of course, another matter, but, even in that case, there was a demarcation line inherent in the very nature of the function for the exercise of which binding decision powers were attributed to the Security Council by Chapter VII. The function in question was that of determining the existence of the conditions contemplated in Article 39 of the Charter and deciding on the measures to be applied by States or by the Organization in order to deal with a particular situation. That function extended neither to adjudication nor to law-making; still less did it extend to a constituent role. It followed that the Council had no more power under Chapter VII than under Chapter VI to terminate or alter the rights and obligations for States deriving from the law of State responsibility or from any other rules of international law. The fact remained, however, that the Council could, in the exercise of its powers for the restoration or preservation of peace and security, take decisions requiring a suspension or, as it were, a compression of the rights and obligations of the States involved, but only to the extent strictly necessary for the proper performance by the Council of its function relating to the maintenance of international peace and security.

9. The problem did not arise exclusively within the framework of international law of collective security. Limitations of a similar kind existed in national legal systems, which had constitutional or legislative rules that could be brought into play in the event of war, grave civil disorder or natural disaster. In such cases, the executive could proclaim a state of emergency, a state of siege or martial law to enable the Government to rule by decree and to suspend civil and political rights and liberties. It was an accepted principle, however, that exceptional measures of that kind affected individual or collective rights only to the extent and for the length of time strictly necessary to deal with the emergency situation. The restriction was even more evident in the case of ordinary police action intended to maintain public order or to prevent or prosecute criminal conduct.

10. A similar principle obviously applied, *mutatis mutandis*, to the effects on the rights and obligations of States of any decisions taken by the Security Council in the presence of a threat to the peace, a breach of the peace or an act of aggression. It followed that the subject-matter of the consequences of crimes—or, for that matter, of any internationally wrongful act—was not one which belonged *de lege lata* to the competence of the Council. The limitation of the Council's powers under Chapter VII was in fact to be drawn from the relevant Charter provisions even more convincingly—*de lege lata*—than would be the case within the framework of a national Constitution. National legal systems were inherently organized systems in which private parties were inherently subject to governmental power, whereas, in international society, organization was still the exception and any form of majority rule or “supra-ordination” was even more exceptional, especially in the

case of a "supra-ordination" of restricted bodies characterized by even more restrictively distributed voting rights. It followed that any function or power attributed to an international body, especially a body of the kind described, could not reasonably be interpreted extensively, especially if it meant attributing to the political body in question, essentially concerned with peace-keeping or peacemaking, law-making or adjudicatory functions which did not fall within its purview.

11. As a lawyer, he found it difficult to conceive of the United Nations membership having accepted a derogation from the principle of equality of States for such purposes. Yet that was precisely the daring proposition that the Commission was being asked to accept by those members who suggested that the consequences of crimes should be left to the exclusive care of the Security Council. For his part, he firmly believed that law-making had not been entrusted to the Council and that State responsibility for crimes, not to mention delicts, did not fall among the matters with which a political organ was legally empowered to deal. It would therefore be very strange if the Commission concluded otherwise.

12. All the arguments he had advanced in the context of *lex lata* applied a fortiori to *lex ferenda*. The notion that a political body, and particularly a restricted one, should be entrusted with the judicial or law-making powers necessary to deal with the international crimes of States was contrary to the most elementary principles of a civilized legal system. For the reasons already given in the sixth⁷ and seventh⁸ reports on State responsibility, it would be the negation of the very idea of law.

13. Referring to the question of the relative merits of article 4 of part two and of draft article 20 as possible ways and means by which the Commission might preserve the necessary distinction between the law of State responsibility and the law of collective security, he reiterated the view that the preservation of article 4 would involve an unacceptable subordination of the articles on State responsibility to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. Apart from the danger represented by the words "as appropriate", which seemed to imply that the question whether the law of State responsibility should bend before the law of collective security was a political matter to be settled in each specific case by the political organ concerned, the article seemed clearly to mean that any rights and obligations of States deriving from the provisions of part two of the draft and eventually from the corresponding provisions of a convention on State responsibility could be put in jeopardy or, in other words, terminated or altered as well as suspended by political decisions taken by the United Nations simply on the basis of the fact that such decisions had been taken within the framework of the Charter provisions relating to the maintenance of international peace and security. Considering that the article, as formulated, referred to the legal consequences of an internationally wrongful act of a State set out in the pro-

visions of part two of the draft, the caveat seemed to be intended to apply to delicts as well as to crimes. Considering also the close interrelationship between part two of the draft, on the one hand, and parts one and three on the other, it was likely that the impact of article 4 would extend to the whole future convention on State responsibility. Considering further that the provisions of the article in question would inevitably also affect the further development of the law of State responsibility, the subordination of that law to the law of collective security would undoubtedly be the result in the future and for an unlimited period of time.

14. On the other hand, draft article 20 aimed to preserve the integrity of the law of collective security without making it prevail over the law of State responsibility. To that end, he had inverted the order of the two sets of rules in that article with a view to ensuring, on the one hand, that the rules on State responsibility would not interfere with the Security Council's legitimate measures for the maintenance of international peace and security in conformity with the Charter and, on the other, that those rules would not be subject to derogation through decisions of the Council. Of course, he was also relying on the judicial competence attributed by draft article 19 of part two⁹ to ICJ for determining the existence/attribution of a crime. Considering the different kinds of relationships thereby established between the law of State responsibility and the law of collective security, he thought it possible to extend the impact of the draft article to internationally wrongful acts in general, as covered in part two, including delicts as well as crimes. Therefore, draft article 20 was by far preferable to article 4 in a convention on State responsibility because, whatever its shortcomings, it certainly respected the law of State responsibility to a greater extent.

15. He was, of course, aware that some members of the Commission preferred not to take a position on draft article 20, to leave article 4 as it stood and to postpone any decision on crimes or on the "institutional" aspects of their consequences until the second reading. That would not be a wise course. First of all, the postponement until second reading of the whole subject of crimes would leave a great gap in a draft whose provisions in part two and part three had been conceived solely for ordinary internationally wrongful acts. The "freeze", so to speak, on article 19 of part one would not only prejudice in a negative sense the very distinction between ordinary wrongful acts and the most serious among the *erga omnes* breaches of international law, but would also make manifest—article 19 of part one remaining, despite the freeze, in part one—a curious renunciation on the part of the Commission to dealing with those most serious breaches.

16. The postponement of the treatment of crimes would create, in particular, a very ambiguous situation with regard to the two issues which he had been addressing in his introduction to the eighth report. It must be realized that the solutions given to those two issues at the current session would affect the international law of State responsibility, for better or for worse, well before

⁷ *Yearbook* . . . 1994, vol. II (Part One), document A/CN.4/461 and Add.1-3.

⁸ See 2434th meeting, footnote 5.

⁹ For the text, see *Yearbook* . . . 1995, vol. II (Part Two), footnote 117.

the Commission's draft went through a diplomatic conference and eventually came into force as an international convention. Rightly or wrongly, not only scholars but also Governments drew conclusions from what the Commission accepted or rejected and even from what its members or special rapporteurs proposed or stated with regard to any issue. The same comment obviously applied to any inaction on the part of the Commission on given aspects of a draft. Thus, the postponement to second reading of the treatment of crimes in part two and part three—namely, the postponement of the consideration of problems covered by draft articles 15 to 20 as proposed at the preceding session—would not fail to have important consequences with regard to the application and development of the law of State responsibility. It would be indicative of the Commission's views about the chances of survival of article 19 of part one as adopted on first reading and would also send a message to all concerned about the way in which the Commission envisaged the relationship between the law of State responsibility—as applicable especially, but not exclusively, to crimes—and the law of collective security. A postponement would also acquire a particularly grave significance in respect of the crucial issues—*de lege lata* and *de lege ferenda*—which scholars had been debating for several years with regard to the powers of international political and legal bodies. The mere postponement would create at least a temporary vacuum in the law of State responsibility. And just as nature, which abhorred a vacuum, immediately sought to fill it, in the same way international political bodies would hasten to assert and exercise legally questionable powers in an area not belonging to them. Those bodies would wait neither the two years between the first and second readings nor the time that elapsed between the finalization of the draft, the diplomatic conference and the entry into force of a convention. They would quickly conclude that, at least in the view of the Commission, which after all was composed of jurists, the law of State responsibility gave way, so to speak, to the law of collective security or, more precisely, to a questionable competence of a political body in an area that only the law of State responsibility must naturally be called on to cover.

17. In conclusion, he said that the Commission was confronted with a crucial choice: between doing a distinguished service, or a disservice, to the preservation, development and codification of the law of international responsibility of States. The Commission would do a service to that law if it included, among the articles it adopted on first reading, provisions on the consequences of crimes—particularly with regard to the “institutional” problem—sufficient at least to eliminate any possibility of doubt, even during the period between the first and second readings, as to which law and which international body or bodies should concur—with States—in the implementation of those consequences. An essential element of the institutional aspect would have to envisage a significant judicial role for ICJ as an indispensable complement of any preliminary determination by the General Assembly or the Security Council on the existence of a crime. The Commission would, however, do a disservice to the law of State responsibility—not to mention other areas of international law—if it accepted, whether expressly or by implication, the baneful theory

according to which the consequences of crimes were exclusively a matter of collective security to be handled exclusively by a political body. Considering the obvious impact of a mere postponement of the choice (a decision by which the Commission would practically “wash its hands” of a most crucial matter), he urged members not to yield to that temptation.

18. The Commission had a unique chance to make a significant contribution to placing both the development of the law of State responsibility and the law of collective security itself on a more acceptable track.

19. Mr. ROSENSTOCK said that the Special Rapporteur's introduction had focused essentially on questions which had already been referred to the Drafting Committee. He had not heard any new arguments, but only misleading analogies which were not in support of the premises for which they had been asserted. He had, however, noted that, in his eighth report, the Special Rapporteur recognized the possibility of replacing the term “crimes” by the expression “internationally wrongful acts of a very serious nature and dimension”, which would make it possible to avoid the inescapable penal implications and leave open the question whether the Commission was describing two qualitatively different categories or a continuum which went from minor delicts to a serious breach to acts of a very serious nature and dimension. He nevertheless wondered whether it made sense to adopt that new phrase in the framework of the consideration of part two on consequences without at the same time re-examining article 19 of part one. That was one of several reasons for taking the advice offered by Mr. Vereshchetin at the forty-sixth session to postpone consideration of the possible consequences of article 19 of part one until the second reading, when the Commission could consider article 19 and possible consequences together.¹⁰ As the Special Rapporteur favoured reconsidering article 4 of part two, he could not logically decline to do the same for article 19 of part one, which, in several respects, had the same status.

20. Without wishing to embark on an in-depth consideration of the arguments set forth in the eighth report to support the text of draft articles 18 and 19 of part two, he drew attention to the subjective nature of the Special Rapporteur's analysis of what constituted *lex lata*. For example, his argument that a recommendation of the General Assembly did not violate Article 12 of the Charter of the United Nations flew in the face of the meaning and intent of the text. That the Special Rapporteur should maintain, in support of that analysis, that Article 12 might not always have been strictly observed was a trifle astonishing, in particular as an argument before the Commission. Article 2, paragraphs 2, 4 and 5, as well as Article 55 of the Charter had been violated more often than Article 12. It was to be hoped that the Commission would not be party to the view that the violation of an article established *lex lata*, thereby permitting a conduct in conflict with the said article.

21. To show that those proposals did not infringe Article 24 of the Charter, the Special Rapporteur asserted that certain acts, which he called crimes, did not consti-

¹⁰ See *Yearbook* . . . 1994, vol. I, 2339th meeting.

tute threats to the peace or even situations that could lead to international friction. He considered it useful in that connection to quote from the statement made by the President of the Security Council on 31 January 1992:

The absence of war and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.¹¹

22. The arguments put forward by the Special Rapporteur were not convincing; furthermore, it was difficult to take a position on the issue as long as the Commission did not know with certainty whether it was talking about crimes or internationally wrongful acts of a very serious nature and dimension. It was certainly not reasonable to brush aside the problem, as the Special Rapporteur did in one paragraph of chapter I of his eighth report, by airily asserting that the scope of the concept of so-called crime was *lex lata*, because the evidence to support such a conclusion did not exist. A statement made in the same paragraph that the role assigned to the Security Council by the Charter constituted *lex ferenda* was only slightly more breathtaking. The Special Rapporteur's arguments that his proposals were not incompatible with Articles 18, 27 and 39 of the Charter were no more convincing at the current session than they had been at the preceding one. His idea of creating, in the context of the United Nations, by separate treaty, regimes incompatible with those Articles of the Charter, among others, was no more appealing as a matter of policy than it was as a matter of law. Nowhere were the members of the Commission reassured that that would not lead to a major weakening of the system, which, although imperfect, was the best as yet devised for dealing with issues of collective security. It seemed grossly ambitious, to say the least, to attempt to use the topic of State responsibility to amend the Charter, *de jure* or *de facto*, whether for the sake of justice and equality or for more pedestrian and academic reasons and preoccupations.

23. Concerning the arguments deployed by the Special Rapporteur to put into question the existing text of article 4 of part two, the Drafting Committee might consider their validity if the Commission decided to refer the question back to it. Consideration should also be given to whether reopening already adopted articles was consistent with the Commission's commitment to conclude the first reading of the draft articles on State responsibility at the current session. The elaborate and cumbersome regime contained in the proposed articles posed other problems which the Special Rapporteur did not seem to address. Did it make sense to postulate a regime based on States' accepting the jurisdiction of ICJ for the extremely sensitive area of so-called crimes of State? It was one thing to ask States to go a bit further than they ever had before. It was quite another to require a quantum leap in an area in which there was a demonstrated lack of willingness to take small steps. There were also other practical problems with the proposed system, to which Mr. Bowett had referred at the preceding session.¹² More generally, was it realistic to expect that States would accept greater restrictions on their response

by way of a countermeasure to extremely serious acts than to relatively minor ones? Was the coherence of the regime for countermeasures enhanced by borrowing the notion of interim measures from an entirely different context? Finally, speaking of crimes by States undermined the notion of individual responsibility and thus reduced the effect of the Commission's work on a draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind.

24. He reserved the right to return to chapter II of the Special Rapporteur's eighth report, which he had only been able to peruse. But he was against the idea of re-considering article 12 of part two. If there was any reason to look again, a third time, at article 12, it was not to raise the same tired issues again, but perhaps to consider in plenary whether part three provisionally adopted by the Commission at the preceding session¹³ made the article unnecessary.

25. Mr. VILLAGRÁN KRAMER said that the Commission's attitude towards the conclusion of its work of codification and progressive development of the law on State responsibility was very positive. The Commission was not sidestepping the subject of crimes or the consequences that flowed from them at the international level. In the case of *lex lata*, there were no provisions, though the Commission could produce a text. The question, however, was how far it would venture into the field of *lex ferenda*.

26. The question of crimes was, of course, not only extremely important, but also highly sensitive. In the 1960s and 1970s, it had been set in an ideological context. Soviet writers had submitted proposals with a view to placing the discussion in that context and the then Special Rapporteur, Mr. Ago, had put forward ideas to avoid creating an ideological conflict in the law and in the Commission. The question had now taken on another dimension. It was clear that there were *jus cogens* rules which, though not themselves *erga omnes*, had *erga omnes* effects: a breach of them could result in an international crime, namely, a serious act prejudicial to an essential interest of the community of States. In that regard, he agreed that an international crime produced *erga omnes* effects and not only with regard to the directly injured State. Consequently, the problem for jurists was now no longer to ask whether international crimes existed since the debate had moved on. It was now a question of conceptualization.

27. Many jurists from third world countries drew a distinction between the Charter of the United Nations prior to General Assembly resolution 377 (V), entitled "Uniting for peace", adopted at the time of the Korean War, and the Charter after that resolution. According to those jurists, there had been a *de facto* revision of the Charter which had not taken the form of inflexible rules or of a text revising it. It was a *de facto* revision that had taken shape over time.

¹¹ See *Official Records of the Security Council*, three thousand and forty-sixth meeting.

¹² See *Yearbook . . . 1995*, vol. I, 2392nd meeting.

¹³ For the text of the articles of part three and the annex thereto provisionally adopted by the Commission at its forty-seventh session, see *Yearbook . . . 1995*, vol. II (Part Two), chap. IV, sect. C.

28. In 1992, the sceptics had had a big shock when the Security Council had taken far-reaching decisions with respect to Iraq involving sanctions and restrictions on its territorial rights, serious political limitations and prohibitions within its territory, more particularly with regard to the right or otherwise to manufacture weapons, in other words, restrictions on its sovereignty.

29. Nowadays, the debate, which could not be ignored, was about the Security Council's powers. Reisman, a Yale University professor, had concluded, in an analysis of the decision handed down by ICJ in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America)*, that the Council had powers under which it could suspend the effects of an international treaty. The Council therefore filled an extraordinary role of which the Commission must be aware.

30. He would invite members to ponder what their attitude would be if an international treaty embodied provisions similar to article 19 of part one or article 5 or to draft articles 15 to 20 of part two of the draft, if they themselves were responsible for advising the representative of their country on the Security Council. How would they answer the question whether the Council had fewer powers or whether it retained the powers vested in it under the Charter in the event of a threat to the peace, a breach of the peace or an act of aggression? Would any restrictions be of a legal, political or other kind?

31. As to the verification of legality to which the Security Council's acts might be subject, he would refer to an article by Mr. Bowett which had appeared the previous year¹⁴ and from which it was apparent that the advisory opinions of ICJ were the only possible way of verifying legality. In theory, therefore, it was not impossible that the Council might unanimously generate a situation of "agreed" illegality. Consequently, in his view, the law of the Charter could be applied and borne in mind, but not changed.

32. The term "crime" was not important in itself and the Commission could consider another phrase such as "a heinous wrongful act", as proposed by Mr. Pellet at the preceding session. Above all, it was important to complete the codification of *lex lata*. If the Commission could start on the *de lege ferenda* exercise as well, that was to be welcomed.

33. Mr. BOWETT said that he fully shared the premise from which the Special Rapporteur started, namely, that the Security Council could at best ask Member States to suspend the exercise of their rights in the interests of international peace and security and that it could not alter, modify or negate those rights. The question therefore was which organ would be empowered to determine whether a State had committed a crime. There were three possible choices. The first was to create a new body for the purpose, but that choice had little chance of success.

The second choice was to have recourse to the Council. The advantage there was that the Council already had competence under the Charter of the United Nations and that its intervention did not therefore require the consent of States. The drawback was that the Council was a political body. Sharing, as he did, all of the Special Rapporteur's misgivings about conferring on a political organ responsibility for deciding whether a State had committed a crime, he had proposed, at the preceding session,¹⁵ that that task should be entrusted to a commission of jurists. The Special Rapporteur, for his part, had opted for the third choice, which was to have recourse to ICJ. As the Court had jurisdiction only if States accepted its jurisdiction, the Special Rapporteur proposed that such consent should stem from ratification of the future convention. Obviously, that solution would be likely to deter very many States from signing the convention, which would remain a dead letter.

34. Mr. PELLET said that the Special Rapporteur had rightly taken the view that the distinction between crimes and delicts should be retained, that that distinction was now enshrined in positive law and that it would be unwise to postpone codifying the rules applicable to crimes until later. The Special Rapporteur had, however, been wrong to try to link the law of State responsibility to the law of collective security at any cost. The two aspects were perhaps linked, but, in the case of the topic under consideration, one had to deal with the first while avoiding any encroachment on the second; in other words, a satisfactory form of wording for article 4 and, if necessary, for draft article 20 had to be found. The system under the Charter of the United Nations was a given whose mechanisms could be used or ignored, but it would be very inadvisable to try to change it.

35. Furthermore, the Special Rapporteur had drawn numerous analogies with internal law. Such analogies were often misleading, but, if they really had to be made, it was on the Charter of the United Nations that constitutional value should be conferred and not, as the Special Rapporteur did, on the law of the international responsibility of States which would have more in common with the law of civil liability. The Special Rapporteur's approach to the actual process of arriving at legal norms, which he regarded as existing *per se*, was also surprising. Law was a product of politics and its processes, a fact that no desire for doctrinal purity could alter. National law was made by parliaments, and international law by States within bodies such as the General Assembly and the Security Council but, above all, at diplomatic conferences. That law was made according to rules which, in the case of the Assembly and the Council, were laid down in the Charter. Thus, the Special Rapporteur had managed to weaken his own argument by blaming the system under the Charter and making the mistake of latching an institutional provision onto a legal provision in the draft articles. When the Commission had included *jus cogens* in articles 53 and 64 of the Vienna Convention on the Law of Treaties, it had done precisely what had to be done, namely, it had alerted the international community to a problem and tried to solve it. It should do the same in the case of crimes, that is to say, it should

¹⁴ D. Bowett, "The impact of Security Council decisions on dispute settlement procedures", *European Journal of International Law*, vol. 5, No. 1 (1994), pp. 89-101.

¹⁵ See *Yearbook* . . . 1995, vol. I, 2392nd meeting, para. 53.

show that international crimes of States—or, if one wanted to avoid the word “crime”—particularly serious violations of a kind that were different from mere delicts—did indeed exist, show what the consequences were and regulate the matter conclusively. If, once that task had been carried out, an institutional provision proved to be necessary, that would be the time to deal with the matter.

36. Mr. IDRIS said that he would like to seek serious clarification on two points. First, had the Special Rapporteur considered any alternative formulation for the expression “crimes of States”, since there was a fairly substantial body of opinion in the Commission that the use of the word “crime” was neither necessary nor appropriate and that it was not simply a matter, as the Special Rapporteur stated, of a purely “terminological problem”? The second point concerned the very serious issues to which the proposals made by the Special Rapporteur in draft article 19 of part two gave rise since they tended to involve the General Assembly, the Security Council and ICJ in finding that a State had committed a crime. According to the Special Rapporteur, those proposals would apply only as between the parties to the future convention on State responsibility and would not affect obligations under the Charter. The question then was whether the proposals were consistent with the responsibilities and relations that should exist as between the Assembly, the Council and the Court. Moreover, if a matter were referred to the Assembly or the Council, would that not be tantamount to introducing a procedure other than the one envisaged under the Charter? Lastly, if the reply to the question whether there had been a crime was in the affirmative, would those proposals not have the serious consequences of a use of force contrary to the Charter and its provisions on domestic jurisdiction? It was crucial to clarify those extremely important points.

37. Mr. LUKASHUK said that a considerable number of norms of international law had been produced over the past 10 years, but there were still gaps so far as mechanisms for applying them were concerned. The adoption of the draft articles on State responsibility would mark a significant step forward, particularly since those articles were already regarded as norms of international law: provisions among those examined by the Commission had, for example, been invoked in the *Rainbow Warrior* case.¹⁶ All those considerations, along with the General Assembly resolutions, thus vested the Commission with special responsibility for completing its consideration of the draft articles in question on first reading. The difficulties to which the consideration of those articles had given rise within the Commission was an indication of the difficulties that their consideration by Member States in the Sixth Committee would encounter. But the fact that States were apparently still not ready to take strong measures to improve the application of international law should not prevent the Commission, as a body of independent experts, from fulfilling its task of strengthening international law and the draft articles

were on the whole likely to help it do so. None the less, they obviously could not be accepted universally without some compromise on a number of provisions.

38. The concept of crimes of States was fairly widespread throughout the legal literature and its use should in principle have no adverse effects. “Criminalization” certainly existed in international law, as was attested to by the settlement that had followed the Second World War and the measures taken against Iraq. Since the Commission’s main task was to save such an important draft, however, the word “crime” should perhaps be replaced by another form of wording such as “particularly serious violation”. As to the powers and functions of the General Assembly and Security Council, they gave rise to special political and legal problems that affected the constitution of the international community, namely, the Charter of the United Nations. At the very least, therefore, it was a matter of a broad interpretation of the Charter. The Commission was entitled to interpret the Charter, but must bear in mind the possibilities of that interpretation being accepted by States. If no agreement could be reached, the draft articles should perhaps be referred to the Assembly in the form of annexes. In more practical terms, the task of the Commission, and of the Sixth Committee, would be facilitated if all the draft articles on State responsibility, which constituted a whole, were grouped together in a single document. He congratulated the Special Rapporteur and thanked him for having carried out a colossal task and made a significant contribution to the progressive development of international law.

39. Mr. EIRIKSSON said that his basic premise was that the Commission should not revisit part one of the draft articles, still less article 19. As he had explained at the previous session, he had no difficulty with the concept of crime of States or in calling that kind of crime a “crime”. The Special Rapporteur should be congratulated on having done exactly what he had been asked to do, namely, on having devised a system to complete the preparation of a complete set of draft articles. He saw no difficulty in following what some might regard as a radical path, although he realized that States might not ultimately follow it. But it would be for them to tell the Commission so at some later stage.

40. As to the links between politics and law, and specifically the role of the Security Council, he would once again voice his dissatisfaction with some of the paths followed by the Council. As he had already stated in the context of the draft Code, while there had to be a link between the law and the activities of the Security Council, it was for some other body to determine what the law was. So far as the link between judicial settlement and countermeasures was concerned, there was no need to revisit article 12 of part two otherwise than to see if some of its provisions had not become pointless as a result of the adoption of part three of the draft articles.

41. The Commission had adopted part three of the draft articles, article 5, paragraph 2, of which provided for compulsory arbitration in the event of countermeasures. It would perhaps be advisable to extend that concept of compulsory arbitration to any case in which a crime under article 19 of part one was committed and to

¹⁶ Ruling of 6 July 1986 by the Secretary-General (United Nations, *Reports of International Arbitral Awards*, vol. XIX (Sales No. E/F.90.V.7), pp. 197 et seq.).

elaborate some mechanism to that effect instead of considering machinery such as that contemplated by the Special Rapporteur or Mr. Bowett. In the circumstances, he therefore proposed that crimes should be the subject of a separate section in part two. The section would start with the articles following article 6 *bis* and would specify which provisions in that article were not applicable to State crimes. As article 4 of part two would remain as drafted, part two would include an article similar to draft article 18 proposed by the current Special Rapporteur and even to former article 14 proposed by the previous Special Rapporteur, Mr. Riphagen,¹⁷ as well as a specific reference to compulsory arbitration if it was stated that a crime had been committed.

42. Mr. CRAWFORD said that, if it was to be able to complete its first reading of the draft articles at the current session, the Commission should focus on points of agreement, rather than on the differences of opinion that continued to arise.

43. To begin with, it was accepted that the Commission could not, directly or indirectly, amend or seek to amend the Charter of the United Nations. In a number of ways the Charter was *lex specialis*. The Commission could not tamper with it. Rather, its concern should be with the *lex generalis* of State responsibility. State responsibility formed a set of rules of general international law applicable unless the provisions of the Charter were duly applied to the contrary in a given case. Secondly, the Commission could not allow itself to reopen the debate on part one of the draft articles at the current late stage, since no agreement would be reached.

44. Thirdly, flexibility was called for. Regarding the nomenclature of serious breaches of international law, it seemed entirely possible for the Commission to include in the commentary to part two, and also of course in its report to the General Assembly, an explanatory note in which it would make it clear that the issue of terminology was left open and that it would return to it when it considered the draft articles, including, of course, article 19 of part one, on second reading. It was a fact that the terminology used needed reconsideration, given that different views were held and that different views were possible. For example, the French word *délit* seemed to have penal overtones that its English equivalent "tort" did not have. It could be clearly seen from the commentary to article 19 of part one¹⁸ that the Commission had not proceeded from an acceptance of the concept of "crimes" to an acceptance of the concept of "different consequences". Rather, the opposite was true: it had come to the conclusion that there were some acts of a qualitatively different character, which it had called "crimes"—a word which, furthermore, was placed in quotation marks in the bulk of the commentary.

45. It seemed that there was a category of most serious violations of fundamental norms of international law and the Commission must therefore not hesitate to make distinctions. It was significant that, in codifying the law of treaties, it had made a categorical distinction between *jus*

cogens norms, for the application and interpretation of which there was compulsory jurisdiction, and non-*jus cogens* norms.

46. At the current session the Commission must elaborate a set of consequences of serious violations of international law. In that regard, article 19 of part one, by the distinction it established between "international crimes" and "international delicts", raised practical as well as conceptual difficulties which should be reconsidered in the context of part three of the draft.

47. It must of course be borne in mind that, if the State became subject to adverse consequences arising specifically from an accusation of international criminality and which would not otherwise have arisen, then, as a general principle of law, that State had a right to clear its name. Some additional provision for jurisdiction was therefore required, which should leave aside the question of the Security Council. The Commission could reach a compromise, but only if it considered its work on the topic as a continuum with a distinction between the first and second readings of the draft articles.

48. Mr. PAMBOU-TCHIVOUNDA, offering his preliminary comments on the eighth report of the Special Rapporteur, said that the debate on the topic had been going on for so long, with no end in sight, quite simply because the Commission wanted to close its eyes to the fact that the debate was basically addressed to itself. For it was the Commission that was at the origin of what had now become an accepted fact, rather than a working hypothesis, for the construction of a comprehensive system of State responsibility. And if its work was to be positive and objective, no methodological misunderstanding must be allowed to arise from the tacit adoption of an approach based on the assumption that the concept of "crime" had a political connotation. That would be tantamount to giving the concept of "international crime" a political content.

49. The Commission would be making a mistake if it adopted such an assumption because, by so doing, it would completely reverse the approach it had hitherto followed; it would call itself into question, particularly where its role in the codification of the law of State responsibility was concerned. On the other hand, by avoiding that wrong turn, by not reopening the debate on part one of the draft as adopted on first reading and by opting for a realistic and coherent approach, it would succeed in formulating substantive rules on the topic, while providing for procedural rules to implement the substantive rules. The temptation to favour the political aspect of the concept of "State crime" would then become less appealing. Were it to proceed in any other manner, the Commission would unduly favour the Security Council, and, by the same token, the political dimension. And it was impossible to abandon a considerable segment of the law of responsibility to that merely political dimension.

50. In fact, no provision of the Charter of the United Nations, either in Chapter VII or elsewhere, assigned jurisdiction to the General Assembly or the Security Council in matters of international responsibility of States. However, an instrument that had the same value as the Charter, namely, the Statute of ICJ, contained a provi-

¹⁷ For the text, see *Yearbook* . . . 1985, vol. II (Part Two), p. 21, footnote 66.

¹⁸ See 2427th meeting, footnote 7.

sion, its Article 36, which gave the Court jurisdiction as to the substance over disputes relating to responsibility. In its deliberations concerning the machinery to be established, the Commission must not forget that competence of the Court. He wondered whether, by striving to overlook the role of the Court, the Special Rapporteur was not attempting to circumvent the problems posed by its current functioning. The Special Rapporteur had thus proposed a two-track system, comprising a political track to safeguard sovereignties by means of the conciliation mechanism, and a legal track enabling the Court to intervene on the procedure and the merits. In so doing, the Special Rapporteur had not strayed into futile digressions: he was, quite rightly, confronting the Commission with its responsibilities. It was now for the Commission to assume those responsibilities.

51. Mr. TOMUSCHAT said that most of the issues raised by the Special Rapporteur in his eighth report had already been discussed at the Commission's preceding session. That report, or at least chapter I, contained no absolutely new element.

52. He agreed that the notion of "international crime" was firmly established and that there was no need to revisit part one before having completed the first reading of part two. He also agreed that the word "crime" had some criminal connotation and he associated himself with other members of the Commission who had favoured the use of a different word. In that regard, he could accept Mr. Crawford's proposal concerning the insertion of an explanatory note in the commentary and in the Commission's report to the General Assembly.

53. The debate that had just taken place did not augur well for the success of the Commission's work, for time was running out and consensus should be sought. A special rapporteur was a servant of the Commission—though not its slave. It was not his task to defend law and justice as he saw fit; rather, he should join the mainstream of the Commission's thinking, assuming that such a mainstream could be identified. In that regard, it was good that Mr. Crawford had emphasized the points of agreement among members.

54. The main question was whether some special machinery was needed in view of the particularly grave consequences of international crimes. Normally, those consequences were dealt with in a purely bilateral framework. If consequences were very harsh, when the interests of the international community as a whole were affected, then the international community must inevitably step in. And that was the difficulty. It could not be left to individual member States to make determinations about the existence of crimes and the consequences that resulted therefrom. And in that regard, none of the proposals before the Commission was fully persuasive. But the Commission could resort to other models: for example, there were references in the United Nations Convention on the Law of the Sea to competent international bodies—in other words, bodies other than those of the United Nations system, in addition to the Security Council and the General Assembly.

55. It was clear that the Commission could not amend the Charter of the United Nations or confer on institutions powers that were not provided for therein. The sys-

tem of State responsibility and the system of collective security inevitably overlapped and keeping the two systems separate was not as easy as Mr. Pellet seemed to think.

56. Any major breach of an international obligation automatically had political overtones. Consequently, those members of the Commission who claimed that ICJ had the last word were wrong. The Court could not intervene in all matters between States: its action was dependent on the consent of the parties. On the other hand, the Security Council could, independently of the parties, intervene in any dispute between Member States, and that was the difficulty.

57. Mr. HE said it was not appropriate at the current stage to reopen the debate on an issue that had been under consideration for a number of years. He thanked the Special Rapporteur for his work, although he was not convinced by the arguments put forward in the eighth report, and particularly by the notion of a "State crime". Having already had occasion to state his position at earlier sessions, he reserved his comments on the many interesting points raised in the report, particularly on the institutional aspect of State responsibility and the relationship between the law of State responsibility and the law of collective security as embodied in the United Nations system in the framework of the Charter of the United Nations, which there could be no question of amending.

58. He drew attention to the fact that, while it was true that in its resolution 50/45 the General Assembly had urged the Commission to complete at the current session its first reading of the draft articles on State responsibility, it had also urged it to take account of the divergent views that nevertheless existed both in the Commission and in the Sixth Committee. Mr. Crawford's proposal was thus worthy of consideration, both by the Commission and by the Drafting Committee.

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he found it difficult to understand the assertion made by some members, and by Mr. Tomuschat in particular, that his eighth report added nothing new to the seventh.¹⁹ On the contrary, it answered, point by point, the debate that the Commission had held on the topic at its preceding session. That debate had certainly not been complete; it had been disturbed and disrupted by the attempts of a minority of members of the Commission to postpone consideration of article 19 of part one or even to get rid of that article altogether.

60. The question of international crimes of States clearly did not seem to be of real interest to the majority of the members of the Commission, who were either absent or were unwilling to speak on a question that he personally regarded as extremely important for the development and codification of the law of State responsibility.

61. He would have hoped that, after the incomplete debate at the preceding session, the Commission would at least have made some attempt to conclude that debate at

¹⁹ See 2434th meeting, footnote 5.

the current session. That, however, did not seem to be the wish of the Commission.

62. He believed he must thus conclude that his views on questions he regarded as essential were not shared by the Commission. Consequently, he considered that the Commission should now appoint, if it deemed it necessary to do so, a new special rapporteur on the topic of State responsibility. He intended to resign from the post of Special Rapporteur with which, on a proposal by Mr. Reuter, the Commission had entrusted him in 1987. He believed he had said, done and written everything he should on the question of State responsibility. In his view, it was high time for him to stop resisting the views that the Commission seemed to prefer and for someone else to take his place.

63. The CHAIRMAN expressed the hope that the Special Rapporteur would reconsider his decision.

The meeting rose at 1.05 p.m.

2437th MEETING

Thursday, 6 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

1. The CHAIRMAN invited the Commission to consider, article by article, the text of the 18 draft articles of

the draft Code of Crimes against the Peace and Security of Mankind adopted by the Drafting Committee on second reading (A/CN.4/L.522 and Corr. 1).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), introducing the draft articles adopted by the Drafting Committee on second reading, said that the Commission had decided at its previous session to allocate at least three weeks of concentrated work for the Drafting Committee in order to achieve the goals it had set for the current quinquennium, of which it was now in the final year. The Commission, at its current session, had agreed with that plan of work for the Drafting Committee. As a result, the Drafting Committee had held 23 meetings from 7 to 31 May, which had necessitated intensive work for its members, for the Special Rapporteur and, of course, for the secretariat. He therefore wished to express his wholehearted thanks to all those involved, for their hard work, spirit of cooperation and discipline in attending all 23 meetings.

3. At the forty-seventh session in 1995, the Drafting Committee had provisionally completed its consideration, on second reading, of articles 1, 2, 4 to 6 *bis*, 8 to 13, 15 and 19. The Commission had taken no action on those articles, instead deferring action to the current session, when it could have all the articles of the draft Code.³ In order to facilitate the Commission's work, all the articles of the draft Code adopted by the Drafting Committee at the preceding and the present sessions were reproduced in document A/CN.4/L.522 and Corr. 1 (reproduced in para. 7 below).

4. At the previous session, the then Chairman of the Drafting Committee, Mr. Yankov, had indicated that the report was of a tentative character and that some of the articles provisionally adopted at that time might need to be looked at again or modified in the light of the definition of crimes. The current Drafting Committee had modified the text of some of the articles adopted in 1995 precisely for the reasons anticipated by Mr. Yankov. He would indicate those changes when introducing the respective articles.

5. In his statement at the forty-seventh session, the previous Chairman of the Drafting Committee had also explained that the work of the Drafting Committee had been much more substantive than the usual second reading exercises, owing to a variety of factors. First, the Commission had deliberately deferred some important issues to the second reading. Secondly, the commentaries adopted for the articles on first reading had indicated that on a number of issues the views of members of the Commission were divided and that those issues would be reconsidered on second reading. Thirdly, the mandate given to the Drafting Committee by the Commission had implied possibly major changes in the scope of the draft and the structure of a number of articles. In addition, when, at the previous session, the Commission had referred to the Drafting Committee the articles on four crimes, namely, aggression, genocide, systematic or

* Resumed from the 2431st meeting.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

³ For the texts of the draft articles and the statement of the then Chairman of the Drafting Committee, see *Yearbook . . . 1995*, vol. I, 2408th meeting; see also *Yearbook . . . 1995*, vol. II (Part Two), paras. 142-143.

mass violations of human rights and exceptionally serious war crimes, it had done so on the understanding that in formulating those articles the Drafting Committee would bear in mind, and at its discretion deal with, all or part of the elements of the crimes which had not been referred to the Committee. Those crimes were: intervention; colonial domination and other forms of alien domination; apartheid; recruitment, use, financing and training of mercenaries; and international terrorism. As a result, some of the texts proposed by the Drafting Committee were substantially different from those adopted on first reading.

6. As to structure, the set of articles was divided into two parts. Part one (General provisions) comprised three sections: section 1 dealt with general principles; section 2 dealt with the articles on individual criminal responsibility; and section 3 dealt with procedural issues and jurisdiction. Part two (Crimes against the peace and security of mankind) then defined and listed crimes against the peace and security of mankind. In order to facilitate cross-referencing, the numbers in square brackets indicated the number of the corresponding articles adopted on first reading.

7. The titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, read:

PART ONE

GENERAL PROVISIONS

Section 1

Article 1 [1 and 2]. Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in part two.
2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Section 2

Article 2 [3]. Individual responsibility and punishment

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression in accordance with article 15.
3. An individual shall be responsible for a crime set out in article 16, 17 or 18 if that individual:
 - (a) Intentionally commits such a crime;
 - (b) Orders the commission of such a crime which in fact occurs or is attempted;
 - (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 5;
 - (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
 - (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
 - (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

4. An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment which is commensurate with the character and gravity of the crime.

[Article 4. Motives]

[Deleted]

Article 3 [5]. Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 4 [11]. Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Article 5 [12]. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Article 6 [13]. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Section 3

Article 7. Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 16, 17 and 18. Jurisdiction over the crime set out in article 15 shall rest with an international criminal court.

Article 8 [6]. Obligation to extradite or prosecute

The State Party in the territory of which an individual alleged to have committed a crime set out in article 16, 17 or 18 is found shall extradite or prosecute that individual.

Article 9. Extradition of alleged offenders

1. To the extent that the crimes set out in articles 16, 17 and 18 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

[Article 7. *Statute of Limitations*]

[Deleted]

Article 10 [8]. *Judicial guarantees*

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Article 11 [9]. *Non bis in idem*

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(a) By an international criminal court, if:

(i) The act which was the subject of the judgment in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) The national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(b) By a national court of another State, if:

(i) The act which was the subject of the previous judgment took place in the territory of that State; or

(ii) That State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 12 [10]. *Non-retroactivity*

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Article 13 [14, para. 1]. *Defences*

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Article 14 [14, para. 2]. *Extenuating circumstances*

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

PART TWO

CRIMES AGAINST THE PEACE
AND SECURITY OF MANKIND

Article 15. *Crime of aggression*

An individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression.

Article 16 [19]. *Genocide*

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 17 [21]. *Crimes against humanity*

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(a) Murder;

(b) Extermination;

(c) Torture;

(d) Enslavement;

(e) Persecution on political, racial, religious or ethnic grounds;

(f) Institutionalized discrimination on racial, religious or ethnic grounds;

(g) Arbitrary deportation or forcible transfer of population;

(h) Forced disappearance of persons;

(i) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation, severe bodily harm and sexual abuse.

Article 18 [22]. *War crimes*

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(a) Any of the following acts committed in violation of international humanitarian law:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering or serious injury to body or health;

- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement of protected persons;
- (viii) Taking of hostages;

(b) Any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

- (i) Making the civilian population or individual civilians the object of attack;
- (ii) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- (iii) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- (iv) Making a person the object of attack in the knowledge that he is *hors de combat*;
- (v) The perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(c) Any of the following acts committed wilfully in violation of international humanitarian law:

- (i) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;
- (ii) Unjustifiable delay in the repatriation of prisoners of war or civilians;

(d) Outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(e) Any of the following acts committed in violation of the laws or customs of war:

- (i) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (ii) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (iii) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;
- (iv) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (v) Plunder of public or private property;

(f) Any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

- (i) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (ii) Collective punishments;
- (iii) Taking of hostages;
- (iv) Acts of terrorism;
- (v) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (vi) Pillage;
- (vii) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) In the case of armed conflict,

ALTERNATIVE A

using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

ALTERNATIVE B

using methods or means of warfare not justified by military necessity in the knowledge that they will cause widespread, long-term and severe damage to the natural environment, thereby gravely prejudicing the health or survival of a population, and such damage occurs.

PART ONE (General provisions)

ARTICLE 1 (Scope and application of the present Code)

8. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said the article had been adopted by the Drafting Committee on second reading at the forty-seventh session and the current Drafting Committee had made no changes to it. The Chairman of the Drafting Committee at that session had explained that article 1 had incorporated articles 1 and 2 as adopted on first reading.⁴ The article constituted section 1 of part one and the Drafting Committee proposed that the Commission should adopt it.

9. Mr. PELLET said that he deplored the fact that the text still contained no definition of crimes against the peace and security of mankind.

10. Mr. PAMBOU-TCHIVOUNDA endorsed Mr. Pellet's comment. At the previous session, he had expressed his hope that a definition could be found for the concept of a crime against the peace and security of mankind.

11. Mr. THIAM (Special Rapporteur) said that, at the outset of its work, the Drafting Committee had discussed at length the possibility and desirability of providing a conceptual definition. The criterion finally adopted had been that of "extreme gravity"—what Mr. Pellet was wont to refer to as a "crime of crimes". Mr. Pambou-Tchivounda had indeed laid great stress on the need for a definition, had promised to submit a proposal, and had even suggested visiting him in Dakar to discuss the problem. So far, however, no proposal had been forthcoming. He would welcome any suggestions for an acceptable definition founded on a general criterion. However, in the absence of any specific proposal, there was no alternative but to retain article 1 in its present form.

12. Mr. CRAWFORD said he actively welcomed the absence of any definition other than that given in the current article 1, since he believed that no further definition was possible.

13. Mr. VILLAGRÁN KRAMER said that in criminal law as it operated in Latin America, the crime was always definable, since the judge did not necessarily

⁴ For the explanations given by the Chairman of the Drafting Committee at the forty-seventh session, see *Yearbook* . . . 1995, vol. 1, 2408th meeting, paras. 2-42.

require a definition, but provided his own when qualifying the crime. In such cases, it was the gravity of the crime that identified it as an international crime.

14. Mr. YANKOV said that draft article 2 under consideration by the Drafting Committee at the forty-seventh session had been an attempt to pinpoint the characteristics of such a crime. After discussion both in the Committee and in the Commission in plenary, it had been accepted that it was not necessary to provide such a definition, for the enumeration contained in part two contained all the elements of such crimes.

15. In the penal codes of his own and of several other European countries, no such prior definition was required, and crimes were enumerated by their parameters, components and consequences. He urged the Commission not to reopen what had already been a lengthy general debate on the question of a definition, particularly since no concrete proposal had been made in that regard. Any dissenting opinions could be duly placed on the record.

16. Mr. IDRIS said that he concurred with Mr. Yankov. He for one had not been satisfied with the imprecise wording of the current draft article 1, but had accepted it because no better alternative proposal had been put forward. He too appealed to other members not to reopen the debate on an issue that had been discussed extensively and intensively in the Drafting Committee and in plenary meetings of the Commission.

17. The CHAIRMAN said it was his understanding that members would simply have the opportunity to place on record their positions on that issue and their regret at the absence of a definition of a crime against the peace and security of mankind.

18. He said that if he heard no objection, he would take it that the Commission wished to adopt draft article 1.

Draft article 1 was adopted.

ARTICLE 2 (Individual responsibility and punishment)

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced article 2 which was the first in a series of articles in section 2 addressing the question of individual criminal responsibility. It corresponded to article 3 adopted on first reading, which had consisted of three paragraphs and had dealt with that issue in general terms. During the consideration of that article on first reading, there had been uncertainties as to how best to deal with the question of individual criminal responsibility. The majority view at that time had been to address the question in individual articles describing the crimes. During the consideration of the article on second reading at the preceding session, the importance of the article on the establishment of individual criminal responsibility in the Code had been emphasized. At that time the Drafting Committee had felt that it would be preferable to deal with all aspects of individual criminal responsibility in a single article. It had therefore deferred consideration of the article, pending a final decision on the articles on the list of crimes. Having finalized the list

of crimes, the Drafting Committee now proposed a much more detailed and comprehensive text. The article consisted of four paragraphs, the first three dealing with the principle of individual criminal responsibility, and the fourth addressing the question of penalties.

20. Paragraph 1 set out the general principle of individual criminal responsibility for crimes against the peace and security of mankind. Even though, in accordance with paragraph 1 of article 1, the Code applied only to those crimes against the peace and security of mankind that were listed in part two of the Code, the Drafting Committee had felt that individual criminal responsibility was a general principle applicable to all crimes against the peace and security of mankind, whether or not they were listed in the Code. For that reason, paragraph 1 set forth the principle with no qualification.

21. Paragraph 2 dealt with individual criminal responsibility for the crime of aggression. The paragraph only reaffirmed the principle and referred to draft article 15 (Crime of aggression), which, for reasons he would explain when introducing that article, also dealt with the issue of individual criminal responsibility.

22. Paragraph 3 set out the principle of individual criminal responsibility for the remaining crimes under the Code. Those remaining crimes were genocide, crimes against humanity, and war crimes. The paragraph had seven subparagraphs, describing seven types of criminal acts. Subparagraph (a) was the actual intentional commission of a crime. Subparagraphs (b) to (f) dealt with conspiracy and complicity, and subparagraph (g) with attempt, in other words, with situations in which the participation of the individual in the commission of a crime entailed his responsibility.

23. He said that it should be noted that, under paragraph 3 (b), ordering the commission of a crime was a criminal act only if the crime had in fact occurred or had been attempted. The Drafting Committee had felt that an individual who ordered the commission of the crime should entail criminal responsibility under the Code, not only when that crime had in fact been committed, but also when its commission had been attempted. Otherwise, there might be an anomalous situation in which an individual who had attempted the commission of a crime would bear criminal responsibility under paragraph 3 (g) but the individual who had ordered the commission of that crime would not. Some members of the Committee had felt that ordering the commission of the crime was a criminal act in itself, even if the criminal act was not committed. They had noted that the Nürnberg Principles⁵ and the statute of the International Tribunal for the Former Yugoslavia⁶ and the statute of the International Tribunal for Rwanda⁷ had attributed criminal responsibility to an individual who had ordered the commission of a criminal act whether or not the crime was in fact com-

⁵ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127). Text reproduced in *Yearbook* . . . 1985, vol. II (Part Two), para. 45.

⁶ Reference texts are reproduced in *Basic Documents*, 1995 (United Nations publication, Sales No. E/F.95.III.P.1).

⁷ Security Council resolution 955 (1994) of 8 November 1994, annex.

mitted. They had been concerned that the formulation of that subparagraph might be interpreted as raising the threshold. Other members of the Drafting Committee, however, had been of the view that the Nürnberg Principles and the statutes of the two International Tribunals had been drafted in view of situations which had already taken place. It was therefore unnecessary to add the requirement that the crime should in fact have occurred. The Code, however, was intended to cover situations which might occur in the future. Ordering a crime would not of itself endanger peace and security, in the absence of the commission of the crime for whatever reason.

24. Paragraph 3 (c) dealt with the failure of the superior in the discharge of his or her responsibility in the circumstances set out in article 5.

25. Paragraphs 3 (d) to 3 (f) dealt with various forms of conspiracy and complicity and, it would be noted, set a rather high threshold for bringing such ancillary crimes under the Code. However, with regard to the application of those subparagraphs to the crime of genocide, the Drafting Committee did not intend any modification of the threshold set out in the Convention on the Prevention and Punishment of the Crime of Genocide. The commentary would make that point very clear.

26. Subparagraph (d) dealt with aiding and abetting or otherwise assisting in the commission of a crime, including providing the means for its commission. The acts in the subparagraph, however, were qualified by three requirements: they should be committed knowingly; they should be direct; and they should be substantial. Those three requirements were intended to limit the application of the Code to those individuals who had had a significant role in the commission of a crime under the Code.

27. Paragraphs 3 (e) and 3 (f) dealt with participation in planning, conspiring and incitement. For reasons stated in relation to subparagraph (a), acts described in subparagraphs (e) and (f) entailed individual criminal responsibility under the Code only if a crime in fact occurred.

28. Lastly, Paragraph 3 (g) dealt with attempt. The statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda did not include attempt as an independent criminal act. In the view of the Drafting Committee, however, the crimes listed in the Code were of such gravity that an individual who took action commencing the execution of a crime which did not occur because of circumstances independent of that individual's intentions should nevertheless bear individual criminal responsibility.

29. Paragraph 4 addressed punishment. He recalled that on first reading, the issue of punishment was to have been covered in individual articles dealing with crimes. It was only on second reading that the Commission had indeed had a serious debate on various forms of punishment and, in particular, on the death penalty. The views in the Commission, as in the Drafting Committee, had been diverse. The Committee had concluded that it was unlikely that the Commission could agree on penalties and that the establishment of penalties at that stage was not essential to the usefulness of the Code. Accordingly, the Committee had found it prudent to formulate only a

general provision on penalties, leaving specific establishment of penalties to the competent court or tribunals implementing the Code. Paragraph 4 therefore only provided that individuals who were responsible for a crime against the peace and security of mankind were liable to punishment commensurate with the character and gravity of the crime. The commentary would also make it clear that the paragraph did not rule out any form of penalty.

30. The title of the article had been changed to "Individual responsibility and punishment", which reflected more accurately its content. The Drafting Committee recommended that the Commission should adopt article 2.

31. Mr. GÜNEY said that, while fully aware of the discussions that had taken place in connection with paragraph 4 and of the explanations just provided by the Chairman of the Drafting Committee, he continued to be of the opinion that the paragraph should form a separate article, thereby giving greater prominence to the fact that an individual responsible for a crime against the peace and security of mankind would be liable to punishment commensurate with the character and gravity of that crime.

32. Mr. IDRIS, referring to paragraph 3 (d), said that the word "and" in the phrase "directly and substantially" was problematic. He asked whether the implication was that, if the assistance rendered was direct yet not substantial, a crime was not committed. A crime could be committed with assistance that was direct yet not substantial, or vice versa.

33. Mr. PELLET said that, first of all, he disapproved of the structure of the article, and particularly of the different forms in which paragraphs 2 and 3 were cast, the reason for which had not been made clear by the Chairman of the Drafting Committee. The wisdom of singling out the crime of aggression for separate treatment was debatable.

34. Secondly, he was not at all happy with the new wording of paragraph 1. He personally had found paragraph 1 of the old article 3 infinitely more satisfactory. Thirdly, with regard to paragraph 3 (e), he would welcome clarification as to the reasons why the Committee had felt it useful to retain the idea of conspiring to commit such a crime, since the Statute of the International Tribunal for the Former Yugoslavia had very deliberately avoided reference to the notion of conspiracy.

35. Lastly, he was troubled by the wording of paragraph 4. Did the reference to punishment "commensurate with the character and gravity of the crime" mean that, within the concept of a crime against the peace and security of mankind, there were crimes of differing character? He quite failed to see how that could be possible, and was greatly opposed to the use of the word *nature*, in the French version, which should be deleted.

36. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said the object of paragraph 3 (e) was to make it clear that responsibility was incurred not only by those who actually committed the crime but also by those who participated in planning it. As for para-

graph 4, Mr. Pellet's difficulty could perhaps be resolved by replacing the word *nature* in the French version by the word *caractère*, which corresponded to the term used in the English text. The point made by Mr. Güney that paragraph 4 should become a separate article had been considered by the Drafting Committee and the conclusion had been reached that the provision was relatively insubstantial inasmuch as it did not say much about penalties and it could therefore be combined with the other provisions of article 2.

37. Mr. THIAM (Special Rapporteur) agreed that the word *nature* in the French version of paragraph 4 should be replaced by *caractère*.

38. Mr. TOMUSCHAT agreed with Mr. Güney that paragraph 4 should appear as a separate article. It contained two substantial propositions and could perfectly well stand on its own. With regard to paragraph 3 (g), an attempt to commit a crime against the peace and security of mankind did not, in each and every instance, qualify as such a crime. Instances where an attempt was of sufficient gravity to qualify as a crime and to require prosecution did undoubtedly occur, but the provision in subparagraph (g) went too far. He did not, however, wish to question the subparagraph at so late a stage and merely asked that his observations be placed on record. Paragraph 4 was, in his view, well drafted, at least in English. The difference between, say, misuse of the emblem of the Red Cross and wilful killing was obviously very great in terms of the punishment that should be imposed on the perpetrator.

39. Mr. RAZAFINDRALAMBO said the structure of article 2 was puzzling. It was difficult to see why the crime of aggression was singled out in paragraph 2, unless it was to distinguish aggression from the crimes set out in articles 16, 17 and 18. Indeed, paragraph 3 seemed to introduce all the relevant general principles of criminal law in rather pell-mell fashion. He wondered whether, in the interests of clarity, subparagraph (g) on attempts to commit a crime should not be moved up to follow on directly from subparagraph (b), where the concept of attempt was introduced for the first time. He agreed that the provision in paragraph 4 should form the subject of a separate article, and also endorsed the proposal to replace the word *nature* in the French text by the word *caractère*. It might be possible to use a term such as *élément caractéristique*.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the structure of paragraph 3 was dictated by the need to combine the principles of civil law with those of common law. He did not think it would be helpful to establish a closer relationship between paragraphs 3 (b) and 3 (g). The former dealt with the ordering of a crime, while the latter spelt out the concept of attempt. The reason why aggression was dealt with separately from other crimes against the peace and security of mankind was that article 15 itself set out all the possible elements of action by the individual concerned. Lastly, he would have no objection to the provision in paragraph 4 becoming a separate article if that was the wish of the majority of members.

41. Mr. THIAM (Special Rapporteur) said that he, too, would have no objection to such a course. With refer-

ence to paragraph 3 (b), the word *exécuté* in the French version should be replaced by *commis*.

42. Mr. PAMBOU-TCHIVOUNDA said that, like Mr. Pellet, he was not entirely satisfied with the wording of paragraph 1 and suggested that the words *de son auteur*, (of the perpetrator) or similar language, should be added at the end of the French text. While agreeing that the provision in paragraph 4 should form a separate article, he wondered whether it would not be technically more correct to replace the words "responsible for" by "found guilty of". In the French version, the word *nature* should replace *caractère*.

43. Mr. CRAWFORD said that he experienced the same difficulties as did Mr. Tomuschat. While recognizing that it was beyond anyone's capacity to improve the text of article 2 at the present stage, he could not help noting that, as the Chairman of the Drafting Committee himself admitted, the definitions in part two invoked in paragraphs 2 and 3 of the article involved quite different techniques. Moreover, some of the cases listed in paragraph 3 referred to acts that had not in fact occurred, whereas genocide, crimes against humanity and war crimes were defined in terms of acts that had in fact taken place and produced results. However, as already stated, it was probably too late to make any changes, but the defective drafting could be improved in one respect. The inclusion of attempts to commit a crime against the peace and security of mankind, as now formulated, was undesirable. Paragraph 3 (g) should simply be deleted. Public incitement was certainly highly relevant and was already covered in paragraph 3 (f). All other cases could be covered by including a reference to the relevant separate conventions already in existence. Admittedly, the Convention on the Prevention and Punishment of the Crime of Genocide did, in its article III, include attempt to commit genocide among the punishable acts, but the Commission was not engaged in re-enacting that Convention, nor should it so engage. It was dealing with a particular category of very grave crimes. Attempts that did not involve public incitement, planning and so forth should be omitted.

44. The provision in paragraph 4, as it stood, ran counter to the principle of *nulla poena sine lege* in that it failed to specify a maximum penalty. The paragraph set out an independent principle of criminal responsibility that had nothing to do with maximum penalties. The draft statute for an international criminal court as adopted by the Commission⁸ specified the maximum penalty of life imprisonment. The Code was not self-executing, as it would require each national legislature to add its own tariff of maximum penalties, which in some countries might involve the death penalty.

45. Mr. THIAM (Special Rapporteur) recalled that the concept of attempt had been discussed in considerable detail in the past. The upshot had been that it should be left to the court to decide whether the concept of attempt was or was not applicable in each particular case. The fact that in some cases an attempt did qualify as a crime against the peace and security of mankind had been

⁸ See 2433rd meeting, footnote 5.

considered sufficient reason for including the concept as a general principle.

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that where the attempt involved, say, systematic or large-scale killing, and where the circumstances that prevented the execution of the crime had been beyond the control of the individual making the attempt, a crime against the peace and security of mankind surely existed. In the case of crimes of a different character and lesser gravity, the concept of attempt might not be applicable. With regard to the question of penalties raised by Mr. Crawford, he had always thought the Commission should propose a maximum and a minimum penalty. The difficulties were, however, enormous, because of differences between national legislations and especially because of the fundamental issue of the death penalty. Some countries would not accept the Code if it prescribed the death penalty, and others would not accept it if it did not. In his own view, paragraph 4 as it stood said very little, but he would nevertheless plead for it to be maintained. The Code should contain at least some reference to punishment.

47. Mr. FOMBA said that, as a member of the Drafting Committee, he of course agreed with the results of the Committee's work and wished only to make a few brief comments.

48. As he understood it, the reason why paragraph 1 did not speak of criminal responsibility was to leave the door open for civil responsibility as well. He would have preferred the words "of the perpetrator" to be added at the end, but could endorse the paragraph as it stood. As far as paragraph 2 was concerned, the purpose of placing the crime of aggression in a separate provision was to underscore its special nature.

49. In the first sentence of paragraph 3, the words *responsable du crime* could well be changed to *responsable d'un crime* in the French version, but he would not insist on such an amendment. There had been some hesitation in the Drafting Committee about the distinction between paragraph 3 (b) and paragraph 3 (g). The main point of paragraph 3 (b) was to make the ordering of the crime a crime in itself, so as to serve as a deterrent.

50. The word "substantially", in paragraph 3 (d), posed a problem, because it was not easy to assess. In the absence of better wording, however, he was not opposed to its being retained.

51. He would have preferred the word *caractère* to *nature* in paragraph 4 of the French text, but considered that the debate on that point was somewhat artificial. He certainly agreed that the paragraph should form a separate article.

52. Mr. VILLAGRÁN KRAMER said that there was no need to make a reference in paragraph 1 to perpetrators and accomplices, although there was no harm in so doing. Anyone reading the article would immediately realize that, only in the case of aggression, mentioned in paragraph 2, were the perpetrators guilty or punishable, whereas in the case of other crimes, both the perpetrators and the accomplices were guilty. That brought him to paragraph 3, under which the idea of intent and attempt

related solely to crimes under articles 16, 17 and 18, namely genocide, crimes against humanity and war crimes. Clearly, in the case of aggression, only perpetrators, without further qualification, were responsible, whereas the various elements set forth in paragraph 3 applied in the other cases.

53. He wondered, in that connection, how the Commission would deal with the situation of accomplices if Mr. Rosenstock's proposal for an article 22 *bis*, on crimes against United Nations and associated personnel, contained in the memorandum submitted by Mr. Rosenstock at the suggestion of the Drafting Committee (ILC (XLVIII)/CRD.2 and Corr.1), was incorporated in the draft. The Commission was identifying articles 16, 17 and 18. By using that method, it was saying that subparagraphs (a) to (g) all applied only to genocide, crimes against humanity and war crimes, whereas if the words "except for the crime of aggression" were inserted in paragraph 3, it would cover all other crimes.

54. The CHAIRMAN said he thought it was not the time to raise Mr. Rosenstock's proposal.

55. Mr. THIAM (Special Rapporteur) said he agreed. The Commission should wait to see whether the proposal was adopted before deciding what importance to give it in the Code.

56. Mr. VILLAGRÁN KRAMER said he did not disagree, but as the draft now stood, intent and accomplices only entered into play in articles 16, 17 and 18. They would not enter into play if other crimes were added later, in which case it would be necessary to revert to the matter.

57. Paragraph 3 rightly touched on the case of an attempted crime and on the question of accomplices, but it did not address situations in which the attempt was foiled or the issue of those responsible for covering up the crime. The law of the Spanish-speaking countries also covered the case of the *encubridor* (accessory after the fact). He had no objection to excluding that aspect, but it should be made plain that the Commission was doing so deliberately.

58. Lastly, Mr. Güney was right to say that paragraph 4 should form the subject of a separate article. However, as Mr. Crawford had rightly pointed out, in countries in which the principle of *nulla poena sine lege* applied, it would be impossible for a court to apply such a provision. It might therefore be preferable, when separating that paragraph, to return to the question of maximum and minimum sentences. He had no difficulty in mentioning the death penalty in countries where it was applied, but it was possible to exclude them by including a reference to the effect that, apart from countries with the death penalty, the maximum punishment would be life imprisonment.

59. Mr. BOWETT said he had been struck by the fact that, whereas the Commission had been dealing with the attempt to commit a crime, it had not addressed the attempt to conceal the commission of a crime. In view of the very serious attempt to conceal the commission of war crimes on a large scale in Bosnia, he wondered whether that matter should not also be taken up.

60. Mr. THIAM (Special Rapporteur) said that an attempt to conceal a crime in fact constituted complicity in that crime.

61. Mr. TOMUSCHAT said he disagreed with Mr. Crawford's assertion that paragraph 4 was a violation of the principle of *nulla poena sine lege*. International law in that field had never been understood as requiring that a penalty be determined. At Nürnberg, for example, it had been found that crimes against peace had been crimes under customary law, although there had been no provision for penalties. Likewise, in the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, although provision was made for penalties, many of the acts had been committed beforehand. The basis was customary international law, which did not stipulate penalties. Thus, there was no violation of the recognized standards of international human rights law.

62. He said he would maintain his proposal to make paragraph 4 a separate provision and suggest dividing it into two sentences. The first would end after the word "punishment", and then the second would begin with "Punishment is commensurate".

63. Mr. HE said that he agreed with Mr. Tomuschat and the Chairman of the Drafting Committee about paragraph 4. There was no need to set a maximum punishment. The most serious crimes were at issue. The case of genocide, for example, involved abhorrent mass killings. In a national court, the perpetrator of such crimes might be sentenced to death if the law of the State in question stipulated the death penalty. If life imprisonment was made the maximum punishment, then the national court of a country with the death penalty would be reluctant to hand over the criminal to the international criminal court. He had no strong feelings about whether or not the paragraph should be made a separate article.

64. Mr. PELLET, first addressing the question of punishment in paragraph 4, said it was apparent that, after so many years of consideration, there was still some confusion about the very function of the Code. The Code was not enough on its own. It would be applied either by domestic courts or by an international criminal court, which would set the scale of punishment. He had no criticism of paragraph 4 in that regard. As he saw it, the question of *nulla poena sine lege* would be resolved in the framework of the statutes of the courts. The Special Rapporteur had rightly suggested replacing the word *nature* by *caractère* in the French text of the paragraph to bring it into line with the English version. But even the English word "character" was not entirely satisfactory. In both the French and the English versions the term should be placed in the plural.

65. He said that he was very hostile to the use in the English version of paragraph 3 (e) of the phrase "conspiring to commit". Conspiracy had a very specific meaning in common law and was a concept that did not exist in civil law countries. It was therefore entirely unacceptable to introduce it in a text with a universal scope of application. In the drafting of the statute of the International Tribunal for the Former Yugoslavia, great thought had been given to the problem and it had been decided, contrary to what had been done at Nürnberg,

not to include conspiracy. First, it was impossible to identify general principles of law on the concept of conspiracy that were common to the common law system and to the civil law system. Secondly, it had been very difficult at Nürnberg to decide just how far conspiracy went. For example, had membership of the National Socialist Party constituted conspiracy or not? There was no point in including the concept in the draft, especially as ordering the commission of such crimes was already covered. In his view, the word "participate" was sufficient.

66. He was sceptical about the usefulness of singling out the crime of aggression. Admittedly, article 15 had been the result of a painful compromise and he was not firmly opposed to it, but he was not sure that separate treatment in article 2 for crimes of aggression was warranted. If the Commission wanted to move ahead in adopting article 2, it should postpone the adoption of paragraph 2 until it had considered article 15. The Commission could very well cover crimes of aggression in article 2, paragraph 3, while leaving the wording of article 15 as it stood.

67. He much preferred retaining the wording of article 3, paragraph 1, adopted on first reading, which read:

An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

It was vastly superior to article 2, paragraphs 1 and 4.

68. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), referring to a question raised by Mr. Pellet, drew the Commission's attention to paragraph (4) of the commentary to article 3, adopted on first reading, which stated:

Paragraph 2 also refers to conspiracy to commit a crime against the peace and security of mankind . . . Instead of the French term *complot*, the Commission preferred the term *entente*, which was taken from article III of the Convention on the Prevention and Punishment of the Crime of Genocide and differed, in French at least, from the term used in the 1954 draft Code and in Principle VI of the Nürnberg Principles. *Entente* and *complot* were both translations of the word "conspiracy", which was used in the English version of the draft article. In any event, the punishable conduct in question was participation in a common plan for the commission of a crime against the peace and security of mankind. The Commission used that concept to mean a form of participation, not a separate offence or crime.¹⁰

That would not solve Mr. Pellet's problem that conspiracy was unknown in civil law systems, but it showed that the concept had already been included in other legal instruments and in the text of the draft Code as adopted on first reading.

69. As to the possibility of punishing complicity in cases where persons who committed a crime had been aided and abetted after the crime was committed, that was the only question that had not been discussed in the Drafting Committee. It was useful, in that connection, to refer to paragraph (3) of the commentary to article 3 of the draft Code as adopted on first reading, which stated:

⁹ See footnote 1 above.

¹⁰ Ibid.

Most members agreed that any aiding, abetting or means provided prior to the perpetration of the crime or during its commission constituted obvious cases of complicity. On the other hand, opinions were divided on how to deal with aiding, abetting or means provided *ex post facto*, in other words, after the commission of the crime, for example, when the perpetrator was helped to get away or to eliminate the instruments or the proceeds of the crime, and so on. A conclusion seemed to be reached that complicity should be regarded as aiding, abetting or means provided *ex post facto*, if they had been agreed on prior to the perpetration of the crime. However, opinions were divided as to aiding, abetting or means provided *ex post facto* without any prior agreement. In the view of some members who represented certain legal systems, that was also complicity and the accomplice would be known under those legal systems as "an accessory after the fact". For other members, that was an offence of a different kind, known as "harbouring a criminal". They did not see how, for example, a person who gave shelter to the perpetrator of genocide could be compared to that perpetrator as a participant in a crime against the peace and security of mankind. That person did, of course, commit a crime, but he did not take part in the perpetration of a crime against the peace and security of mankind.¹¹

As he saw it, it should be possible to resolve the problem by including a statement in the commentary, as in the commentary to the articles adopted on first reading, pointing out that doubts persisted on the question.

70. Mr. THIAM (Special Rapporteur) said that the concept of complicity had a broader meaning in common law countries than in civil law countries. There was no need to dwell on the question, which was of a purely theoretical nature. He had already discussed the distinction in his commentary.

71. Mr. KABATSI said that paragraph 4 should stand as drafted. Admittedly, it departed from the norm in that in many jurisdictions crimes and their punishments were strictly defined, but it catered for a special situation in which a wide divergence of policies in the matter of sentencing had to be taken into consideration. He, too, favoured a separate article for the provision.

72. Mr. ARANGIO-RUIZ said he would like to know why Mr. Pellet believed that the word *nature*, in the French text, should be replaced by the word *caractères*, in the plural. His own feeling was that the word *nature*, or the word *caractère*, in the singular, was better, since it denoted the kind of crime referred to.

73. Mr. EIRIKSSON said that he would have preferred the draft Code to provide for a maximum penalty of life imprisonment for the gravest crimes.

74. Mr. Sreenivasa RAO said article 2 dealt with a number of concepts that had been the subject of widely differing interpretations under the various systems of law. It was therefore particularly important to ensure that the commentary to the article was carefully drafted to bridge the gaps, in so far as possible, and show how certain concepts had been drawn together. The way in which some concepts had been borrowed from established practice must be viewed afresh in order to arrive at a better understanding of what precisely was involved. Otherwise, the article would only continue to give rise to debate not only in the Commission but also in the Sixth Committee and in other bodies.

75. In general, he could go along with the various points raised, provided they met with general consensus. Like Mr. Pellet, however, he had some difficulty with paragraph 2 of the article and its reference to article 15, one which spoke of an "individual, who, as leader or organizer". A point would have to be clarified. If a participant in aggression was not an organizer or leader, would he be exempted from responsibility under article 15 and hence under paragraph 2 of article 2? Also, why was the provision in paragraph 2 not included along with articles 16, 17 and 18? What was the reason for its separate treatment? He would be grateful for clarification.

76. Mr. ROSENSTOCK said that the extract read out by the Chairman of the Drafting Committee from the commentary adopted on first reading indicated disagreement among members of the Commission. He did not, however, believe there was any disagreement that someone who hid or otherwise concealed the fact, or perpetrator, of a crime was guilty of a crime. Only at the very conceptual level was there any such difference. It was true that, because of the inclusion of the words "in the commission of such a crime", paragraph 3 (*d*) could be perceived as being limited to conduct before the actual commission of the crime. But the Commission could perhaps agree that what that provision covered was not merely conduct before the crime but also actions which, under one legal system, would make the perpetrator an accessory after the fact and under another would constitute independent crimes. If such agreement was not possible, some relatively minor drafting changes could perhaps be made, for instance, by adding to paragraph 3 (*d*) some wording along the lines of "or in deliberately concealing the commission". He saw no basis whatsoever for any member taking the view that acts such as hiding the perpetrator of a crime or destroying evidence did not amount to criminal conduct. Nor did he see why the commentary should indicate that anybody thought it was not criminal conduct, which seemed to be the implication of what had been read out.

77. Mr. TOMUSCHAT said that he could not agree with Mr. Rosenstock. To conceal or hide a person after that person had committed a crime against the peace and security of mankind might constitute criminal conduct, but it certainly did not amount to a crime against the peace and security of mankind. If such concealment or hiding formed part of a concerted plan, that was a different matter, but to hide a criminal after he had committed even a terrible act was not an act of sufficient gravity to amount to a crime against the peace and security of mankind. The scope of article 2 would be broadened enormously and he had been among those who had opposed such a course at the forty-third session, in 1991.

78. Mr. PELLET said that the purpose of a commentary was to clarify a text, not correct it. If the text was unsatisfactory, then it should be corrected. The commentary should not be used to state the opposite.

79. With regard to Mr. Arangio-Ruiz's comment, the reason why he wanted to replace the word *nature* by the word *caractères* was precisely because crimes of the same *nature*, could have different *caractères*. Crimes against the peace and security of mankind fell into a specific category and, within that category, such crimes

¹¹ Ibid.

could differ either as to their object or intent or because of participation or incitement. The word *caractères* removed the ambiguity inherent in the word *nature*, and to a lesser extent in the word *caractère*, which gave the impression that in the general concept of crimes against the peace and security of mankind there were crimes of a diverse *nature*. And that shocked him.

80. As to the use of the word *entente* (conspiring) in the French text, the extract read out from the commentaries adopted on first reading was not altogether satisfactory. He therefore proposed formally that the phrase “or conspiring to commit” in paragraph 3 (*e*) should be deleted and also that some reference should perhaps be included in the commentary to indicate that the word “planning” embraced the common law concept of conspiracy which had no equivalent in civil law.

81. Mr. BOWETT, referring to the remark by Mr. Tomuschat, said that, in proposing the addition of the words “attempts to conceal the commission of a crime”, he had certainly not had in mind merely giving shelter to or hiding the criminal but rather the large-scale and systematic attempts by the Government in Bosnia to conceal the evidence and the commission of crimes against humanity and war crimes.

82. The CHAIRMAN, speaking as a member of the Commission, said paragraph 1 was too general, and he therefore proposed that the words “of the perpetrator” should be added at the end of the sentence.

83. The wording of the English and French versions of paragraph 4 should certainly be brought into line and he would have no objection if the word *nature*, in the French text, was replaced by the word *caractères*. As to whether paragraph 4 should form the subject of a separate article or remain as a provision in article 2, he would be happy to go along with either possibility.

84. While he understood Mr. Pellet’s reservations regarding the words *entente* and “conspiring”, he would not go so far as to demand that they be deleted. Possibly, however, the commentary could sound a note of warning against certain interpretations of those terms. In any event, the courts that would have the task of applying the provision in question would take account of its scope and would not arrive at their decisions lightly. Since it was obviously not possible to draft a text that would be satisfactory to all, the best thing would be to try to reflect in the text ultimately adopted a harmonization of the various legal systems.

85. Mr. EIRIKSSON, noting that some of the proposals made would require further thought, said that the Chairman of the Drafting Committee might wish to have more time to consult with the authors of those proposals.

86. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he did not think he would be able to produce anything approaching a compromise solution, particularly since the formulations the Commission had before it were already compromises worked out in the Drafting Committee. Moreover, of the proposals made during the discussion, only one, in his view, would meet with general acceptance, namely the proposal that paragraph 4 should form the subject of a separate article,

and possibly also Mr. Tomuschat’s proposal that the paragraph should be recast as two sentences. The other proposals made in the course of discussion could be put to the vote, if necessary.

87. Mr. PELLET said he would propose that paragraphs 1 and 4 of article 2 should be merged and re-drafted on the basis of paragraph 1 of article 3 adopted on first reading, with the possible addition of the second sentence of paragraph 4 as proposed by Mr. Tomuschat.

88. Mr. THIAM (Special Rapporteur) said that, while he had every sympathy with that proposal, it did not have the Drafting Committee’s support.

89. Mr. PELLET reminded members that he had also proposed that the Commission should not adopt paragraph 2 of article 2 until it had examined article 15. He therefore proposed that paragraph 2 should be placed between square brackets and that the Committee should revert to it after it had examined article 15.

90. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he would suggest, as an alternative, that paragraph 2 should not be placed between square brackets but that it should be approved on the understanding the Commission would revert to it, if need be, after it had approved article 15.

91. Mr. PELLET said that, in that event, he would be obliged to call for a vote, as he was totally opposed to paragraph 2.

92. Mr. EIRIKSSON suggested that discussion of paragraph 2 should be deferred until article 15 had been examined and that it should not be placed between square brackets.

93. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he would have no objection to that solution.

94. The CHAIRMAN suggested that, in a spirit of conciliation, the Commission should leave aside paragraph 2 for the time being and revert to it after it had adopted article 15.

It was so agreed.

95. The CHAIRMAN reminded members that the Commission also had before it a proposal by Mr. Pellet to delete the reference in paragraph 3 (*e*) to “conspiring”.

96. Mr. BOWETT proposed that the words “or its concealment” should be added after the words “in the commission of such a crime”, in paragraph 3 (*d*), and that the words “or concealment” should be added at the end of that provision. He would welcome a vote on those proposed changes.

97. Mr. GÜNEY suggested the Commission should at that point simply agree that paragraph 4 of article 2 should form the subject of a separate article and that it should defer consideration of all the other proposals until the next meeting to allow time for reflection.

It was so agreed.

98. The CHAIRMAN said that he would ask the Chairman of the Drafting Committee and the Special Rapporteur to prepare for the Commission's consideration a new wording for paragraph 4.

The meeting rose at 1.05 p.m.

2438th MEETING

Friday, 7 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukaschuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING³ (*continued*)

PART ONE (General provisions) (*continued*)

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

1. The CHAIRMAN invited the members of the Commission to continue their consideration of article 2 (Individual responsibility and punishment) of part one of the draft Code of Crimes against the Peace and Security of Mankind and to take decisions on two draft amendments to paragraph 3 of that article. The first draft amendment, proposed by Mr. Pellet, would involve deleting the words "or conspiring to commit" in subparagraph (e).

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

² Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

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

Mr. Pellet's amendment was rejected by 8 votes to 4, with 4 abstentions.

2. The CHAIRMAN invited the members of the Commission to give their views on the second draft amendment, which had been proposed by Mr. Bowett and which consisted in adding, after subparagraph (f), a new subparagraph (f) *bis*, to read:

"(f) *bis*. Deliberately attempts to conceal the commission of such a crime;"

3. Mr. EIRIKSSON said that it would be wiser to add that text to the end of subparagraph (d), which would then read:

"(d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission and deliberately attempting to conceal the commission of such a crime;"

4. Mr. BOWETT said that he had no objection to relocating the text in subparagraph (d), but, in that case, he would reword it to read:

"(d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime or its concealment, including providing the means for its commission or concealment;"

5. Mr. PAMBOU-TCHIVOUNDA said he wondered how it would be possible to establish materially an attempt to conceal a crime, particularly if that attempt was deliberate. He would welcome elucidation on that point before deciding on the proposed text.

6. Mr. THIAM (Special Rapporteur) said that he, too, had not clearly grasped Mr. Bowett's proposal and would welcome a fuller explanation.

7. Mr. BOWETT said that his proposal was not an attempt to introduce into the draft Code the general concept of an accessory after the fact. It was concerned with a specific crime, namely, the deliberate concealment, not of the perpetrator of a crime, but of evidence that a crime had been committed. Thus, the mass graves which had just been discovered in Bosnia and in which between 3,000 and 8,000 bodies were thought to be buried were an example of the deliberate concealment of evidence of a crime.

8. The CHAIRMAN asked whether that idea was not already covered by the expression "aids, abets or otherwise assists . . . in the commission of such a crime", used in subparagraph (d).

9. Mr. VILLAGRÁN KRAMER said that a distinction must be made, as was the case in Spanish and Latin American criminal law, between the person who committed a crime, the person who aided the commission of that crime and the person who concealed that crime. It was the latter act that was the subject of Mr. Bowett's proposal and it had nothing to do with the act of protecting the perpetrator of a crime, which constituted an entirely different offence. It was generally easy to determine the perpetrator of the crime and his accomplice, in other words, the person who participated directly or indi-

rectly in the commission of the criminal offence. The task was much more difficult in the case of concealment of the crime because the culprit might be an authority. Even where an individual was the culprit, concealment could be interpreted in various ways. Those observations would perhaps enable the European and African members of the Commission to grasp the issue more clearly. It remained to settle the problem of terminology and to find the term in the other languages that corresponded to the Spanish word *encubrimiento*, which fully reflected the idea contained in the proposal.

10. Mr. YAMADA said that, unfortunately, the explanations provided by Mr. Bowett had not enabled him to understand the issue any more clearly. In criminal law, concealment meant any act aimed at concealing the perpetrator of a crime, providing the means of avoiding his apprehension or concealing or destroying the evidence of the crime he had committed. Article 2 tried to establish the general principle of individual criminal responsibility and, to the best of his knowledge, all criminal justice systems treated an offence of concealment as a less serious offence than the principal offence. He therefore doubted the advisability of including the crime of concealment among crimes against the peace and security of mankind. Furthermore, the acts committed in the former Yugoslavia of the kind referred to by Mr. Bowett, namely, the burial of victims' bodies in mass graves, had probably been committed not by third parties otherwise innocent of the crime concealed, but by the very persons who had committed the said crime and who were therefore punishable under the Code. Lastly, he was concerned that, if the text proposed by Mr. Bowett was included in article 2, the question of the accessory would then arise, and that would widen the scope of the Code.

11. Mr. KABATSI said that the problem posed by Mr. Bowett's proposal resulted chiefly from the fact that it referred to an "attempt" to conceal a crime and not to its actual concealment. It was obvious that, if a crime was concealed successfully, it would never be known that it had been committed—hence the need to speak of an "attempt". It was also true, as Mr. Yamada had pointed out, that the proposed text had connotations of the concept of an accessory after the fact. Nevertheless, having regard to the concerns expressed by Mr. Bowett in connection with the former Yugoslavia, he thought that that question should be covered in the Code and he would therefore have no difficulty in accepting the text of that proposal.

12. Mr. TOMUSCHAT said that he shared the views expressed by Mr. Yamada. Mr. Bowett's proposal consisted of an abstract text that was open to a number of interpretations. A crime might be concealed for many widely differing motives and it was not possible to focus exclusively on situations such as those to which Mr. Bowett had referred concerning Bosnia. As Mr. Yamada had said, the text was liable to widen the scope of the Code and the Commission would be ill-advised to accept it.

13. Mr. de SARAM said that it would be wrong to consider Mr. Bowett's proposal within the narrow confines of national criminal law or, in other words, to consider the idea expressed in it as covered by the concept of an accessory before and after the fact. The proposal

went much further and deserved to be taken into account. The only question to be settled was where it ought to be placed in the draft Code. In view of the difficulties raised by the concept of attempt, the best solution would be to place it in article 17, which dealt with crimes against humanity.

14. Mr. FOMBA said that the law was not just an intellectual construct, but was supposed to govern real-life situations. He therefore wondered exactly what was meant by the concept of deliberate concealment of the commission of a crime: was it the crime of concealment of evidence or simply of withholding information relating to the commission of the crime?

15. As a contribution to the clarification of that point, he said that, in 1994, shortly before the end of the mandate of the Commission of Experts to investigate violations of international humanitarian law in Rwanda, which had been set up under Security Council resolution 935 (1994) of 8 November 1994, of which he had been a member, the United Nations High Commissioner for Refugees had reported information on allegations of massacres of Hutus by the regime in power. Unfortunately, it had not been possible for the Commission of Experts to establish the facts, mainly for lack of time. But a human rights monitoring team already present in Kigali which had tried to look into the matter, had met with a refusal on the part of the authorities and, in particular, had failed to obtain access to certain areas said at the time to be strategic from the military point of view. Yet there had been presumptions of the commission of massacres and the existence of mass graves in the areas in question. No proof could, however, be produced. He wondered whether that was the type of situation Mr. Bowett's proposal was meant to cover. Insofar as allegations of that kind were confirmed later, it could be deduced that concealment of evidence had taken place and that certain mass graves had been hidden. Mr. Bowett's comments (2437th meeting) had given him to understand, however, that the situation Mr. Bowett had in mind was in fact that of certain countries where crimes against the peace and security of mankind were supposed to be taking place, but about which a deliberate silence was being maintained for political reasons. That would be a case of the withholding of information.

16. He agreed with Mr. Tomuschat that the question would certainly have deserved in-depth discussion in the Drafting Committee and in the Commission. The proposal was well intended, but, before taking a decision, the Commission would need to have a precise definition, backed by a broad consensus, of what exactly was meant.

17. Mr. BOWETT said that he withdrew his proposal.

ARTICLE 2 *bis* (Punishment)

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 2 *bis* which read:

"Article 2 *bis*. *Punishment*

"An individual who is responsible for a crime against the peace and security of mankind shall be lia-

ble to punishment. The punishment shall be commensurate with the character and gravity of the crime.”

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, on a proposal by Mr. Tomuschat (2437th meeting), the Drafting Committee had agreed that there should be a separate article on the question of punishment. It had come up against only one problem, that of the use of the word “character”, but had been unable to find a more appropriate term. If article 2 *bis* were adopted, it would be necessary to delete paragraph 4 of article 2 and to change the title of the article to read “Individual responsibility”.
20. The CHAIRMAN recalled that, at the preceding meeting, Mr. Pellet had proposed that the word *caractère* in the French text should be in the plural.
21. Mr. THIAM (Special Rapporteur) said that he accepted the Drafting Committee’s proposal. He had no strong feelings about the use of the word *caractère* in the singular or the plural although he would tend to favour the singular. If the Commission decided to use the word in the plural, the reasons would have to be given in the commentary.
22. Mr. PAMBOU-TCHIVOUNDA said that he accepted the proposed text as to substance and, except for one detail, as to form. He suggested that the second sentence, at least in the French text, should be amended to read: *Ce châtement est proportionnel au caractère et à la gravité dudit crime*. The present indicative should be used in the French version because an established principle was being stated. He would not insist on the use of the words *dudit crime* and could accept the wording suggested by the Drafting Committee.
23. Mr. RAZAFINDRALAMBO, recalling that he had been in favour of the idea of devoting a separate article to the question of punishment, said that he wished to make the following drafting comments: the words *qui est* in the first sentence were superfluous, at least in the French text; the word *caractère* should be kept in the singular; and it would be useful to keep the words *de ce crime*, which appeared in most of the articles proposed by the Drafting Committee.
24. Mr. ROSENSTOCK said that he had no objection to the deletion of the words “who is”. The word “character” should be left in the singular, at least in the English text, as the plural would be incongruous and would, moreover, sound like the word “characteristics”, which had a basically different meaning.
25. The CHAIRMAN said that there was no need for further discussion of the use of the word “character” in the singular, on which there seemed to be general agreement.
26. Mr. EIRIKSSON associated himself with the comments made by Mr. Rosenstock and the Chairman.
27. Mr. TOMUSCHAT said that the definite article at the beginning of the second sentence should be deleted.
28. Mr. BARBOZA said that he agreed with the principle of having a separate article on punishment, which should be entitled *Sanción* in the Spanish version. He was, however, puzzled by the statement that the punishment was commensurate with the “character” of the crime. The crimes covered by the Code were well known and it would be enough to say that their punishment should be commensurate with their gravity.
29. Mr. CRAWFORD said that the definite article at the beginning of the second sentence should be maintained because, otherwise, the provision would become generic. He was somewhat disturbed by the lack of any reference to the idea that trial must come before recognition of responsibility and punishment.
30. Mr. EIRIKSSON, referring to the last comment, said that the wording proposed by the Drafting Committee corresponded perfectly to the function of a code, which was to make rules. In the case in point, the Code provided that an individual responsible for a crime against the peace and security of mankind was liable to punishment. Determining responsibility was the function of the court.
31. Mr. THIAM (Special Rapporteur) suggested that, in order to take account of the comment made by Mr. Crawford, the beginning of the first sentence might be amended to read: “An individual recognized as being responsible for a crime”.
32. Replying to Mr. Barboza’s comments, he said that all crimes against the peace and security of mankind were of the same nature, but could have a different character depending on how they were committed. For example, the responsibility of an individual who was the direct perpetrator of a crime was different from that of an individual who had ordered the commission of a crime or had refrained from preventing the commission of a crime.
33. Mr. BARBOZA said that he did not think that the word “character” conveyed the very cogent idea which had just been expressed by the Special Rapporteur and which was subsumed in the concept of “gravity”.
34. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the word “character” should be understood to refer to the actual nature of the crime, the way in which it had been committed, and that a differentiation on that basis could affect the penalty imposed. He recalled that the problem of terminology had arisen in the Drafting Committee, which had chosen the word “character” for lack of a better one.
35. Mr. IDRIS said that it would not be wise to replace the words “The punishment” by the words “This punishment”, as Mr. Pambou-Tchivounda had proposed, since the nature of the punishment could not be foreseen.
36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 2 *bis* proposed by the Drafting Committee, as orally amended in the French text.
- Article 2 bis, as amended in the French text, was adopted.*
37. The CHAIRMAN said that the articles adopted on first reading had contained an article 4 (Motives), which

the Drafting Committee had deleted at the forty-seventh session essentially because of the reservations expressed by Governments, the Committee having taken the view that the article blurred the distinction between “motive” and “intent”.⁴

ARTICLE 3 (Responsibility of States)

38. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 3 had been adopted at the preceding session by the Drafting Committee, as article 5, and that its text was sufficiently explicit. The Drafting Committee recommended that the Commission should adopt article 3.
39. Mr. KABATSI said that he was in favour of the deletion of article 3 because he did not see the logic of a reference to the regime of State responsibility in an article relating to individual responsibility, but he would not insist on his proposal if the Commission preferred to retain the provision.
40. Mr. IDRIS said that, on the contrary, article 3 was of vital importance in the Code. In order to bring the text into line with that of article 2, paragraph 1, however, he proposed that the words “responsibility of individuals” should be replaced by the words “individual responsibility”. He also noted that the words “The fact that” at the beginning of articles 3, 4 and 5 were not very appropriate in a text of a convention.
41. Mr. PAMBOU-TCHIVOUNDA said that the question whether article 3 belonged in the Code had been settled: it could play an important role during the determination by the judge of various levels of responsibility, especially with regard to certain crimes.
42. He proposed an amendment to the French text that would shorten and clarify it by the deletion of the words *toute question relative à* and the replacement of the words *en droit international* by the words *en vertu du droit international*. The English text did not read “any question relating to the responsibility”, but “any question of the responsibility”, that is to say responsibility as such. His proposal was thus in keeping with the spirit and letter of the English text.
43. Mr. THIAM (Special Rapporteur), referring to whether it was appropriate to retain article 3 in the Code, said that, when a crime was committed by an individual, two situations were possible: the individual acted either in a private capacity or as an agent of the State. In the latter case, the State might incur responsibility, not at the criminal level, but in respect of compensation. It might thus be prosecuted on the grounds of its international responsibility. That was what article 3 meant, and it thus served a definite purpose. As to the wording of the article, the sentence was in fact a bit long and convoluted and the formulation proposed by Mr. Pambou-Tchivounda was preferable, provided that it created no difficulties for the English text.
44. The CHAIRMAN stressed the importance of leaving the English text as it stood.
45. Mr. VILLAGRÁN KRAMER said that article 3 must be retained in all its clarity because, by virtue of the mandate entrusted to it by the General Assembly, the Commission dealt with three areas of responsibility: individual responsibility for international crimes, State responsibility for international delicts or crimes and State liability for acts not prohibited by international law. The Commission could therefore not disregard the civil liability of States. However, the final wording proposed by the Special Rapporteur, in which the words *toute question relative à* were deleted, was perhaps best.
46. Mr. FOMBA said that, in substance, article 3 was a very important saving clause that, in fact, merely reproduced something that already existed, for example, in the Convention on the Prevention and Punishment of the Crime of Genocide.
47. Mr. BOWETT said that he wondered whether the statement in article 3 was true. For example, concerning aggression, in the framework of the consideration of the draft statute for an international criminal court, the Commission had taken the view that a prior finding that the State had committed aggression was necessary before an individual could be accused of aggression. Hence, how could individual responsibility be without prejudice to the responsibility of the State? The two went hand in hand.
48. Mr. LUKASHUK said that, in order to speed up the Commission’s work, agreement had to be reached on the wording of the text in one working language without constantly going back over the translation. In that connection, he was surprised that, in the practice of the Commission, French was apparently more “equal” than the other languages. He recognized that it was appropriate to keep the tenor of article 3 in the text of the Code, but thought that it should be inserted in article 2, paragraph 1, and that the title could be deleted.
49. Mr. YANKOV said that the Commission should not amend the English text of article 3 so as not to give the impression that the question of the responsibility of individuals could be compared with that of the responsibility of States. Not only might the responsibility of the State as a whole be at issue, moreover, but also certain aspects, details or conditions.
50. Mr. GÜNEY said that he supported the wording proposed by Mr. Pambou-Tchivounda, which was a considerable improvement of the text from the point of view of both style and the terms used.
51. Mr. ROSENSTOCK said that he agreed with Mr. Kabatsi, but would not insist any more than he had that the article should be deleted. On the other hand, he took issue with Mr. Bowett. The fact that the determination of an aggression committed by a State was a pre-condition for considering the responsibility of individuals did not mean that there was anything in the law of the responsibility of individuals which itself affected the responsibility of States. The Commission could thus live with the English text of article 3, specifying that it covered wrongful acts committed by States.
52. Mr. TOMUSCHAT said that article 3 gave the wrong impression that there were two air-tight compart-

⁴ See *Yearbook* . . . 1995, vol. I, 2408th meeting, para. 14.

ments, State responsibility, on the one hand, and individual responsibility, on the other. The comment by Mr. Bowett was correct and confirmed by a reading of article 15 (Crime of aggression). Attention might therefore be drawn in the commentary to the existence of links between State responsibility and individual responsibility. Secondly, he found the words "The fact that the present Code provides" somewhat cumbersome. Moreover, that was not a fact, but a legal proposition, and the text would be more elegant if the phrase were quite simply deleted.

53. Mr. Sreenivasa RAO said that, like Mr. Lukashuk, he was in favour of incorporating the tenor of article 3 in article 2, paragraph 1. But if the Commission insisted on retaining the article, he agreed with Mr. Idris and Mr. Tomuschat on the need to make the wording at the beginning of the sentence less cumbersome.

54. With regard to the comment by Mr. Bowett, he did not think that the text of the article prevented individual responsibility arising from a prior determination of State responsibility. What article 3 said was that individual responsibility established directly in the framework of the Code, apart from the case of aggression, was without prejudice to any question of the responsibility of States. That would be determined separately and would be decided separately from its consequences.

55. Mr. de SARAM said that he had no objection to article 3, but pointed out that its purpose was to recognize that there could be State responsibility for the commission of an internationally wrongful act under the applicable rules of international law.

56. Mr. ARANGIO-RUIZ said he agreed with Mr. Bowett that there was a contradiction between article 3 and the draft statute for an international criminal court. In his view, however, it was the statute that was wrong, not article 3.

57. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 3 proposed by the Drafting Committee, it being understood that the Special Rapporteur, Mr. Güney and Mr. Pambou-Tchivounda would review the translation of the English text into French.

Article 3 was adopted on that understanding.

State responsibility (continued)* (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,⁵ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

58. The CHAIRMAN reminded the members that Mr. Arangio-Ruiz had announced his intention of resigning his office as Special Rapporteur for the topic of State responsibility (2436th meeting). Mr. Arangio-Ruiz had made a significant contribution, in the form of draft articles, to the Commission's work on the topic, whose importance was equalled only by its difficulty in both intel-

lectual and practical terms. As the Commission had been on the verge of completing the first reading of the draft articles, it would be desirable, at that crucial stage in its work, if it could continue to benefit from the Special Rapporteur's contribution.

59. Mr. ARANGIO-RUIZ said that he wished to explain more clearly why he had resigned his office as Special Rapporteur. Since his preliminary report on the topic in 1988,⁶ he had been very circumspect so far as the concept of international crimes of States was concerned. Considering that that matter was *terra incognita* for him, he had decided to deal first with delicts or internationally wrongful acts in general and only thereafter with crimes. The Commission had accepted his choice, but some members had obviously been impatient to see the topic of crimes taken up and from time to time had asked him about the matter.

60. He had finally taken up the subject in 1993 in his fifth report,⁷ but, in the interim, there had been a very important development, namely, the felicitous end of the cold war and the equally felicitous revitalization of United Nations action under Chapter VII of the Charter of the United Nations. There had also been two other developments, however, one within the Commission and the other in the world at large. So far as the latter development was concerned, he had noticed—and he had not been the only one to do so—that the United Nations had at times gone beyond certain limits and had occasionally encroached on the area of international relations that pertained to the law of State responsibility. That had increased his misgivings, preoccupation, diffidence and suspicion in respect of article 4 of part two as adopted on first reading.⁸ At about the same time that he had really started to deal with crimes, a theory had been put forward in the Commission that since all the crimes to be considered could be covered by one or other of the hypotheses contemplated in Article 39 of the Charter, the Commission had little or nothing to say on the institutional aspects of the consequences of crimes. The Security Council would suffice. As to ICJ, it had been considered not popular enough and too slow—another fact of life for which there were allegedly no remedies.

61. Twice during the forty-seventh session—in informal meetings and then in two formal votes, by 18 votes to 6—the Commission had rejected the attempt of the members who opposed his draft articles 15 to 20 being referred to the Drafting Committee. Repeatedly, therefore, the possibility had then been preserved that, *inter alia*, a serious discussion be carried out, in the current Drafting Committee, on the comparative merits of his proposed draft article 20, on the one hand, and article 4 as adopted, which obviously implied, in his view, an improper subordination of the law of State responsibility to the law of collective security as interpreted by a political body. Considering, however, that the latter issue, in particular, had not been adequately debated, if at all, at the

⁶ *Yearbook* . . . 1988, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

⁷ *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3.

⁸ Originally adopted as article 5, see *Yearbook* . . . 1983, vol. II (Part Two), p. 43.

* Resumed from the 2436th meeting.

⁵ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

forty-seventh session, and that it was far from sure that a thorough discussion of such a serious matter would be carried out at the current session, he had decided in his eighth report (A/CN.4/476 and Add.1) to revert to the problem of the relationship between the law of State responsibility and the law of collective security. In introducing the report (2436th meeting), his main aim throughout his statement had been to stress the distinction between the two areas of international law, to compare article 4 as adopted and the proposed draft article 20 and to undertake a critical examination of article 4. Article 4 was also a source of concern to other lawyers, including Mr. Bowett, who had written an article⁹ expressing doubts and mentioning that the Special Rapporteur had frequently suggested that article 4 should be reviewed. At the end of his statement—and in addition to the fact that many members had been absent and some of those who had been present had remained silent—there had been only one strong minority statement and a few, often very short, statements, which, with a few exceptions, had been very discouraging in terms of what he firmly believed the Commission should do in instructing the Drafting Committee regarding the consequences of crimes and notably draft articles 19 and 20, as referred to the Drafting Committee at the preceding session together with draft articles 15 to 18.

62. What could a special rapporteur do in such a situation? Mr. Tomuschat had reminded the members that special rapporteurs were at the service of the Commission—quite so, but, in the present case, it was to serve the progressive development and codification of the law of State responsibility. It was not to help to dismantle at least one important part of that law, which was what the effect would be of retaining article 4 as drafted and of certain attempts to subject the institutional aspects of the consequences of crimes to the will of political bodies whose decisions were not susceptible of any review whatsoever by a judicial body.

63. His situation was in fact even worse at the current session compared with the preceding one, when there had been votes which had shown a clear majority and minority and he had been able to hope for better things the following year. At the current session, he was somewhat of a lame duck in that, for reasons of no interest to the Commission, he was not a candidate for a further term of office and would therefore be unable to exert any influence with regard to the second reading of the draft on State responsibility or make any contribution to that work. Nevertheless, considering the importance of the problems involved in the draft articles relating to State crimes, he would in principle have been ready to continue up to the end of the session. However, the scarcity of the Commission's debate which had followed his introduction of the eighth report had given him the clear impression either that it did not want to hold a proper debate on the subject or even that it—or at least some of its members—deemed any further discussion pointless in that they had already decided to settle the delicate issue in a manner he did not consider to be appropriate. In the circumstances he felt that he had no other choice but to resign his office as Special Rapporteur. The Commis-

sion would certainly be able to find a lawyer, or diplomat/lawyer, who would be more amenable than he to the necessities which were deemed, rightly or wrongly, to be predominant and who could better help the Drafting Committee to complete the first reading of the draft articles on State responsibility.

64. The CHAIRMAN said that he accepted that decision, although with regret. The reports of the Special Rapporteur, Mr. Arangio-Ruiz, had made an outstanding contribution to the study of a topic the difficulty of which was unquestionable. Unfortunately, as was the way with such reports, they tended to become the target of much criticism, which was sometimes constructive, but sometimes smacked of a demolition job.

65. Mr. VILLAGRÁN KRAMER said that, in his view, the Commission should react in a frank and logical manner to Mr. Arangio-Ruiz's decision. The successive Special Rapporteurs on the topic of State responsibility had made valuable contributions, but they had not all had the same temperament. Mr. Arangio-Ruiz's contribution was no exception to that rule, even if his views on *lex ferenda* in particular were not shared by everyone. Mr. Arangio-Ruiz was a man of conviction, determined, energetic and enthusiastic, but one who sometimes tended to the theatrical in the tradition of the great European university professors. It would be neither appropriate nor right to insist on his remaining in the office of Special Rapporteur, but he should be urged to continue to make his valuable contribution to the work of the Drafting Committee and the Commission.

66. The CHAIRMAN suggested that the discussion should be continued in an informal meeting of the plenary with a view to arriving at a decision on how to proceed.

It was so agreed.

The meeting rose at 12.35 p.m.

2439th MEETING

Tuesday, 11 June 1996, at 10.10 a.m.

Chairman: Mr. Robert Rosenstock

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Szekely, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

⁹ See 2436th meeting, footnote 14.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

PART ONE (General provisions) (continued)

1. The CHAIRMAN noted that the Commission was not making very rapid progress in its consideration of the draft articles adopted by the Drafting Committee on second reading (A/CN.4/L.522 and Corr.1) and might even have to encroach on the time allotted to other topics. He therefore suggested that any linguistic or other minor changes should be submitted to the secretariat and that statements for the record should take the form of brief explanations after the article in question was adopted. In particular he urged members to resist the temptation to re-litigate controversial points in plenary meetings.

2. He invited the Chairman of the Drafting Committee to resume his introduction of the draft articles adopted on second reading.

ARTICLE 4 (Order of a Government or a superior)

3. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had adopted the article at the forty-seventh session, as article 11, and had made no changes to it at the current session apart from deleting the square brackets around the last phrase. The article laid down the principle that the fact that an individual had acted pursuant to an order of a Government or a superior did not absolve him or her of criminal responsibility but could be considered in mitigation of punishment if justice so required. The reference to mitigation had been placed between square brackets pending the adoption of an article on mitigating circumstances and there was now a general provision on the subject. The Committee considered that it would be useful to retain the concluding clause as a guide for the competent court. The explanation of the article given by the Chairman of the Drafting Committee at the preceding session appeared in the relevant summary record.⁴

4. Mr. PAMBOU-TCHIVOUNDA said that the provision in article 4 was addressed to the courts. That being so, he proposed that, in the French version, the phrase *considéré comme un motif de la diminution de la peine* should be replaced by *retenu comme circonstance atténuante de la peine*.

5. Mr. THIAM (Special Rapporteur) said he agreed with that proposal but would prefer to keep the word

considéré. It was a question of language and as such could perhaps be referred to the secretariat.

6. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, if it was also Mr. Pambou-Tchivounda's intention to delete the words "if justice so requires", that would involve a substantive change which could not be approved in either the French or the English text of the article.

7. Mr. PAMBOU-TCHIVOUNDA said he did not mind whether those words were retained or deleted.

8. Mr. GÜNEY said that Mr. Pambou-Tchivounda's proposal improved the French text of the article considerably. He also considered that the words "if justice so requires" should be deleted.

9. Mr. THIAM (Special Rapporteur) said that, although those words were not altogether necessary, they already appeared in an earlier instrument, namely, the Charter of the Nürnberg Tribunal.⁵ He would therefore propose that they be retained.

10. The CHAIRMAN said that, in the light of comments made, if he heard no objection, he would take it that the Commission wished to adopt article 4 as proposed by the Drafting Committee.

Article 4 was adopted.

ARTICLE 5 (Responsibility of the superior)

11. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said the Drafting Committee had adopted article 5 at the forty-seventh session, as article 12, and had made no changes at the current session. As the Chairman of the Drafting Committee in 1995 had explained,⁶ it corresponded to article 86, paragraph 2, of Additional Protocol I to the Geneva Conventions of 12 August 1949 and its antecedents lay in the jurisprudence of the international military tribunals established after the Second World War and in the texts on international criminal law adopted at that time.

12. Mr. PAMBOU-TCHIVOUNDA said that the last part of the article, starting with the words "if they did not take all . . .", raised a substantive question. Specifically, was it possible that the ability of the superior to repress the crime could be called into question a posteriori?

13. Mr. GÜNEY suggested that the words "the perpetrator of" should be added before the words "the crime" at the end of the article.

14. Mr. THIAM (Special Rapporteur) explained that the text of the article had been taken directly from article 86 of Additional Protocol I to the Geneva Conventions of 12 August 1949. It would be better therefore not to modify the article without good reason.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

⁴ See 2437th meeting, footnote 4.

⁵ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

⁶ See 2437th meeting, footnote 4.

15. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 5 as proposed by the Drafting Committee.

Article 5 was adopted.

ARTICLE 6 (Official position and responsibility)

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said article 6, like the two previous articles, had been adopted at the forty-seventh session, as article 13, without any changes. The explanation given by the Chairman of the Drafting Committee at the preceding session appeared in the relevant summary record.⁷ At the current session, the Drafting Committee had introduced two changes. The first was a drafting change which consisted in replacing the words “and particularly the fact that he acts” by “even if he acted”. The purpose was to emphasize that even if, under other circumstances, an individual would be entitled to immunity by virtue of his high position in the Government, that would not absolve him of criminal responsibility under the Code of Crimes against the Peace and Security of Mankind. The second, substantive, change was the addition of the words “or mitigate punishment” at the end of the article. The reason for the addition was that article 6, unlike the Charter of the Nürnberg Tribunal and the statutes of the International Tribunal for the Former Yugoslavia⁸ and the International Tribunal for Rwanda,⁹ did not expressly exclude official position as a basis for mitigation. The Drafting Committee had felt it essential to make that clear in the article to avoid misunderstanding.

17. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 6 as proposed by the Drafting Committee.

Article 6 was adopted.

ARTICLE 7 (Establishment of jurisdiction)

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said article 7, which was the first provision in section 3, dealing with procedure and jurisdiction, had been formulated and adopted by the Drafting Committee at the preceding session, as article 5 *bis*, on the understanding that it would have to be reviewed in the light of the crimes that would eventually be covered by the Code, with a view to establishing exclusive international jurisdiction for specific crimes, including aggression. The Committee had reconsidered the article at the current session and there had been a general consensus of opinion, first, that the possibility of having two types of jurisdiction—jurisdiction of an international criminal court and universal jurisdiction—should be maintained for genocide, crimes against humanity and war crimes, and secondly, that jurisdiction over the crime of aggression should rest exclusively with an international criminal court. The article had therefore been revised and now consisted of two sentences. The first sentence preserved the possibility of the two types

of jurisdiction for crimes other than aggression, while the second preserved the exclusive jurisdiction of an international criminal court over the crime of aggression.

19. It would be explained in the commentary that the term “international criminal court” was intended to apply to tribunals that had credibility and support in the international community such as ad hoc tribunals established by the Security Council or by treaty. It was not intended to include tribunals established by a few States which had no support in the international community. The commentary would also explain that the competence of an international criminal court did not preclude trial of an individual by his or her own national court for commission of aggression under its domestic law.

20. Mr. KABATSI said that, while he accepted the general thrust of the rule laid down in the second sentence of the article, there should be one exception to it whereby a country would have the right to try its leaders if they committed the crime of aggression when there was no international criminal court in place.

21. Mr. LUKASHUK said that Mr. Kabatsi’s point was well taken. As a way out of the difficulty, he would propose that, in the second sentence of the article, the words “as a rule” should be added before the words “rest with an international criminal court”.

22. Mr. CRAWFORD said he too could see Mr. Kabatsi’s point, but wondered whether there was any need to cover such an eventuality.

23. Mr. PELLET said that he agreed in part with Mr. Kabatsi’s observation, but the less one singled out the crime of aggression the better. The principle seemed to be that States should be able to punish the crime of aggression in their internal courts and he for one saw no reason why Iraq, for example, could not and should not eventually try those responsible for the aggression against Kuwait. In particular, however, he did not want to be told that his opposition would be reflected in the commentary: that smacked of compromise and could never be an acceptable solution.

24. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Lukashuk’s proposal was not satisfactory as it would open wide the door to the jurisdiction of every national court and not just the national court of the individual who committed the crime of aggression. If the Commission wished to cover the point in the body of the article, the best way would be to add a third sentence, along the following lines: “But the trial of an individual by his or her national court for the commission of the crime of aggression is not precluded”.

25. Mr. CRAWFORD said the Commission might wish to decide in principle whether to provide for such a situation and, if so, the Drafting Committee could then reconsider the matter. On balance, he agreed that some change was required.

26. Mr. PELLET said he supported the proposal by the Chairman of the Drafting Committee, possibly by following the procedure suggested by Mr. Crawford.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) agreed that the Commission should

⁷ Ibid.

⁸ Ibid., footnote 6.

⁹ Ibid., footnote 7.

first decide whether it wished to change the existing text so as to include in it what had been proposed as a commentary. However, if it was decided to make the change, he saw no need to refer the article back to the Drafting Committee. A small group of members could easily produce a new text in a matter of minutes.

28. The CHAIRMAN said the proposal was an attractive one.

29. Mr. EIRIKSSON, said that he too supported the proposal. In addition, the small group should consider whether the obligation to extradite and the extradition procedure referred to in articles 8 and 9 should also apply in such circumstances.

30. The CHAIRMAN suggested that the Commission should momentarily defer consideration of the second sentence of article 7.

31. Mr. CRAWFORD said that it was not clear from the first sentence whether it imposed the obligation on States to assert universal jurisdiction over the crimes mentioned in articles 16, 17 and 18. That was a possible construction of the sentence; but, at least with respect to the crime of genocide, that would be an extension of existing treaty law since, under the Convention on the Prevention and Punishment of the Crime of Genocide, there was no universal jurisdiction. If the Commission was proposing to impose a treaty obligation on States to assert universal jurisdiction over the crimes mentioned in articles 16, 17 and 18, that should be explicitly stated. Because he was in favour of universal jurisdiction with respect to genocide, he therefore proposed that some such wording as "irrespective of where or by whom the crime was committed" should be added at the end of the sentence.

32. The CHAIRMAN asked whether the Commission was ready provisionally to adopt the first sentence of article 7, before reverting to the second sentence.

33. Mr. Sreenivasa RAO said that the discussion of article 7 had revealed the difficulty of coming to grips with the basic policy underlying it. He wished to have an opportunity to consider both sentences in their redrafted form before commenting on the article as a whole. It would be premature to adopt any part of it at the present juncture.

34. Mr. THIAM (Special Rapporteur) said that the text clearly raised a number of problems. Mr. Kabatsi had proposed that a court of the country of the author of the crime of aggression should be considered competent. In that case, why not a court in the victim country? Given the large number of proposals made, the Commission was in danger of adopting an unsatisfactory provision if it was too hasty in its decisions. A small informal group should look into the question.

35. The CHAIRMAN said that, if he heard no objection he would take it that the Commission wished to defer its consideration of article 7 until the informal group proposed by Mr. Thiam had concluded its work.

*It was so agreed.**

* Article 7 was adopted with the whole of the draft Code (see 2454th meeting, para. 3); it subsequently became article 8 and was then amended (see 2465th meeting, paras. 1-4).

ARTICLE 8 (Obligation to extradite or prosecute)

36. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said article 8 had been adopted by the Drafting Committee at the forty-seventh session as article 6. As the Committee's then Chairman had explained, it had embodied the fundamental *aut dedere aut judicare* principle underlying a large number of penal law conventions concluded over the past 25 years with a view to ensuring punishment for a variety of crimes of international concern.¹⁰ At the current session, the Committee had inserted the word "Party" after "State" at the beginning of the article, an addition that had been necessary to align article 8 with the others. It had also replaced the phrase "extradite that individual or refer the case to its competent authorities for the purpose of prosecution" by "extradite or prosecute that individual", since the first phrase had allowed for prosecutorial discretion inappropriate under the Code. The obligation under the article was limited to crimes other than aggression, for an international criminal court had—or would have, if article 7 was to be changed—exclusive jurisdiction over that crime. The question of transfer of perpetrators of aggression to the international criminal court would be dealt with by the court's constituent instrument.

37. Mr. CRAWFORD said he opposed the change made by the current Drafting Committee, imposing an automatic obligation of prosecution in respect of any allegation of a crime, which was contrary to the normal principles of international judicial cooperation. He accepted that, in the context of crimes dealt with by the Code, the ordinary sort of prosecutorial discretion would be inappropriate. But there were many reasons for not prosecuting a person which had nothing to do with a decision that he or she should not be prosecuted on the merits: for instance, there might be no evidence that the person had actually committed a crime. As it read, article 8 imposed an obligation on any State party to prosecute regardless of the existence of any evidence. A simple solution would be to revert to the language used by the Drafting Committee when it had first adopted the article. No doubt there were also other possible solutions.

38. Mr. Sreenivasa RAO said that article 8 reflected a well-known principle incorporated in a number of treaties and conventions on extradition. The point made by Mr. Crawford was valid, but was made more explicit in those treaties and conventions, which stated that the duty was to submit the matter to the prosecution. Discretion was thus inherently allowed of the prosecution. The article could be expanded to bring the matter more closely into line with practice. Alternatively, an explanation could be provided in the commentary.

39. Mr. PELLET said he was struck by the absence of any reference in articles 8 and 9 to the crime of aggression (art. 15). No doubt the omission had been prompted by the desire to ensure that the alleged authors of crimes of aggression were not too easily accused without sufficient evidence. If that was indeed the reason, the objection would fall if Mr. Crawford's proposal was adopted. Of course, States should not be given scope to character-

¹⁰ See 2437th meeting, footnote 4.

ize the crime of aggression too freely. Nevertheless, he found it disquieting that the authors of aggression, the supreme crime, should totally escape extradition and the principle of universal jurisdiction. In that regard he cited article 227 of the Treaty of Versailles, which had provided for the trial of the Kaiser by an international tribunal. The Netherlands, if he recalled correctly, had vigorously refused to hand him over—a decision which, while politically expedient, was judicially exceptionable. Pending an explanation of the decision to omit a reference to the crime of aggression, he reserved his position on article 8.

40. The CHAIRMAN noted that there was a regime, of which articles 7, 8 and 9 were a part, and, as drafted, it was a coherent and consistent regime.

41. Mr. GÜNEY said that, although the purpose of article 8 was to establish an obligation to extradite or prosecute, the actual text of the article in the French version was not in line with the title. The words *extrade ou poursuit* should be amended to read *est tenu d'extrader ou de poursuivre*.

42. The CHAIRMAN said he would be grateful if, in the interests of saving time, members would refer any problems of translation directly to the secretariat.

43. Mr. GÜNEY said his proposed amendment was not merely a matter of translation. It might also affect the wording of the English text.

44. Mr. THIAM (Special Rapporteur) said he saw no difference of substance between the existing text and Mr. Güney's proposed amendment. He would be happy to accept either version.

45. Mr. PELLET said that the point at issue was not a problem of translation. If the French text was amended to read *est tenu de*, then the English version must also be altered to read "is bound to". He personally thought that the existing text was the right one, for two reasons: first, in law, an indicative was tantamount to an imperative; and secondly, the obligation to extradite or prosecute was made explicit in the title of the article. There was thus no need to further burden the text.

46. Mr. Sreenivasa RAO said that the wording "shall extradite" was generally understood to mean "is bound to extradite". However, both wordings were subject to the basic law of extradition, which allowed for several circumstances in which extradition was excluded, one being the case of political crimes. There was a risk that it would constantly be claimed that crimes under the Code were political crimes and hence there was no obligation to extradite. Unless provision was made to the contrary, one of the basic exceptions would constantly be invoked, particularly in the case of aggression.

47. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Sreenivasa Rao's point referred to article 9, not to article 8. With regard to Mr. Pellet's question as to why crimes under article 15 were not included in article 8, the reason was that a State did not have jurisdiction. It could not prosecute because the competence to do so lay with an international tribu-

nal. If the Commission made the proposed change, whereby the possibility would be opened up for the State of which an individual was a national to try that individual in a case of aggression, that would be a different matter. However, article 8 had been drafted in a context in which there had been no possibility of it including crimes under article 15. On the other hand, an attempt was being made to maintain the concept of "extradition"; in the case of the international criminal court, care had been taken to use the word "transfer" rather than the word "extradition".

48. Mr. YAMADA, taking up Mr. Crawford's point on the question of prosecution, said that the Commission must make a policy decision on whether to opt for automatic or for discretionary prosecution. He understood that one of the reasons why the Drafting Committee had opted for automatic prosecution was that the Geneva Conventions of 1949 did not provide for prosecutorial discretion for the grave breaches of the Conventions which were the main source of an article on war crimes in the Code.

49. Mr. CRAWFORD said that the Commission must consider whether it could live with the general language of the "extradite or prosecute" provisions in other treaties—the language earlier favoured by the Drafting Committee—or whether it wished to impose some sort of obligation to prosecute. It seemed to him that it was not a policy decision to impose an obligation to prosecute where there was no evidence. Therefore, some formulation was required to indicate that an allegation must be supported by credible evidence. States simply would not accept an obligation to extradite or prosecute on the basis of a mere allegation.

50. Mr. THIAM (Special Rapporteur) asked whether Mr. Crawford could provide a text in writing.

51. Mr. CRAWFORD said that his initial proposal had been to revert to the previous text. His alternative proposal was to use the language of article 54 of the draft statute for an international criminal court adopted by the Commission, namely, "to refer the case to its competent authorities for the purposes of prosecution".¹¹

52. The CHAIRMAN, speaking in his capacity as a member of the Commission, said that the article in its current form was not an invitation to prosecute irrespective of whether there was a scintilla of evidence. Rather, it ruled out prosecutorial discretion, which was a fairly broad and extensive concept. It would be possible to insert in the commentary some polite wording to the effect that the prosecutor was not expected to engage in a meaningless, senseless or otherwise preposterous activity as a result of the language of the article, and to produce a result consistent with the Geneva Conventions of 1949 and the policy decision recommended by the Drafting Committee.

53. Mr. EIRIKSSON said that as a member of the Drafting Committee he remained loyal to the article and would resist any proposal to replace the words "shall

¹¹ See *Yearbook . . . 1994*, vol. II (Part Two), p. 26, para. 91.

extradite" by a formulation such as "is obligated to extradite". With reference to Mr. Pellet's comments concerning article 15 and the crime of aggression, he agreed that if an international criminal court was the only one with jurisdiction, the matter would be dealt with in the statute of that court and need not be addressed in the current context. Furthermore, if the Commission were to leave open the possibility of prosecution of someone in the courts of his own State, that would not constitute an obligation on that State to prosecute its nationals. A fortiori, and subject to a decision of the informal group, he did not think that there should be an obligation on other States to extradite to a country nationals of that country. Accordingly, a change might not be necessary. Certainly, there would be no obligation for that State to prosecute if it did not extradite.

54. He had participated in the debate in the Drafting Committee on the formulation "submit to its authorities for prosecution". At the time he had felt that too much had been built into that clause and now thought that too little had been built into the existing clause. In his view, as much as possible should be left to the commentary.

55. Mr. Sreenivasa RAO said that if the Drafting Committee intended to favour automatic extradition and prosecution, rather than allow for prosecutorial discretion in the light of the specific circumstances, it was failing to provide for situations that might arise. For instance, a State might not want to extradite and not want to prosecute because of the difficulty of obtaining evidence. The result would be that it would drop the case. Account must be taken of realities and he therefore reserved his position.

56. Mr. THIAM (Special Rapporteur), responding to a point raised by Mr. Crawford, said that the purpose of the adjective "alleged" was to show that there was indeed firm evidence against the individual to be extradited. On a different point raised by Mr. Sreenivasa Rao, he stressed that crimes against the peace and security of mankind were not political crimes but crimes under ordinary law, conferring no privilege on the perpetrators.

57. Mr. PELLET expressed concern that article 8, unlike article 7, contained no reference to the future international criminal court. In his view, the State party referred to in the article should also have the possibility of transferring the alleged criminal to the international criminal court.

58. Mr. CRAWFORD suggested that Mr. Pellet's point could be met by reproducing the "without prejudice" clause of article 7 in article 8. His own point concerning the need for sufficient evidence of the alleged criminal's guilt could perhaps be met by replacing the word "prosecute" by "initiate proceedings for the prosecution of".

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he would be inclined to endorse the second of those two proposals, as a result of which the provision in article 8 would be somewhat stronger than the text proposed by the Drafting Committee in 1995 but would not go quite as far as the formulation now under consideration.

60. Mr. THIAM (Special Rapporteur) suggested that the informal group to review article 7 should also consider possible changes to article 8.

61. Mr. EIRIKSSON suggested that the Chairman should also be invited to join the group on articles 7 and 8.

It was so agreed.

The meeting was suspended at 11.25 a.m. and resumed at 12.10 p.m.

ARTICLE 7 (Establishment of jurisdiction) (*continued*)

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking on behalf of the informal group, proposed that the phrase "irrespective of where or by whom those crimes were committed" should be added to the first sentence of article 7 and that a third sentence reading: "However, a State Party is not precluded from trying its nationals for the crime set out in article 15" should be added at the end of the article.

63. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 7, as amended.

*Article 7, as amended, was adopted.**

64. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking on behalf of the informal group, proposed that the words "Without prejudice to the jurisdiction of an international criminal court," should be added at the beginning of article 8.

65. Mr. Sreenivasa RAO said that he was prepared to join the consensus but would expect the commentary on articles 7 and 8 to draw attention to the progressive development aspect of those provisions by explaining to what extent the draft Code of Crimes against the Peace and Security of Mankind represented a departure from existing law.

66. The CHAIRMAN said that he had no doubt that any changes from existing law, bearing in mind also the comments made by Mr. Yamada, would be duly reflected in the commentary.

67. Mr. CRAWFORD said that he hoped the commentary would make it clear that the obligation set forth in article 8 applied only to allegations for which there was probable cause.

68. Mr. PELLET said the commentary should make it clear that the object of adding the "without prejudice" clause was not so much to uphold the jurisdiction of an international criminal court as to require the State party in whose territory the alleged criminal was found to extradite, prosecute or transfer him to the international court.

* See 2465th meeting, para. 1.

69. The CHAIRMAN said that, on the understanding that those points would be reflected in the commentary, he would take it that the Commission wished to adopt article 8, as amended.

Article 8, as amended, was adopted.

ARTICLE 9 (Extradition of alleged offenders)

70. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that like article 7, article 9 had been formulated and adopted as article 6 *bis* by the Drafting Committee at the preceding session. Under article 8, the State in whose territory an individual alleged to have committed genocide, crimes against humanity or war crimes was found had the obligation to prosecute that individual or extradite him to another State for prosecution or transfer him to the international criminal court. However, as the then Chairman of the Drafting Committee had explained,¹² the Code needed an article establishing a legal basis for the extradition of the alleged criminal. Article 9 had been formulated for that purpose. The current Drafting Committee had made no changes to the article except to replace the last clause at the end of paragraph 4, which had read “territories of the States Parties which have established their jurisdiction in accordance with article 5 *bis*”, by the words “any other State Party”. The change did not affect the substance of the article and was in the nature of further clarification of the text of the paragraph.

71. Mr. CRAWFORD said that he wondered whether the choices offered to States under certain circumstances, in particular in article 9, paragraph 2, were consistent with the strong obligation to extradite formulated in article 8.

72. Mr. Sreenivasa RAO said that the provisions of article 9 exactly reproduced the extradition clauses of other multilateral treaties, which were always automatically transposed into bilateral agreements and incorporated in the national law of the States parties. He could see no objection to the article on that ground. What did seem necessary, however, was to include an explicit provision somewhere in the Code to the effect that the crimes listed therein could not be claimed to be political crimes for purposes of extradition.

73. Mr. THIAM (Special Rapporteur) said it was absolutely clear that crimes against the peace and security of mankind were not political crimes but crimes under ordinary law. He saw no need to spell out that fact in connection with the extradition of alleged offenders.

74. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the point raised by Mr. Sreenivasa Rao was covered in article 9, paragraph 1. He understood that the Drafting Committee had considered the matter at the preceding session and had decided to deal with it in that way rather than to speak explicitly of political offences.

75. Mr. Sreenivasa RAO said that he accepted the explanation given by the Special Rapporteur, but was a

little less happy with that given by the Chairman of the Drafting Committee. He would not, however, labour the point any further.

76. Mr. CRAWFORD pointed out that the words “at its option” in article 9, paragraph 2, did not seem to be consistent with article 8 in its new form.

77. Mr. de SARAM said it was his understanding that the provisions of article 9, paragraph 2, were subject to the principal obligation in article 8, which was to extradite or prosecute the individual alleged to have committed a crime against the peace and security of mankind.

78. Mr. EIRIKSSON said that the words “at its option”, which were not to be found in the traditional models, had been introduced because some members of the Drafting Committee at the forty-seventh session had felt that the word “may” by itself was not optional enough. Some explanation could perhaps be provided in the commentary.

79. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 9 as proposed by the Drafting Committee.

Article 9 was adopted.

80. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, among the articles adopted on first reading, article 7 had dealt with the non-applicability of statutory limitations. The article had formed the subject of reservations on the part of a number of States. It would also be recalled that, in his twelfth report¹³ the Special Rapporteur had advocated that it should be deleted, arguing that the rule of the non-applicability of statutory limitations did not appear to be applicable to all the crimes listed in the draft Code and that national legislations differed in that respect.

81. The Drafting Committee had decided to delete the article for the reasons put forward by the Special Rapporteur and also because the statute of limitations dealt with rules of procedure not essential to the Code at the current stage.

ARTICLE 10 (Judicial guarantees)

82. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) went on to introduce article 10, which had been adopted by the Drafting Committee at the forty-seventh session as article 8.

83. Mr. VILLAGRÁN KRAMER said that he was prepared to endorse all the provisions of article 10 with the possible exception of paragraph 1 (*h*). In many legal systems, a confession of guilt was regarded, in certain cases, as an extenuating circumstance. The practice known as “plea bargaining” in the United States of America made it possible to adjust a convicted criminal’s sentence in the light of his confession. He wondered whether the provision would not restrict the potential use of such practices and should not, for that reason, be deleted.

¹² See 2437th meeting, footnote 4.

¹³ *Yearbook* . . . 1994, vol. II (Part One), document A/CN.4/460.

84. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the subparagraph in question did not deal with the effects of a confession of guilt but only specified that no compulsion could be used to obtain such a confession. The words of the provision were exactly those to be found in article 14, paragraph 3 (g), of the International Covenant on Civil and Political Rights.

85. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 10 as proposed by the Drafting Committee.

Article 10 was adopted.

ARTICLE 11 (*Non bis in idem*)

86. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 11, which had been adopted by the Drafting Committee at the forty-seventh session as article 9, had been discussed extensively in the Drafting Committee at the time. As the then Chairman of the Drafting Committee had explained,¹⁴ in reformulating the article the Committee had taken into consideration article 10 of the statute of the International Tribunal for the Former Yugoslavia¹⁵ and article 42 of the draft statute for an international criminal court,¹⁶ which dealt with the same issue. The article proposed by the Drafting Committee at the preceding session had comprised five paragraphs. As the structure of the article had been rather complicated, the Drafting Committee had tried at the current session to simplify it without changing its substance. Paragraph 2 in the new text was a simplified version of paragraphs 2 to 4 of the previous one. Paragraph 2 (a) set out the two exceptions to *non bis in idem* in respect of a trial by an international criminal court, and paragraph 2 (b) the two exceptions to that principle in respect of a trial by a national court. Paragraph 3 corresponded to paragraph 5 of the previous version and remained unchanged.

87. Mr. HE said that, although he had been a member of the Drafting Committee, he was not quite satisfied with article 11 as it stood.

88. While he could go along with the idea of the primacy of the international criminal court, he had misgivings about paragraph 2 (b), which contradicted the principle of *non bis in idem*. The statute of the International Tribunal for the Former Yugoslavia contained no such provision. The Commission should follow suit and state that only an international court could retry a case. He was in favour of deleting paragraph 2 (b) to preserve the *non bis in idem* principle as much as possible and to consolidate the primacy of international criminal law.

89. Mr. LUKASHUK said he was against the use of the term *non bis in idem* in the current context. The draft Code might well appear in manuals for members of the armed forces, and the Latin expression would make the article more difficult to understand.

90. Although he did not agree entirely with Mr. He, in his opinion paragraph 2 (b) was not ready either for codification or for the progressive development of international law. For one thing, the provision was contrary to *non bis in idem*, as Mr. He had rightly pointed out. For another, a study of case law showed that the relevant provisions of the International Covenant on Civil and Political Rights only covered national jurisdiction. If a court in a given State protected an accused person from criminal prosecution, that should not preclude that person's being judged in the court of another State. For example, in the case of the former Yugoslavia a war criminal brought to court in one country evaded trial in another if the jurisdiction of an international tribunal was not taken into account. Therefore, the provision should be deleted until enough information on actual practice became available to enable the Commission to take a decision.

91. Mr. CRAWFORD said that the concept of *non bis in idem* left aside the question of trial in different national courts. But it had been decided to go beyond the traditional principle of double jeopardy because the Commission was considering international crimes. In any event, a subsequent trial by a national court must meet the same conditions as were applicable for an international court. Those conditions should not be more liberal for a national court than for an international jurisdiction. He saw no reason to depart from the current provision.

92. Mr. Sreenivasa RAO said that he had no objection to replacing the Latin term *non bis in idem* in order to make it more understandable in non-legal circles. In his view, paragraph 2 (b) was a departure from the principle prohibiting double jeopardy. For reasons already stated by Mr. He, it should be deleted.

93. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the term *non bis in idem* had also been used most recently in the draft statute for an international criminal court.

94. Mr. THIAM said that the point made by the Chairman of the Drafting Committee was well taken. The sole reason for including the exceptions under paragraph 2 (b) had been to win acceptance for the *non bis in idem* principle. Many members of the Drafting Committee had said at the time they could not accept that concept without the exceptions in paragraph 2 (b). As he saw it, *non bis in idem* was a fundamental principle of human rights. Whether a person was judged by a national or an international court, he was entitled to the rights that protected him. Personally, he would not object to deleting paragraph 2 (b), but he was in favour of anything that ensured protection of human rights. Quite plainly, the *non bis in idem* principle did afford protection.

95. Mr. Sreenivasa RAO said those in favour of retaining paragraph 2 (b) had argued that, if one State had tried an accused person, found him guilty and handed down lenient punishment, a national court in another State should then have jurisdiction to re-examine the case if the act had taken place in the territory of that State or if that State had been the main victim of the crime. But the argument of lenient punishment concerned paragraph 2 (a), not paragraph 2 (b). In any

¹⁴ See 2437th meeting, footnote 4.

¹⁵ *Ibid.*, footnote 6.

¹⁶ See footnote 11 above.

event, once a national jurisdiction had completed a trial, the case was open for retrial. That indirectly encouraged trials *in absentia*. On the other hand, if a person had served his sentence and had then found himself in the territory of a country where he might be prosecuted, that created a danger of double jeopardy.

96. He was not convinced that for any given crime there would always be more than one jurisdictional basis for a trial by more than one State. He was in favour of deleting paragraph 2 (b).

97. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) agreed that there were reasons to believe that paragraph 2 (b) was not fully consistent with the principle of *non bis in idem*. It could have been possible to establish priority for extradition, for example, by saying that extradition took precedence over trial by the State in which the individual was found. But that had not been done. The current wording was meant to satisfy the interests of both States—the State of which the person was a national and the State which was the victim of the crime. Strictly speaking, paragraph 2 (b) was not perfect, but the Commission could live with it. If the Commission deleted the provision, it would be doing away with an important point.

98. Mr. ROBINSON said he could not imagine that paragraph 2 (b) reflected the direction in which the law should be developed. It might well be precisely in those circumstances that there was a need to insist on the application of the principle of *non bis in idem*. He could only agree to an exception in relation to a national court if it was placed on the same bases as applied in relation to an international criminal court.

99. Mr. Sreenivasa RAO, referring to the last statement by the Chairman of the Drafting Committee, said that if a document was not perfect, it should not be transmitted to the General Assembly.

100. The CHAIRMAN said he was not sure that it was imperfect. It was a limitation on the extension, or progressive development if one wished, contained in paragraph 2 (b).

101. Mr. FOMBA said that, in his opinion, the criteria of territoriality and of the main victim were sufficient per se, due account being taken for national sovereignty. But from the point of view of the strictly logical link with the principle of *non bis in idem*, those two criteria were somewhat inadequate. To remain consistent with the logic of the provision, paragraph 2 (b) should reflect the same guarantees as were contained in paragraph 2 (a) (ii). That had the merit of clarity, without prejudging the basic question of whether the Commission should retain the provision.

102. Paragraph 2 (b) was a major exception to the *non bis in idem* rule. If the Commission retained paragraph 2 (b), he would have no objection, but it was particularly important to include a reference to court proceedings that had not been impartial or independent.

103. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, although it might seem logical to include in paragraph 2 (b) the same requirements as those under paragraph 2 (a) (ii), that was surely unacceptable. An international court could find that the

proceedings in a national court were not impartial, but how could the court of another State take such a decision? That would be contrary to the basic principles of nationality and statehood and might even lead to war.

104. Mr. Sreenivasa RAO agreed that no State would accept that its jurisdiction should be open to question in another jurisdiction.

105. The CHAIRMAN suggested that the Commission should vote on the two proposals concerning paragraph 2 (b).

The proposal to delete paragraph 2 (b) was rejected by 9 votes to 3, with 4 abstentions.

The proposal to include in paragraph 2 (b) the guarantees contained in paragraph 2 (a) (ii) was rejected by 11 votes to 3, with 3 abstentions.

106. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 11 as proposed by the Drafting Committee.

Article 11 was adopted.

The meeting rose at 1.15 p.m.

2440th MEETING

Wednesday, 12 June 1996, at 11.20 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

PART ONE (General provisions) (continued)

ARTICLE 12 (Non-retroactivity)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to resume his introduction of the draft articles adopted on second reading (A/CN.4/L.522 and Corr.1).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 12 laid down a basic principle of criminal law and of human rights law. As provisionally adopted on first reading as article 10, it had not given rise to any reservations, either by Governments or in the Commission. At the current session, the Drafting Committee had made only two drafting changes in paragraph 2: it had replaced the words "shall preclude" by the word "precludes" and had deleted the words "and punishment", the purpose of the latter being to align the article with article 11. The Drafting Committee recommended the adoption of article 12 to the Commission.

3. Mr. LUKASHUK proposed that the end of paragraph 1 should be amended to read: ". . . for acts committed before the entry into force of its provisions", otherwise the Code of Crimes against the Peace and Security of Mankind could remain irrelevant until the end of time.

4. Mr. TOMUSCHAT said that, as article 12 applied to the whole of the Code, it should be placed at the end of the text, as was the rule with treaties.

5. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the draft Code would perhaps take the form of a treaty one day, but its existing structure consisted of a part one dealing with general provisions and a part two dealing with the actual crimes. Article 12 therefore did have a place in part one because its provisions were part of the principles of criminal law and not of treaty law procedure. Mr. Lukashuk's proposal reflected the concern that the existing wording of paragraph 1 would intimate that the draft Code would inevitably take the form of a treaty. The proposed change involved what was perhaps a superfluous clarification, but it would do no harm.

6. Mr. THIAM (Special Rapporteur) said he wondered what provisions of the Code would come into force before the Code did. That point could perhaps be clarified in the commentary. As for the placement of article 12, part one of the draft dealt with general principles, and the *nullum crimen sine lege* principle was one of the basic principles, if not the most basic, of criminal law.

7. Mr. TOMUSCHAT said that, while he agreed article 12 could in fact have a place in part one, he would point out that part one consisted of three sections. The first section was very general, the second dealt with responsibility and punishment, in other words, with substantive law, and the third with procedural provisions. Articles 12, 13 and 14 then dealt with fundamental guarantees and not with procedures and therefore belonged in the second section. Articles 13 (Defences) and 14 (Extenuating circumstances), for example, had a close link with article 4 (Order of a Government or a superior) and with article 6 (Official position and responsibility) and those four articles should therefore be included in the same section.

8. Mr. ROBINSON said that Mr. Lukashuk's proposal was not essentially different from the existing text. What was important, therefore, was that the commentary should indicate the various ways in which the Code could come into force.

9. Mr. EIRIKSSON said that the question of the placement of the articles in the draft had been considered at length in the Drafting Committee.

10. With regard to Mr. Lukashuk's proposal, he pointed out—and was supported in that regard by Mr. ROSENSTOCK—that paragraph 1 clearly referred to conviction "under the present Code". It would therefore suffice to state in the commentary to paragraph 2, not paragraph 1, that a trial under some other auspices was in no way precluded.

11. Mr. CRAWFORD said he too considered that paragraph 1 should not be changed. As to the placement of the article, he would point out that there were no titles to the three sections in part one and that the third simply contained what had not been placed in either of the two others. One option would perhaps be to delete the sections altogether.

12. Mr. LUKASHUK said he did not think that there should be any difficulty if paragraph 1 were reworded to read: "No one shall be convicted, under the provisions of the present Code, for acts committed before the entry into force of those provisions".

13. Mr. FOMBA said that he had no objection to paragraph 1 being retained as drafted because, in his view, the words "provisions of the present Code" did not add anything to the words "present Code". The main thing was that the words "before its entry into force" did not prejudice the form in which such entry into force would be effected.

14. Mr. TOMUSCHAT said that, by analogy with internal law, the third section should belong to a code of criminal procedure, whereas articles 12, 13 and 14, and even article 11, should appear in the criminal code itself. Logically, therefore, those articles should form part of the second section.

15. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had been unable to agree on titles for the three sections of part one. Those sections could in fact be deleted.

16. Mr. Sreenivasa RAO supported that proposal.

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

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to delete the division into three sections of part one of the draft articles.

It was so agreed.

18. The CHAIRMAN reminded the Commission that it still had to take a decision on Mr. Lukashuk's proposal.

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he personally had no objection to that proposal, but was afraid that the majority of members would not go along with him.

20. Mr. Sreenivasa RAO said he thought that the text was sufficiently clear as it stood, but he would not oppose a change that might make it even clearer.

21. Mr. ROSENSTOCK said that a good case could be made for claiming that article 28 of the Vienna Convention on the Law of Treaties obviated the need for article 12. But, as article 12 existed, it was essential not to blur the extremely clear distinction between paragraphs 1 and 2. The former clearly stated that no one could be convicted under the Code for acts committed before its entry into force, and the latter clearly stated that a person could be convicted for acts which, at the time of their commission, had been criminal in accordance with international law. If some provisions of the Code were already part of international law or would become part thereof before the Code came into force, it would be possible to be convicted under those provisions before the Code came into force. That point might perhaps be spelled out in the commentary to paragraph 2.

22. Mr. LUKASHUK said he was sorry that his proposal posed such a problem for the other members of the Commission and that he would therefore not insist on it. He still thought, however, that States might use paragraph 1 as a pretext for not applying the Code because it had not entered into force. Furthermore, paragraph 2 contained a reference to acts which, at the time of their commission, were already criminal in accordance with international law before the entry into force of the Code, but no mention was made of acts which would become criminal in accordance with international law in the future.

23. Mr. TOMUSCHAT thought that Mr. Lukashuk's proposal raised the question of the form that the Code would eventually take. It was nowhere stated that it would be adopted as an international treaty in good and due form, as Mr. Lukashuk seemed to intimate by his proposal. It might very well be adopted as a declaration of the General Assembly. The Commission must not prejudge the question, but it might be useful if it were to discuss it on completion of the adoption of all the articles proposed by the Drafting Committee in order to decide what recommendation it would address to the General Assembly on the matter.

24. Mr. ROBINSON said that he wondered why national law was referred to in paragraph 2 of article 12 if the purpose of that paragraph was to preserve the application of customary international law. In his view, the text of that provision should resemble the text of para-

graph 2 of article 15 of the International Covenant on Civil and Political Rights, rather than paragraph 1 of that article. He also wished to know whether, in the Commission's view, it was taken for granted that the principle of non-retroactivity applied to punishment as well as to trial or whether that should be expressly indicated.

25. Mr. THIAM (Special Rapporteur), replying to Mr. Robinson's first question, said it was true that paragraph 2 contained a reference to national law which did not feature in article 15 of the International Covenant on Civil and Political Rights. It had been added at the request of certain members of the Drafting Committee after a long debate; however, he personally had no objection to deleting it and keeping to the text of article 15 of the Covenant.

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had not participated in the drafting of the article and had not been present during its adoption on first reading and that, at the current session, the Drafting Committee had simply agreed on the wording of the article without entering into a discussion on the issues.

27. Mr. Sreenivasa RAO said that, when the article had been adopted on first reading, it had been his understanding that the purpose of that provision had been to preserve the application of national law in the case of any act that was criminal in accordance with that law. The application of the Code was only a possibility, for international law must be understood to mean all the provisions existing in other treaties or conventions and the provisions of customary law. Nothing precluded the trial of an individual for acts that were criminal by virtue of principles already recognized, whether at the national or at the international level. That was the sense of the paragraph.

28. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the article stated a basic principle of criminal law and of human rights law. Furthermore, when adopted on first reading, it had given rise to no reservation or objection either on the part of the Commission or of Governments. Consequently, the members of the Commission should not be so punctilious.

29. The CHAIRMAN said that, in the article adopted on first reading, mention had indeed been made of national law, but it had been specified that the reference was to "domestic law applicable in conformity with international law", a formulation that had been eliminated from article 12 in its current form.

30. Mr. THIAM (Special Rapporteur) said that that formulation did indeed appear in the article adopted on first reading, but that it was obvious that national law must be in accordance with international law and that it was therefore not necessary to state the fact in the actual text of the article; it would be enough to explain it in the commentary. That being said, the simplest solution would still be to follow the text of the International Covenant on Civil and Political Rights and accordingly delete the reference to national law in paragraph 2.

31. Mr. FOMBA said that it could be clearly seen from article 1, paragraph 2, that international law prevailed over national law, as that article stated that crimes against the peace and security of mankind were punishable under international law, whether or not they were punishable under national law. In those circumstances, he would have no objection to the elimination of the reference to national law in article 12, paragraph 2, given that, in any case, the question of the relationship between international law and national law in general and, in particular, at the criminal level, would always arise. It must be considered that, in principle, international law must prevail and that national law should be taken into account only subject to its being in conformity with international law.
32. Mr. EIRIKSSON said that an innocent question put by Mr. Robinson had caused the Commission to revisit decisions it had already taken on first reading. In his opinion, the Commission should first decide on the text that was before it, the wording of which he himself supported, before embarking on a substantive debate on the question.
33. Mr. PELLET expressed surprise that the text of article 12 should be different from that of article 10 adopted on first reading, as the Chairman had stated, and that no explanation of the fact had been given by the Drafting Committee. With regard to the substance of the debate, he pointed out that article 15 of the International Covenant on Civil and Political Rights was not of course conceived in the same manner, but that its paragraph 1 did indeed refer to national or international law, whereas its paragraph 2 merely referred to the "general principles of law recognized by the community of nations". Consequently, the arguments by the Special Rapporteur in favour of the deletion of the reference to national law were not convincing.
34. Furthermore, a conviction under national law "applicable in conformity with international law" was not the same as a conviction under international law. That formulation simply meant that a person could be convicted on the basis of national law if it did not contain a rule contrary to international law. So the elimination of any mention of national law would imply that an individual could be convicted only under international law—and that was a quite different matter. In his view, it was therefore important to mention national law in article 12 in order to avoid erroneous interpretations of that provision.
35. Mr. THIAM (Special Rapporteur) said that the point at issue was in fact what must be done when a State requested the application to one of its nationals of a punishment that was provided for in its internal law, but that was not in accordance with international law; hence the inclusion in the article of a reference to national law and the formulation "applicable in conformity with international law". But it was obvious that national law could not be applied if it was contrary to international law and that it was therefore not necessary to say so. Nevertheless, if the formulation was retained, the reasons for its presence should be explained in the commentary.
36. Mr. TOMUSCHAT said that article 12, paragraph 2, must be interpreted as meaning that national authorities had full power to institute proceedings against the perpetrator of acts that were criminal in accordance with international law or their national law and also recognized as such in the Code, notwithstanding the fact that the Code had not entered into force, for paragraph 1 might be misinterpreted as stating that no one could be prosecuted for a criminal act listed in the Code as long as the Code had not entered into force.
37. On the other hand, article 15 of the International Covenant on Civil and Political Rights had a totally different meaning from article 12 of the Code. Article 15 of the Covenant established that the fact that an act was not considered as an offence punishable in accordance with national law did not prevent it from being punishable in accordance with international law, whereas under article 12 of the Code, international law was not an obstacle to a conviction under national law.
38. Mr. ROSENSTOCK said that, for the reasons given by Mr. Tomuschat, it would be best to maintain the safeguard clause appearing in article 12, paragraph 2, whose purpose was to allay certain fears and concerns. Accordingly, he proposed that the wording of the article should remain unchanged.
39. Mr. de SARAM concurred with Messrs. Pellet, Rosenstock and Tomuschat that article 12, paragraph 2, should be kept in its current form. There was no provision in the Code that would prevent States and their courts from trying or sentencing an individual in accordance with their national law. That was made very clear by article 11 as well.
40. Mr. VILLAGRÁN KRAMER said that the non-retroactivity of laws was a principle which was well established in international law, embodied in the constitutions of many countries and emerged very clearly from paragraph 1 of article 12. So far as paragraph 2 was concerned, he thought it better to use the terms contained in an instrument already in force, namely, the International Covenant on Civil and Political Rights, which had been ratified by a large number of States.
41. Mr. THIAM (Special Rapporteur) recalled that the question of the application of national law had been raised by certain States in the context of the drafting of the statute for an international criminal court in connection, in particular, with penalties; that was why it had been expressly indicated in article 12 that national law had to be in accordance with international law. As it went without saying that national law could not be contrary to international law, however, he did not think it necessary to say so expressly in article 12; an explanation could be given in the commentary, if necessary. He would nonetheless not insist on his proposal if the majority of the members of the Commission were in favour of maintaining article 12 as it stood.
42. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 12 as proposed by the Drafting Committee.

Article 12 was adopted.

ARTICLES 13 (Defences) AND 14 (Extenuating circumstances)

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the articles had been considered by the Drafting Committee at the current session. They were the last two articles in section 3 dealing with procedural and jurisdictional issues. Their text essentially followed that of article 14 which had been provisionally adopted by the Commission on first reading and which the Drafting Committee had now divided into two separate articles based on the advice given by the Special Rapporteur in his twelfth report.⁴ The concepts of defences and of extenuating circumstances were of a different order in that, while the former stripped an act of its criminal character, the latter merely had an effect on the penalty for a crime. It was therefore better to deal with them separately. He wished to point out that, in article 14, the phrase “in accordance with the general principles of law”, already included in the text on defences, had been added. It was thus clearly stated that the competent court should be guided by the general principles of law when considering defences as well as extenuating circumstances. The Drafting Committee recommended that the Commission should adopt articles 13 and 14.

44. The CHAIRMAN suggested that it would make the discussion easier if articles 13 and 14 were considered one by one.

45. Mr. PELLET said that he continued to be disturbed by the use of the singular in the phrase “character of each crime”, which seemed to imply that crimes were of a different nature and that it was their intrinsic character that mattered, whereas it was surely the characteristics or, in French, *les caractères* of each crime—concretely speaking, the extent to which each crime was committed—that could justify the existence of defences, the attenuation of penalties and so forth. He very much regretted the use of the singular, but, in view of the fact that the Commission had, for what he considered to be disputable reasons, failed to accept the amendment he had proposed to article 2 whereby the singular would have been replaced by the plural, he would resign himself to the singular. He nevertheless continued to think that the text gave the wrong idea of the Commission’s intention, as the point at issue was surely not the character, but the particular characteristics of each specific crime that was committed.

46. Mr. THIAM (Special Rapporteur) explained that the English-speaking members of the Commission did not think that the use of the plural would be appropriate in the article under consideration and that the French-speaking members had not been convinced by the arguments for replacing the singular by the plural. He therefore proposed that the Commission should maintain the singular in the text of the article and that Mr. Pellet’s reservation should be reflected in the commentary.

47. Mr. TOMUSCHAT said that, in his view, it would certainly have been better to list the admissible defences in detail, but, in order to do that, the Commission would

have had to ask for the assistance of criminal law experts. Failing that, the Commission had to resign itself to relying on the practice of the courts which would be called upon to apply the Code and which would be in a position to benefit from the practice followed in many countries, as well as from the experience of judges specializing in criminal law.

48. He therefore wished to place on record his reservations with regard to the slightly general nature of the text, while at the same time recognizing that the Commission could not improve on the text unaided.

49. The CHAIRMAN said he wished to point out that the text’s lack of precision in that regard would be compensated for by the inclusion in the commentary of a reference to the standard concepts in that field. Furthermore, the courts required to apply article 13 would also be able to draw on the jurisprudence of the International Tribunal for the Former Yugoslavia⁵ and the International Tribunal for Rwanda.⁶

50. Mr. ROSENSTOCK, noting that there were no specific provisions on defences in the Charter of the Nürnberg Tribunal,⁷ said that, in his view, article 13 was unnecessary and potentially dangerous. In the case of crimes covered by the Code, as also of the crimes whose perpetrators had been tried at Nürnberg, the only possible defences could consist in the refutation of an essential element of the crime alleged by the prosecution. Bearing in mind the very different context and the particularity of the acts in question from the point of view of their gravity, their nature and their character, the Commission should not venture into the realm of defences that might possibly be admissible in the context of internal criminal law and applicable to crimes under internal law.

51. Mr. EIRIKSSON, referring to the point made by Mr. Tomuschat, said that the Commission in its collective wisdom could have drawn up a list of defences. As to substance, however, it would be better for the Commission to confine itself to a short article, leaving it to the court or to any competent authority to prepare the defences. Mr. Rosenstock’s comments confirmed the validity of that view.

52. Mr. ROBINSON said that he was surprised by so much sensitivity about the Drafting Committee’s work. Having listened with interest to the comments made by Mr. Pellet, he thought that the phrase “in the light of the character of each crime” added nothing to the text and even introduced an element of confusion. Did it mean the characteristics of a particular crime before the court or the character of the crime in general? The text would be no less meaningful if the phrase were deleted.

53. Mr. KABATSI thought that article 13 did not pose any problem and that it was preferable to give the competent courts free rein. However, he was not in full agreement with the idea that the only possible defences might be failure to prove an element of the crime. There

⁵ See 2437th meeting, footnote 6.

⁶ Ibid., footnote 7.

⁷ See 2439th meeting, footnote 5.

⁴ See 2439th meeting, footnote 13.

might be definite defences for a particular conduct arising out of the interpretation of evidence.

54. Mr. THIAM (Special Rapporteur), speaking for the benefit of members of the Commission who had doubts about the need to retain article 13 in the Code, said that there were two opposing views on defences for crimes against humanity. Some writers, considering that no circumstance could justify a crime against humanity, deemed the word "defences" inappropriate in the current case. Others, going by the case law of the tribunals created at the end of the Second World War, were of the view that there could be defences, such as the order of a superior. Consequently, it had been thought better to include a general provision which the courts would interpret on a case-by-case basis.

55. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 13 as proposed by the Drafting Committee.

Article 13 was adopted.

56. Mr. CRAWFORD, referring to article 14, said that the work of the Commission demonstrated that it was far from drafting a true code of crimes against the peace and security of mankind and that it might be more accurate to call it a "list" of such crimes. However, for the reasons stated by Mr. Tomuschat, the Commission had no other option.

57. With regard to extenuating circumstances, he thought that the Commission was committing a solecism. Whereas he could conceive that there might be general principles of law applicable to the question of criminal responsibility, he could not imagine what the general principles of law were in relation to extenuating circumstances. He supposed that there might be a general principle of law that extenuating circumstances were to be taken into account, but, after that, it was a question of considering the particular facts of the particular case. In his view, the Commission was inferring the existence of general principles of law of which there was no evidence.

58. Mr. TOMUSCHAT said that the meaning of article 14 was different: it stated that, according to a general principle of law, extenuating circumstances were relevant and must be taken into account, not that there existed a panoply of rules on extenuating circumstances.

59. Mr. CRAWFORD said that that point would have to be spelled out in the commentary.

60. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.

*Part one, as amended, was adopted.**

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

61. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that part two of the draft Code contained four articles dealing with four crimes.

62. As a preliminary observation, he said that the Drafting Committee's work had primarily involved legal archaeology and the aim had been not to innovate, but just to codify the existing law.

ARTICLE 15 (Crime of aggression)

63. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, as had been the case on first reading, one of the most difficult issues raised had been whether to include aggression as a crime under the Code and, if so, how to define it.

64. At its forty-third session, the Commission had adopted a lengthy definition for aggression, on first reading, which had been taken almost verbatim from the Definition of Aggression contained in General Assembly resolution 3314 (XXIX) and had given rise to objections and criticism from Governments. The Drafting Committee's decision at the forty-seventh session, following the Special Rapporteur's advice, to reduce the definition to two paragraphs, one dealing with the form of participation by an individual in aggression and the other with a general definition of aggression based on Article 2, paragraph 4, of the Charter of the United Nations, had not been entirely satisfactory.

65. At the current session, the Drafting Committee had continued its work on the basis of two ideas: first, it had taken the view that a clear distinction had to be drawn between the definition of aggression committed by a State, on the one hand, and the crime of aggression committed by an individual, on the other. A majority of the members of the Drafting Committee had felt it unnecessary for the Commission to attempt to define aggression, which was covered in the Charter and defined by the General Assembly, especially as individuals, and not States, were the subject of the Code. The issue, therefore, turned to finding a formulation in which the role or involvement of an individual in the commission of aggression by a State could be defined for the purposes of attributing a criminal act to an individual.

66. Secondly, the Commission should avoid reliance on General Assembly resolution 3314 (XXIX), which had been adopted in 1974 and had not been intended to produce a definition that might be useful for a criminal code, and on Article 2, paragraph 4, of the Charter, which had proved controversial on two levels: first, as to whether all violations of that paragraph constituted aggression, and secondly, as to what degree of violation of Article 2, paragraph 4, constituted aggression.

67. Consequently, the Drafting Committee had decided at the current session to recommend a single article on aggression as a crime under the Code, focusing only on the identification of the role of an individual in the commission of aggression by a State. Under that definition, individual involvement was limited to that of a

* See 2465th meeting.

leader or organizer, the roles that had appeared in the Charter of the Nürnberg Tribunal and in the Charter of the Tokyo Tribunal.⁸ The threshold of involvement of an individual in his capacity as leader or organizer was active participation in or ordering the planning, preparation, initiation or waging of aggression committed by a State. The threshold of involvement was thus rather high and, as in the Charters of the Nürnberg and Tokyo Tribunals, was based on the fact that aggression was always committed by individuals occupying the highest decision-making positions in the political or military apparatus of the State and/or in its financial and economic sector.

68. Concerning the structure of the article, it should be noted that an individual could be guilty of the crime of aggression only if aggression had been committed by a State. In that connection, the majority of the members of the Drafting Committee had agreed that there was no need for a definition of aggression by a State. But some members had thought otherwise; in their view, it would be difficult for a judge to apply article 15 in the absence of such a definition. The Drafting Committee had also not discussed the issue whether a court implementing the Code could itself define aggression or whether it could deal with the possible criminal responsibility of an individual only if and when the Security Council had determined that there had been an aggression by a State.

69. The Drafting Committee proposed that the Commission should adopt article 15.

70. The CHAIRMAN invited the Commission to continue consideration of article 15 at the next meeting.

The meeting rose at 1 p.m.

⁸ Charter of the International Military Tribunal for the Far East; *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.

2441st MEETING

Thursday, 13 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock,

Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING³ (*continued*)

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

ARTICLE 15 (Crime of aggression) (*continued*)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), continuing his introduction of article 15 from the previous meeting, said that the article contained a clear definition of the crime of aggression, entailing individual responsibility. It did not say what aggression by a State was taken to mean. That had not been deemed to be the Commission's task when considering individual crimes. The definition of State aggression had its roots in the Charter of the United Nations, and in other instruments, such as the definition of aggression contained in General Assembly resolution 3314 (XXIX). The Commission might wish to explain in the commentary why it had decided to leave aside the definition of State aggression and where such a definition might be found.

2. The CHAIRMAN said that the Chairman of the Drafting Committee had done well to focus on the main difficulty of article 15: the fact that it contained no definition of a State crime. The Commission was seeking to define the crime of an individual who, on a case of aggression committed by a State, might be a leader or organizer of the crime and was personally liable for it. Of course the criticism could be made that, while the area under discussion was criminal law, the crime concerned had to be defined elsewhere. That was the weak point of article 15 which, as everyone was aware, was due to the fact that the crime of aggression was on the borderline between the draft Code of Crimes against the Peace and Security of Mankind and the draft on State responsibility.

3. Mr. BOWETT said he was in favour of stating in the commentary that article 15 concerned not just one single leader or organizer, but rather the group of persons, who,

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

at the highest level, had been instrumental in forming the policy of the State which had committed aggression.

4. Mr. HE said that, as a member of the Drafting Committee, he approved the formulation of article 15, which, together with article 2, paragraph 2, was well suited to determining individual criminal responsibility for the crime of aggression. However, the phrase "leader or organizer" was too narrow, and he proposed that a reference should be made to instigators and accomplices, as had already been done in the Charter of the Nürnberg Tribunal.⁴

5. Mr. THIAM (Special Rapporteur) said that there had been an in-depth discussion of the preparation of aggression covered by the Charter of the Nürnberg Tribunal⁵ when he had presented his sixth report.⁶ He suggested stating in the commentary who the organizers might be—persons with direct responsibility or persons who acted as accomplices. The commentary should give as broad an explanation as possible of the word "organizer". The Charter of the Nürnberg Tribunal could not be taken as a basis, because it was very controversial. In French law, an instigator was an accomplice, whereas in the Charter of the Nürnberg Tribunal, the two terms were not identical.

6. The CHAIRMAN said that the problem had not yet been entirely resolved. When the Commission had adopted article 2 on first reading, complicity and related crimes had related only to articles 16 to 18, and not article 15. In other words, article 15 was limited to the definition that it contained. The commentary might explain what the Commission meant by "organizer" or "leader", but not complicity, which must be defined as a crime in criminal law. Otherwise, he did not see how the Commission could include the concept of complicity in the commentary.

7. Mr. THIAM (Special Rapporteur) said that complicity meant different things in different legal systems. Consequently, there was no other solution but to give the broadest possible definition of instigator. If article 15 was confined to "leaders", it would fail to take account of all political systems. The word "organizer" had been included to cover, for example, in such systems as had recently disappeared in one part of Europe, not only leaders in the sense of members of Government, but also members of a political party.

8. Mr. LUKASHUK said that the Commission had been considering the article on aggression for many years; probably no other article had been the subject of so many versions. Having worked on the article for so long, the Commission had succeeded in producing the best draft. There was no reason not to adopt it in its present form.

9. Mr. SZEKELY said that the Drafting Committee had found an ingenious way to draft article 15. It had avoided falling into the trap of trying to define, through

the Code, a crime which must be defined elsewhere—in the present instance, in the international law on State responsibility. Article 15 concerned a crime perpetrated by an individual because he participated, on behalf of a legal person, in the commission of a crime regulated elsewhere in international law. Criticism of the article was unfounded: many legal systems established special responsibility for public officials who committed certain crimes under the criminal code. In fact, article 17 of the draft Code included crimes which were not defined but were regulated elsewhere, for example, the crime of torture.

10. He was, nonetheless, concerned about the limited nature of "leader or organizer", which did not cover the whole possible range of complicity. The Special Rapporteur had said that instigators were accomplices. Yet the opposite was not true: not all accomplices were necessarily instigators, for example, persons who financed or facilitated the commission of a crime. The Commission had been rather radical in restricting, in article 2, paragraph 2, the sphere of individual responsibility for the crime of aggression. It should decide whether it could pinpoint certain matters in article 2, paragraph 3, so that complicity would apply to an individual responsible for committing the crime of aggression. He had in mind, for example, paragraph 3 (d), which was somewhat more specific and less limited than the phrase "leader or organizer" in article 15. The Commission should open up the scope of individual responsibility a little bit more than was now the case in article 15.

11. Mr. BARBOZA said that article 15 needed to be broadened to include persons who were not leaders or organizers. The crime of aggression as defined in article 15, for the individual, was a form of participation in a crime that could not be committed by individuals, but rather by a legal person, namely the State. Aggression was typically a State crime, and it was therefore essential to define degrees of participation in article 15 in greater detail. He would like to hear the view of the Chairman of the Drafting Committee on that point and would be interested in learning why the Drafting Committee had made a special exception of the crime of aggression, removing it from the common regime of participation under article 2. It might be necessary for several members of the Commission to meet in a small group to amend that part of article 15 so as perhaps to include the same categories as were to be found in the Charter of the Nürnberg Tribunal.

12. Mr. VILLAGRÁN KRAMER said that article 15 as submitted by the Drafting Committee constituted a return to the period before 1974. It had left out all the parameters established by the Charter of the United Nations in order to be able to define the crime of aggression. Accordingly, he was in fundamental and total disagreement with the Drafting Committee.

13. The Commission might imagine the situation in which an international or even a national judge would find himself if he had to apply the principle embodied in article 15, assuming the article was approved. The first thing he would ask himself was: what was aggression? If he decided to see what the Charter of the United Nations said on the subject, he would find Article 2, paragraph 4,

⁴ See 2439th meeting, footnote 5.

⁵ See *Yearbook . . . 1988*, vol. II (Part Two), pp. 58-59, paras. 224-228.

⁶ *Yearbook . . . 1988*, vol. II (Part One), p. 197, document A/CN.4/411.

under which the use of force—by a State—was illegal. He might then turn to General Assembly resolution 2625 (XXV) the annex to which contained the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, where he would learn that a large majority of the States Members of the United Nations had found aggression to be a crime, not of individuals, of course, but of States. Then he might come across Article 39 of the Charter, which provided that the Security Council could determine the existence of any threat to the peace or act of aggression. The judge might then ask who committed the crime of aggression. Who was responsible for such a crime? Crimes were committed by persons, including legal persons, under certain legislation. Crimes were committed by individuals, but they did so in a State context, and it was therefore a State crime, for it was the State that committed aggression. In the draft under consideration, the definition was dangerous, because aggression ceased to exist for States, becoming merely the responsibility of a leader, organizer, group or the like.

14. In 1974, the General Assembly had approved the Definition of Aggression in resolution 3314 (XXIX). It was not apparent why the members of the Drafting Committee had disregarded that definition, which had not been a political decision, but had been elaborated by legal experts in the Sixth Committee of the General Assembly. Mr. Rosenstock, himself and other members of the Commission had been present. It was worth pointing out that, at the time, the countries of the third world had been told that the resolution had been the result of a delicate agreement reached between the United States of America and the Union of Soviet Socialist Republics and, therefore, the countries of the third world had no say in the matter, but simply had to accept it. The Latin American countries had stood up and had insisted on discussing the question. Nevertheless, when the resolution had been adopted by the General Assembly, the satisfaction had been general.

15. The countries of the Americas, including the United States, had taken the definition of aggression very seriously. In fact, the definition of aggression in the Protocol of Amendment to the Inter-American Treaty on Reciprocal Assistance (Rio Treaty) had been based on General Assembly resolution 3314 (XXIX). Although not a compulsory rule because the Rio Treaty had not yet entered into force, the definition of aggression had become a clear and specific reference point for judges throughout the western hemisphere.

16. What the United Nations and the countries of the western hemisphere had said was that aggression was the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. The first use of armed force by a State in contravention of the Charter of the United Nations would constitute prima facie evidence of an act of aggression. The members of the Commission from countries that were world Powers were alive to the problem of international security when they considered those international matters, but the legal experts of small countries had similar concerns. For instance, in 1969 there had been a conflict between El Salvador and Honduras which had been a

very delicate issue for his own country, because El Salvador had used force to enter the territory of Honduras, thereby creating tension in the region. The Rio Treaty bodies had been convened, and the Salvadorian Government had been told that if it did not withdraw its troops to the border, El Salvador would be termed the aggressor and would have to bear heavy international responsibility. El Salvador had subsequently withdrawn. In another recent example, a border dispute between Peru and Ecuador had almost led to war. But both Governments had made every effort to avoid making first use of force in order not to be termed the aggressor. If States took such precautions, it was not clear why the legal experts of the Commission should restrict aggression to the terms of the Drafting Committee's proposal. Use of force was a crucial component of aggression, and it was inconceivable that draft article 15 should make no mention of it.

17. The subject was not one that lent itself to adoption by consensus, because at some later date the Commission would certainly be taken to task if it proceeded in that way. The subject was both political and legal in nature. The Commission must not disregard the various elements that defined aggression, which included: use of force; who used it first; and in what circumstances self-defence, rather than aggression, was involved.

18. Mr. ROSENSTOCK said he agreed with Mr. Szekely that article 15 as drafted afforded an ingenious response to the problem involved. It recognized that the Commission's task was to deal with individual responsibility, not to define the components of wrongful acts committed by States, and also that the crime of aggression by an individual must involve participation in the activity of the State at a policy-making level in order to ensure the presence of the element of *mens rea*. That element must be a component of individual responsibility in a serious wrongful act committed by a State. If the Commission attempted to mix the question of the responsibility of the individual and the precise parameters of a wrongful act by the State in which the individual participated, it would merely replicate the failure of previous efforts by the League of Nations and the Commission on first reading. The Definition of Aggression was not particularly helpful to the Commission in doing what it had to do, as was apparent from the experience gained on first reading. He saw no need for Mr. Villagrán Kramer's concern that the ability under the Rio Treaty to caution parties that their action might involve the wrongful conduct of aggression was destroyed by focusing on what the individual's responsibility was in such a context.

19. He had doubts about reverting to article 2 and trying to incorporate some of the conduct covered by paragraph 2 of that article in aggression, which required participation at the policy-making level. Mr. Bowett had, however, suggested a possible way of solving the problem. Admittedly, the commentary should not include anything not covered in the body of the article itself, but it could explain what was meant by the term "leader or organizer". Specifically, it should make it clear that anyone who organized or financed the industrial output that made an act of aggression possible, and did so in the knowledge of the purpose to be served by such aggress-

sion, would be participating in that aggression as a leader or organizer.

20. Mr. YANKOV said it was a basic premise that acts of aggression were always committed by individuals at the highest decision-making levels in the political and military structure of the State or in its economic and financial life. However, if an attempt was now made to elaborate on article 15, he feared no positive results would be achieved, particularly in view of the considerations referred to by Mr. Villagrán Kramer. For the time being, therefore, the text of the article as drafted, with its reference to "leader or organizer", should provide something sound for Governments to ponder and he would resist any temptation to add to it.

21. Mr. PELLET said that article 15 was a model of concision, prudence, skill and subtlety as well as—and it was not necessarily a defect in international law—hypocrisy. On the whole, he approved of article 15 as now drafted, since it was the only reasonable solution the Drafting Committee could have adopted. It was essential to have a provision on aggression in the draft Code, but it was impossible to define the crime of aggression precisely. He shared the positions of Mr. Szekely and Mr. Rosenstock, yet was not altogether persuaded by the explanation—more heroic than convincing—given by the Chairman of the Drafting Committee of the contrast between the procedure used in article 15, which was not to define aggression, and the procedure used in articles 16, 17 and 18, which meticulously endeavoured to lay down a definition that could not, however, be used in criminal law. In that regard, he understood, but did not share the concern of Mr. Villagrán Kramer. He would note, in passing, that Mr. Villagrán Kramer had spoken, if he had understood properly, of some of his colleagues as representing the world Powers. Members of the Commission did not, however, represent States and he wished to make it quite clear that he did not regard himself as the representative of France on the Commission.

22. There were essentially two reasons why it had not been possible to lay down a definition of aggression that could be used in criminal law. First, contrary to what Mr. Villagrán Kramer had said, the definition laid down in General Assembly resolution 3314 (XXIX) was execrable and of no use whatsoever, at any rate for the purposes of criminal law, as was made plain in the commentary when the article had been adopted on first reading. The Commission, which could not, therefore, cling to that definition, could hardly be expected to arrive at a satisfactory solution in a few weeks when that had not been done for over more than 50 years. Secondly, it was common knowledge that an objective definition was impossible unless one admitted that aggression was what was defined as such by the Security Council. That, however, was not possible, which was why the provision in article 15 had been drafted and it presented a reasonable way out of a difficult situation.

23. It was most doubtful that, as the Chairman of the Drafting Committee had stated, there was no need to define aggression since it was committed by States. In general, it was hard to imagine genocide being committed other than in the State context or in conjunction with

State authorities, and he was not sure that war crimes and even crimes against humanity could not also be committed by States. But that did not exempt the Commission from saying what the definition of the crime of aggression was. Article 15 provided that a crime of aggression was the act of participating in or ordering the initiation of aggression committed by a State. It had constantly been explained to him that, for the purposes of criminal law, definitions had to be very precise. Any unfortunate judge who came across article 15 would be incapable of convicting anybody on the basis of an article that meant nothing and contained no legal guidelines.

24. Thus he approved of the article but at the same time disapproved of it. He approved of it because he was convinced that it was adequate within the context of the exercise in which the Commission was engaged, the main thing in the case of the Code being to indicate the circumstances in which a person could be prosecuted. That person could then be brought before the courts, whose statutes, at least in the case of the international courts, would define the crimes they could try. In other words, the general provision laid down in article 15 was sufficient, provided that, when the day came to bring a person responsible for a crime of aggression before an international or indeed a national court, that court would have other laws it could apply, since it would be quite impossible to apply article 15.

25. He was utterly opposed to articles 16, 17 and 18, which, unlike article 15, sought to replace the statutes of international criminal courts that defined the crimes to be punished. Thus, if he agreed with article 15 as a whole, it was because he did not agree in the main with the articles that followed, since they were not what was to be expected of a code of crimes against the peace and security of mankind.

26. He shared Mr. Szekely's view concerning the relationship between article 15 and article 2. Article 2, paragraph 2, was not very satisfactory as it appeared to treat the last part of article 15 as an acceptable substitute for paragraph 3 of article 2 so far as aggression was concerned. The list in article 2, paragraph 3, could apply to crimes of aggression, subject to one reservation inasmuch as a crime of aggression obviously presupposed the use of armed force: it was probably difficult to punish the soldiers who launched an assault that led to the commission of aggression as the perpetrators of a crime of aggression, although he was not altogether sure. After all, if a soldier in Bosnia and Herzegovina was told to go and rape Muslim women and did so, he was merely following orders, but that would not excuse him in law. The main idea was nevertheless that the soldiers of the Wehrmacht in the Second World War, for example, should not all be regarded as guilty of crimes against the peace and security of mankind and should not all be considered as having committed a crime of aggression.

27. The procedure he would have preferred would be to delete article 3, paragraph 2, and to provide that paragraph 3, subject to one or two exceptions, was applicable in general.

28. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he could not agree with Mr. Pellet's suggestions that the Drafting Committee was

hypocritical in its drafting of article 15. Indeed, both he and the other members of the Committee had proceeded cautiously. Mr. Pellet had also said that the Drafting Committee had not defined aggression. What it had actually not defined was aggression by the State, which fell outside the Code and outside the Drafting Committee's mandate, which was to define crimes by individuals. Mr. Pellet had further asked how a judge could try an individual for a crime of aggression. A judge could do so very easily. He merely had to verify at the outset that aggression had indeed been committed by a State, whereupon he could refer to the Charter of the United Nations and to the Definition of Aggression which Mr. Pellet had termed execrable.

29. Mr. HE said that, after many years of heated debate, the Commission had reached the conclusion that it was not its task, nor was it possible, to lay down a definition of aggression in the Code. Rather, its task was to determine how an individual could be held criminally responsible for the crime of aggression. Article 15 seemed to meet that requirement. He wondered, however, whether it might be possible to broaden the scope of the article to include other persons, in addition to leaders and organizers, who participated in the crime of aggression. Possibly Mr. Bowett or a small working group could find some suitable wording, failing which an explanation could perhaps be included in the commentary to meet his concern.

30. Mr. SZEKELY said that he was unable to share Mr. Villagrán Kramer's concern, which apparently stemmed from a misunderstanding, regarding the wording of article 15. Mr. Villagrán Kramer had said, for instance, that under the article there would be no aggression by States. But there was no ground whatsoever for arriving at such a conclusion, particularly since the article referred expressly to "aggression committed by a State".

31. It struck him as somewhat strange that Mr. Villagrán Kramer, and Mr. Pellet too, felt sympathy for the judge who would have to apply the article. Such a judge would not necessarily be a national judge and, even if he were, it would not be the first time that a national judge had had to apply international law or refer to the rules of international law. It happened every day. National and international judges would have to refer to international law in general and would not confine themselves to the strict limits of the Code.

32. Mr. Villagrán Kramer had further stated that the Rio Treaty, which contained a definition of aggression, provided a frame of reference for courts in the Americas. There was also the Definition of Aggression laid down by the General Assembly, which Mr. Pellet had described as execrable. A certain contradiction thus arose. Did the Commission really want to say that in the modern world no State could really end up by committing the crime of aggression simply because there was no objective and universally accepted definition of aggression? In his view, the General Assembly definition could very well be applied, notwithstanding its many defects. Mr. Villagrán Kramer had asked finally why the definition was confined to individuals. The reply, of course, was because it appeared in a Code that regulated the respon-

sibility of individuals and not the responsibility of States, which was regulated under other instruments.

33. He too had been very disturbed by Mr. Pellet's use of the word "hypocrisy". There was absolutely no reason to address members of the Commission and the Drafting Committee in such a cavalier fashion.

34. Mr. FOMBA said that the problem of substance was to lay down the principle of individual criminal responsibility in the case of aggression committed by a State. A series of difficulties would first have to be resolved at both the legal and institutional level, but those difficulties had wisely been left aside.

35. So far as the scope *ratione personae* of article 15 was concerned, the chain of responsibility in the case of aggression committed by a State naturally lay at the highest level, whether political, administrative, military or even economic. Furthermore, the category of leaders and organizers covered by article 15 should be interpreted in the broadest sense. He was somewhat hesitant, however, about the possibility of drawing a clear distinction between the categories of decision-takers and of executants.

36. As to the article's scope *ratione materiae*, the underlying idea involved the notion of participation, whether active or passive. By virtue of that notion it would be possible to cover all forms of activity relating to the criminal conduct in question. Also, the categories of the activities covered—the planning, preparation, initiation and waging of aggression—were sufficiently broad, although he was inclined to think that complicity, whether active or passive, should have a place in the article. A global and consistent interpretation of those various elements would provide a sound basis for a broad consensus. Accordingly, he could accept the text of article 15.

37. Mr. BARBOZA said the Commission was considering a long-standing and complex question and the solution found by the Drafting Committee might be acceptable. The substance of his earlier remarks had been that aggression was a State crime—that much was not disputed; and that individuals therefore only participated in the commission of that crime. Article 15 used the term "participates". Yet the definition of "participation" was expressly applicable only to articles 16, 17 and 18. Was it to be inferred from that fact that there must be some shades of difference in the way the word "participation" applied to aggression? He supposed that there must indeed be some differences. So, technically speaking, there was a gap that needed filling.

38. Of course, a plenary meeting of the Commission was not the best place in which to engage in drafting exercises. It had been suggested that the commentary would somehow complete what was missing. Resort should be had to *travaux préparatoires* only in cases where the text and the context produced an illogical result. He was confident that in the current case, the court would be confronted with an illogical, ambiguous or vague result, so that resort to *travaux préparatoires* would be quite legitimate. The commentary would thus be of great value. He therefore considered that, in view of all the difficulties that had arisen, the Commission

could accept article 15 as it stood, and leave it to the commentary somehow to explain what was meant by "participation as leader or organizer". Meanwhile, he reserved his position until he had had an opportunity to see the actual text of the commentaries.

39. Mr. Sreenivasa RAO said that the Commission seemed to have come full circle in its consideration of article 15. In the early stages of its consideration it had sought elaborate definitions, but discretion had prevailed over valour, and it had now abandoned that search. Let there be no mistake, however: when the draft was seen by the outside world, there would be enormous disappointment at the outcome of the Commission's work, and its very credibility as an expert group might be questioned, especially at a time when the General Assembly was seeking guidance on the matter. The important point was that, if the Commission defined articles 16, 17 and 18 with such meticulous care but not article 15, there was a yawning gap in the drafting technique that could not be accounted for.

40. Admittedly, no definition existed of aggression other than the one contained in General Assembly resolution 3314 (XXIX), which, he felt, was not without value in a certain context and would continue to be a guiding factor. The fact nonetheless remained that, when a court of law was faced with an act of aggression, particularly in a matter where the Security Council had not taken action, it would have to look for certain factors. In his view, it would look to Article 51 of the Charter of the United Nations for "armed attack" as the criterion for determining aggression in the clearest possible sense of the word. Yet it was curious that in the case of Article 51, there was a tendency to expand going beyond armed attack to elaborate on the defences available, while the opposite tendency was discernible when it came to Article 2, paragraph 4, of the Charter and a definition of aggression; for they were two sides of the same coin—there could be no self-defence without aggression. That was a contradiction all the international tribunals would eventually have to confront—and which ICJ had indeed already confronted in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.⁷

41. He was, therefore, not entirely pessimistic about the lack of a definition in article 15, and was reasonably satisfied with the wisdom of the Drafting Committee in ducking the issue. The explanation given, namely that the article dealt only with individual responsibility and not with State aggression was not satisfactory. Better guidance must be available than the mere assertion that, if the State was committing aggression according to a determination of the Security Council, such a determination was not a definition and hence it was not possible to attribute motive to an individual. It was not possible to provide reasonable guidance that the person had acted with the knowledge and means at his disposal and with clear intent to commit the crime. That problem would exist. Accordingly, in an imperfect world, the Commission could accept an imperfect solution.

42. Mr. ROBINSON said that article 15 was a difficult one, and the Drafting Committee had come up with what was, in no pejorative sense, a very clever solution. Nevertheless, several questions did arise. One thing that concerned him was the dissociation between the crime of aggression and other crimes in terms of the whole series of elements enumerated in article 2, paragraph 3 and he was not satisfied that they should not be equally applicable to aggression. At any rate, as Mr. Pellet had suggested, the Commission could start out on the assumption that they should all apply, then attempt to isolate those that might not be applicable. The argument in favour of adopting such a course was that it made the whole approach to the draft Code more rational, presenting a more integrated and unified attitude to the elements.

43. The words "actively participates", which, following as they did the words "as leader or organizer", were problematic and perhaps unnecessary, since a leader or organizer was inherently active. Furthermore, one would then have to distinguish between "actively participates" as used in article 15, and "directly participates", as used in article 2, paragraph 3 (e).

44. Another question was whether the linkage with aggression committed by a State meant that a court faced with the trial of one individual for aggression could only proceed with that trial if a determination had been made by the Security Council that aggression had been committed by a State. Would that question be dealt with in the commentary, or was a court free to proceed with the trial notwithstanding the absence of any determination by the Council? There was nothing on the matter in the article itself. The Code as a whole might have a saving clause in relation to the powers and functions of the organs of the United Nations, but he believed that it would be open to the interpretation that a court faced with a trial of an individual for aggression could proceed with the trial in the absence of a determination by the Council.

45. The CHAIRMAN, speaking as a member of the Commission, said that article 15 was certainly an unsatisfactory provision, but it had proved difficult to find a better formulation. It related to a crime that the Code did not define, a crime committed by a State, that was defined—or supposed to be defined—by other instruments. Admittedly little was provided by way of guidance for judges, either in the Code or in the many other existing texts, but those were perhaps problems that could not be resolved by the Commission if it was to overcome the difficulties posed by the relationship between the crime of aggression committed by a State and the crime of aggression imputed to an individual.

46. As to the links between article 15 and article 2, he agreed with the comments by Messrs. Szekely, Pellet and Robinson. Article 2, paragraph 2, singled out the crime of aggression in a categorical and unjustifiable manner. Article 2, paragraph 3, contained a number of subparagraphs with wording that was to some extent reflected in article 15. It seemed to him that paragraph 3, subparagraphs (a), (b), (c), (d)—which also raised the problem of the complicity of another State or its leaders in a crime of aggression—and (e) were as applicable to

⁷ *Merits, Judgment, I.C.J. Reports 1986*, p. 14.

article 15 as they were to articles 16, 17 and 18. Paragraph 3 (f), however, perhaps went too far in broadening the scope of the crime of aggression, as, a fortiori, did paragraph 3 (g), since there had been no support for including the crime of attempted aggression when it had been proposed in the Commission and the Sixth Committee.

47. His question to the Chairman of the Drafting Committee and the Special Rapporteur was, therefore: was article 2, paragraph 2, really necessary; or should there not perhaps be a paragraph 3 consisting of subparagraphs (a) to (e), applicable to articles 15 to 18, and a separate paragraph consisting of subparagraphs (f) and (g), which were apparently less—or not at all—applicable to aggression?

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, like some other members, Mr. Mahiou had raised the question whether there were not some subparagraphs of article 2, paragraph 3, that also applied to the crime of aggression. While it was true that subparagraph (a) would apply, intentional commission was mentioned separately in that subparagraph because there were other elements that might also go to make up the crimes in question. However, there would be no need to specify that the crime was committed intentionally in the case of a crime of aggression. The same was true, *mutatis mutandis*, of subparagraph (b), since the word “orders” was contained in article 15. As to subparagraph (c), he was not sure that it should be a crime to fail to prevent or repress the participation of a leader or organizer in a crime of aggression by a State.

49. In the case of subparagraph (d), if someone, as a leader or organizer, knowingly aided, abetted or otherwise assisted in the commission of a crime of aggression, he was actively participating; so subparagraph (d), too, was also already included. Subparagraph (e) must be ruled out, as its reference to direct participation in planning or conspiring to commit such a crime already constituted the core of article 15 as currently drafted. It did seem strange to treat the crime of aggression separately from other crimes under the Code, but the distinction had to be maintained because of the intrinsic difference between the other crimes, which referred to acts that could be committed by individuals, and aggression, where the act of the individual was one of participation. In short, he did not rule out an adjustment to article 2 of the sort proposed, but he was not convinced that such an adjustment was necessary.

50. Mr. VILLAGRÁN KRAMER said that, as a president of the Spanish Republic had once observed, quixotic figures were to be found even among jurists. He wished to place on record his opposition to the adoption of article 15, as he was against it for a number of reasons. First, he opposed it because the comments, reactions and observations of Governments of Member States, as expressed in the Sixth Committee during the fiftieth session of the General Assembly in 1995 (A/CN.4/472, sect. A), had been disregarded. On that occasion the Special Rapporteur’s proposals regarding the crime of aggression had met with both favourable and adverse reactions. While there had been no agreement on other components such as intervention and first use of

force, most States had nonetheless favoured retaining the fundamentals of aggression and its definition.

51. Secondly, he opposed adoption of article 15 because the Commission was resorting to techniques that contradicted the logic whereby a legal provision was formulated. Such a provision contained a mandate or clear expression of will to consider a certain form of conduct as obligatory and its non-observance as punishable. The draft article was thus anti-technical.

52. Thirdly, he opposed it because, by adopting article 15, the Commission was in no way contributing to the consolidation, strengthening and better understanding of international law during the United Nations Decade of International Law⁸ in which it was especially duty-bound to do so. As it stood, the draft Code left the crime of aggression undefined.

53. Some concise explanations were called for. In the first place, the Special Rapporteur had taken the trouble to provide, in the extensive documentation he had prepared for the second reading of the draft articles, a detailed account of the reactions of some Governments to article 15. Thus, one could read, in the Special Rapporteur’s thirteenth report,⁹ that the Australian Government took the view that article 15 encompassed, in addition to wars of aggression, unjustified acts of aggression short of war. That, it believed, went beyond existing international law which criminalized wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it did not, in that Government’s view, follow that the international community was willing to recognize that individuals in the delictual State were guilty of international crimes. The view taken by the Australian Government was thus an adverse one. He respected that Government’s right to draw his attention to those views and considered it his duty to reflect upon them.

54. Belarus, on the other hand, a newly independent State not bound by the Definition of Aggression approved by the former Soviet Union, had welcomed article 15. Its views, and also those of Paraguay, were not negligible. The United Kingdom of Great Britain and Northern Ireland had grave doubts concerning article 15. The United States of America opposed the Code’s definition of aggression, and Switzerland, too, had further comments to add. It was plain to see that States and Governments had expressed concern about the question, and it was the Commission’s duty to provide the clearest possible guidance. It could not afford to treat the issue lightly.

55. The Special Rapporteur’s proposals and reports had been discussed in the General Assembly at its fiftieth session, and he could not but be struck by the fact that, while in certain cases the Commission persisted in heeding the comments of Governments in the Sixth Committee, on the matter of aggression it chose to ignore them. Thus, the topical summary of the discussion in the Sixth Committee showed that many Governments

⁸ Proclaimed by the General Assembly in its resolution 44/23.

⁹ *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/466.

of Africa, Asia, Europe and Latin America were in favour of spelling out the elements of aggression or of giving a clear indication of what constituted aggression. That was because those Governments were aware that it was customary for legal technique to provide an explanation, guideline or interpretation of the meaning of a term. The Commission should not leave the concept of aggression hanging in thin air, but should specify the elements it thought could serve as points of reference. He himself would be satisfied if the Commission were to incorporate in article 15 the Special Rapporteur's proposed definition, which is that aggression was the use of armed force. The concept of aggression was too important to be left floating in a legal vacuum.

56. The Special Rapporteur, who had worked so hard on the draft, must find it very painful to see it cut so drastically on second reading. The whole concept of international responsibility for crimes against the peace and security of mankind appeared to be relegated to oblivion. He could not agree with the arguments advanced by the Chairman as a member of the Commission to the effect that article 2, paragraph 3, covered the problem, and did not believe that an explanation in the commentary would be an adequate solution. He hoped that the Special Rapporteur, in summing up the debate, would indicate whether he thought that article 15 could or could not include some elements of a definition of aggression.

57. Mr. YAMADA said that, having taken part in the drafting of article 15, he supported the adoption of that article as it stood. The Chairman of the Drafting Committee had said that article 15 defined a crime of aggression as committed by an individual. It should be noted that article 15 had been formulated in a manner quite different from articles 16, 17 and 18. Article 15, while defining a crime, included all the elements of individual criminal responsibility for that crime. The wording of article 15 covered all categories of individuals who would be made criminally responsible for the crime of aggression at the political, military, financial, economic or any other level. Therefore article 2, paragraph 3, which defined individual criminal responsibility had no relevance to article 15. On the other hand, articles 16, 17 and 18 defined the crimes of genocide, crimes against humanity and war crimes. Those articles did not deal with individual criminal responsibility for those crimes. Such individual responsibility was found in article 2, paragraph 3.

58. Mr. PELLET said the Drafting Committee's position appeared to be that aggression could only be committed by a State and consequently fell outside the purview of the Code, which dealt only with the possible criminal responsibility of individuals. When an individual participated in aggression, the Code spoke of the "crime of aggression", something it did not do in the case, for instance, of genocide, which was not referred to in the Code as the "crime of genocide". For his own part, he could not follow the Committee's logic. One of the consequences of an international crime of the State, as defined in the excellent article 19 of part one of the draft articles on State responsibility,¹⁰ was that the individuals who committed the crime against international

peace and security could themselves be prosecuted. The link between aggression and the crimes covered by the Code was therefore closer than the Drafting Committee appeared to think. But even if he accepted the reasoning of the Committee, if aggression was different, the "crime of aggression" as defined—or not defined—in article 15 was the same in nature as the other crimes against the peace and security of mankind. In other words, it was a particularly serious crime against the peace and security of mankind, internationally defined and entailing judgement of the individuals presumed to be responsible for it. And he did not see why, by nature, that crime, committed by individuals, was different from the other individual crimes in articles 16, 17 and 18. He could not see any logical explanation for treating aggression differently from other crimes under the Code for the purposes of article 2.

59. While commending the exercise undertaken by Mr. Mahiou in analysing the subparagraphs of article 2, paragraph 3, from the viewpoint of their possible applicability to the crime of aggression, he did not entirely agree with the conclusions reached. In his opinion, both incitement and attempt to commit the crime were as relevant to aggression as to the other crimes in the Code. The only problem he could see was with subparagraph (d), which would extend responsibility for the crime to simple soldiers, who, for reasons of policy, ought in the case of aggression to be exempt from responsibility.

60. Recalling that action on article 2 had been left in abeyance pending the adoption of article 15, he suggested that the issue should be referred not so much to the Drafting Committee as to an informal working group to consider the possible effects on article 2, paragraph 3, of deleting paragraph 2 of that article.

61. The CHAIRMAN, speaking as a member of the Commission, said that in the case of the crime of aggression, the provision in article 2, paragraph 3 (d), would have to be read in conjunction with article 15, which specified that the individual in question had to be a "leader or organizer" of the crime.

62. Mr. TOMUSCHAT said that he agreed with those members who considered that the Drafting Committee had found a well-balanced formulation. Unlike Mr. Pellet, he thought that aggression was different in nature from the other crimes in the draft Code in that aggression was a crime that could only be committed by a collectivity and involved the use of organized force. The same was undoubtedly true of some of the crimes against humanity listed in article 17, more particularly those listed in subparagraphs (f) and (g), which also partook of the nature of aggression, inasmuch as they were collective crimes. However, article 15 and its relationship to article 2, paragraph 2, should be left untouched. As far as the definition of aggression was concerned, he could not see that it was possible to go beyond the simple fact that aggression was governed by the Charter of the United Nations. Mr. Villagrán Kramer was incorrect in believing that the comments of Governments, and in particular those of the Government of Australia, on the subject of a definition of aggression had been ignored by the Drafting Committee. On the contrary, those comments had been discussed at length and the conclusion

¹⁰ See 2427th meeting, footnote 7.

had been reached that to provide such a definition did not form part of the Commission's task.

63. As for the decision to maintain the formula "as leader or organizer", it was important that article 15 should make it quite clear that only those in a policy-making or command position could be held responsible for a crime of aggression. If responsibility were extended to everyone involved in the act, the provision would become so diluted as to lose all meaning. It was true that the Charter of the Nürnberg Tribunal did refer to acts of complicity, but it should be remembered that all the individuals on trial at Nürnberg had been major war criminals and that no accomplices, even high-ranking ones, had been charged at that stage. He recommended that draft article 15 should be adopted as it stood.

64. Mr. EIRIKSSON said that, as a loyal member of the Drafting Committee, he associated himself with that recommendation. He did not think it was appropriate to amend article 2 and it was pointless to set up a working group to review it. Article 15 restricted responsibility for a crime of aggression to the category of leaders or organizers, but listed a wide range of activities that would make such individuals responsible for the crime. Any change in article 2, paragraph 3, could have the opposite effect, namely increasing the categories of individuals but reducing the number of activities. Such a course would be undesirable. As to the analyses of article 2, paragraph 3, by Messrs. Mahiou, Calero Rodrigues and Pellet, his own opinion was that the provisions in question could be divided into four categories. Subparagraph (a) would already be included in article 15. The second category could be said to include subparagraphs (f) and (g), in respect of which he agreed with Mr. Mahiou but differed from Mr. Pellet. For reasons of policy they should not apply to the crime of aggression. The third category, consisting of subparagraphs (d) and (e), namely abetting and participating, would, if applied to the crime of aggression, expand too far the definition of an individual responsible for the crime. Lastly, the provisions in subparagraphs (b) and (c) which really related to orders of a superior, would seem to be covered by the definition provided in article 15.

65. Mr. ROSENSTOCK said that he was in complete agreement with Mr. Tomuschat and Mr. Eiriksson and especially with Mr. Yamada's analysis and hence the conclusion that article 2, paragraph 2, should not be reopened for discussion. It was regrettable that some other members had chosen to use the present debate as an opportunity to advertise the appalling material contained in article 19 of part one of the draft on State responsibility. While recognizing that in some situations it might be necessary to go back to a decision already adopted, which might be the case with article 12, it would be imprudent to revert to article 2, paragraph 2, which the Commission had adopted in the full knowledge of what it was doing.

66. The CHAIRMAN pointed out that the Commission had decided to leave article 2, paragraph 2, in abeyance pending the discussion on article 15.

67. Mr. LUKASHUK said that, desirable as it might be to provide a definition of aggression, the Commission should recall that not only the United Nations but also

many other academic and political organs had tried in vain to grapple with the problem. A decision to prepare such a definition would involve postponing the Commission's work on the draft Code, possibly for many years. He did not think that such a possibility should be envisaged, and again urged the Commission to adopt article 15 as formulated by the Drafting Committee.

68. Mr. ROBINSON said that an individual who actively participated in or ordered the planning, preparation, initiation or waging of aggression should be held responsible for a crime of aggression whether or not he did so as a leader or organizer.

69. The CHAIRMAN, further to a suggestion by Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), said that members of the Commission interested in further considering article 2, paragraph 2, could perhaps meet informally with a view to formulating suggestions for consideration at the next meeting.

70. Mr. EIRIKSSON said that, if a small group of members wanted to try to convince the majority to change its mind, it was of course free to do so, but not under the auspices of the Commission.

The meeting rose at 1.10 p.m.

2442nd MEETING

Friday, 14 June 1996, at 10.35 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (concluded)*

[Agenda item 1]

1. The CHAIRMAN informed the Commission that the Enlarged Bureau had met immediately prior to the plenary meeting to decide on the programme of work for

* Resumed from the 2434th meeting.

the three-week period from Monday, 17 June to Friday, 5 July. He read out the programme proposed by the Enlarged Bureau, which had also been distributed in table form to all members of the Commission. If he heard no objections, he would take it that the Commission wished to adopt the proposed programme.

It was so decided.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

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

ARTICLE 15 (Crime of aggression) (concluded)

2. Mr. THIAM (Special Rapporteur) said that, in his view, it would be wiser to conclude article 15 first instead of discussing it simultaneously with article 2. He noted that a clear majority was emerging in favour of article 15 as proposed by the Drafting Committee. Some members had expressed reservations, but would not oppose the adoption of the text and only one member continued to call for a definition of the crime of aggression. The problem with the definition of aggression was not new. At first, the Commission had intended to use the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX), some members of the Commission being in favour of adopting it in full, while others preferred to leave out the provisions relating to the Security Council's jurisdiction. Consequently, he had used only article 2 of the Definition of Aggression, which defined aggression in very general terms. As a number of members had been of the opinion that even that very general definition had no place in the draft Code of Crimes against the Peace and Security of Mankind because it made reference to the use of force by a State, whereas the Code had to do with individual responsibility, he had proposed not to define aggression and it was with that in mind that the draft article proposed by the Drafting Committee had been drawn up. In his view, the Commission should retain the formulation proposed by the Drafting Committee and reach agreement on article 15 before taking up article 2.

3. The CHAIRMAN pointed out that article 2, paragraph 2, made reference to article 15, thereby justifying a discussion on both articles. At the adoption stage, however, he agreed that they must be separated.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

4. Mr. BENNOUNA said that, on the whole, he endorsed the approach adopted by the Drafting Committee, it being understood that the custom and practice of the United Nations would give substance to the text. However, it would be useful to explain in detail the expression "actively participates" in the commentary, perhaps by citing practice.

5. The CHAIRMAN, speaking in his capacity as a member of the Commission, referred to the case of the mercenaries who had attacked Benin in 1977, concerning which the Security Council, in its resolution 405 (1977) of 14 April 1977, had used the word "aggression" without designating any State. Given that under article 15, aggression must be committed by a State, the problem arose whether mercenaries who had perpetrated aggression under the same circumstances could also be prosecuted under the Code.

6. Mr. THIAM (Special Rapporteur) said that the problem raised by the Chairman was very pertinent. The Commission had a tendency to adopt the terms of existing instruments, in the current instance from the Definition of Aggression, which spoke of aggression by one State against another. For his part, he remained convinced that leaders used the State apparatus to commit an aggression, which gave rise to two types of responsibility: an international responsibility of the State and an individual criminal responsibility of the leaders. Perhaps it should be stated in the commentary that aggression was a crime committed by the leaders of the State, and not by the State itself.

7. Mr. ROSENSTOCK said that he was against pursuing the discussion because all members of the Commission agreed that aggression was committed by a State and that the crime of aggression was committed by individuals who organized and ordered the aggression.

8. Mr. BARBOZA said that, inasmuch as part one of the draft articles on State responsibility⁴ postulated that certain acts could be attributed to a State, the problem of mercenaries raised by the Chairman could be solved only as one of evidence as to the nature of those who had actually ordered the aggression. Since that approach might well be very difficult, however, the text should be left as it stood.

9. Mr. PELLET said that aggression was an internationally wrongful act by a State and a crime within the meaning of the law of international responsibility. But the current debate had been closed by article 3 of part one of the draft on State responsibility. Concerning the text of article 15, as Security Council resolution 405 (1977) spoke of an "act of armed aggression" without designating any State, the problem raised by the Chairman was a real one and he suggested that it should be solved by deleting the restriction introduced by the words "committed by a State" and leaving it, as suggested, to practice and custom to define aggression.

⁴ For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

10. Mr. EIRIKSSON said he was of the view that the text should remain as it stood.

11. Mr. KABATSI said that he found Mr. Pellet's proposal interesting because it covered situations such as the one referred to by the Chairman. However, he thought that it would be wiser not to reopen the discussion at such a late stage and to retain the text as it stood.

12. Mr. TOMUSCHAT said that he was also in favour of keeping the text unchanged. In his opinion, mercenaries who attacked a country from outside were simple criminals. They had no right to any legal protection and were covered by criminal law, by virtue of which they could be prosecuted for high treason or for many other reasons. There was no reason to devote special provisions to them in the Code. In actual fact, the point was to state expressly that starting a war, which in the past had been a sovereign decision of the State, was henceforth unlawful.

13. Mr. BENNOUNA noted that Security Council resolution 405 (1977) was the result of a political compromise within a political body. No State was named because powerful States, some of them with the right of veto, had wanted it that way. It was common practice in the United Nations not to designate States by name and the Commission could not derive rules therefrom, especially if that meant diluting the concept of aggression to the point where it was devoid of all substance. As Mr. Tomuschat had said, either mercenaries were simple criminals or they acted with the complicity or on the orders of a State. He had been in favour of including the notion of mercenary in the draft Code, but the Commission had decided otherwise and the problem should therefore not be reintroduced through article 15.

14. Mr. LUKASHUK said that he had two points to make. First, Mr. Pellet's proposal would alter the very concept of aggression. The subject of an aggression, like its target, could only be a State; that was a particularity relating to the concept of aggression. Secondly, that proposal would change the meaning of article 15 because, in order to determine the existence of a crime, the crime would already have had to be perpetrated by the State. The deletion of that condition would alter the very meaning of article 15 insofar as the planning or preparation of aggression would already be considered a crime in itself, regardless of whether the crime had been perpetrated or not. Mr. Pellet's proposal would thus modify two very important structures in an article which was the result of many years of work within the Commission. It would therefore be better for the Commission to adopt article 15 as it stood.

15. Mr. de SARAM, speaking as a member of the Drafting Committee, admitted that the question of transboundary attacks by non-governmental groups had not been discussed; perhaps it might be in the future. However, it would be a mistake to view those transboundary crimes, attacks or acts of violence perpetrated by non-governmental troops as being covered by ordinary criminal law.

16. Mr. FOMBA said that he fully understood the doubts on the expression "aggression committed by a State" expressed by Mr. Mahiou, who had wondered

whether the scope of article 15 could not be enlarged to include individuals other than those currently covered, as well as the suggestion by Mr. Pellet in that regard. He was, however, prepared to endorse the wise solution advocated by Mr. Bennouna of retaining the text as it stood.

17. Mr. PAMBOU-TCHIVOUNDA said that, for want of anything better, the Commission should confine itself to the text before it. But he would like to make a comment, which might be considered a reservation, on the very nature and identity of the guilty party. To speak of an individual as leader or organizer was to go straight to the heart of the constitutional system of a State. In view of the wide variety of constitutional political systems and having regard, in particular, to public opinion, he wondered whether that description was apt to make the text suitable for use.

18. Mr. Sreenivasa RAO said that, no matter what, a text could never provide for all the ramifications of a particular situation. That was perhaps human and, in the event, having regard to the time limitation, quite acceptable. So far as the question of mercenaries was concerned, there was a sufficient body of law, doctrine and political and State opinion to serve as a guide.

19. Mr. GÜNEY said he agreed that article 15 should stand as drafted. The words "actively participates", however, introduced a subjective element that could give rise to different interpretations of a practical nature and even create a degree of confusion in future. It would therefore be advisable for the Special Rapporteur to clarify those words in the commentary and, if possible, even to give specific examples.

20. Mr. ROBINSON said that the tradition of respecting consensus in the Commission must not prevent it from examining proposals that warranted consideration such as the proposal submitted by Mr. Pellet. Mercenaries were capable of taking action that could threaten the territorial integrity and political independence of States and such action was therefore not to be confused with mere criminal activity. It was in that regard that he considered the proposal to omit the words "committed by a State" to be interesting and attractive because the omission of those words would not necessarily be tantamount to saying that aggression could be committed by individuals. State practice and customary law would then influence the courts that would be acting on the basis of article 15. If, however, the consensus in the Commission was in favour of retaining the article as drafted, he would go along with it.

21. Mr. SZEKELY said that, if the Commission deleted the words "committed by a State" from article 15, it would have to provide a definition of aggression in the text, as there would no longer be any clear point of reference. But, if it attempted to draw up a new definition of aggression covering not only States, but also mercenaries and other groups, it would never manage to pinpoint even the main elements of aggression. The only basis for the Commission was the definition of aggression perpetrated by a State, as provided for under article 15, which was applicable to individuals who could be regarded as accomplices. Mr. Pellet's proposed amendment would lead to problems which the Commission

would be unable to solve. The idea of an organizer, of a person who provoked an aggression, should therefore be retained in the article, which the Commission should adopt without change.

22. The CHAIRMAN said that the discussion had highlighted the many facets of the crime of aggression and also the difficulty the Commission had had in defining it. The definition at which it had arrived was perhaps not the best, but, for the time being, it was the least it could propose.

23. Mr. VILLAGRÁN KRAMER said that he was unable to join in the adoption of article 15, but would not seek a vote.

24. The CHAIRMAN, taking note of the reservations expressed by Mr. Villagrán Kramer, said that if he heard no objection, he would take it that the Commission wished to adopt article 15 as proposed by the Drafting Committee.

Article 15 was adopted.

ARTICLE 16 (Genocide)

25. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 16 had been provisionally adopted by the Drafting Committee at the forty-seventh session as article 19,⁵ when it had reproduced articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide. At the current session, the Drafting Committee had made adjustments to the article to take account of the expanded scope of article 2 of the Code on individual responsibility. In the first place, paragraph 1, which had read: "An individual who commits an act of genocide shall be punished under the present Code", had been deleted because the issue was now covered by paragraph 1 of article 2. Similarly, paragraph 3, which identified acts entailing individual criminal responsibility such as conspiracy, incitement, attempt and complicity, had been deleted in view of the content of paragraph 3 of article 2. The text before the Commission corresponded to article II of the Convention. The Drafting Committee recommended the adoption of article 16 by the Commission.

26. Mr. IDRIS said that he would like to make four observations. First, following the debate on article 15 relating to the crime of aggression, he would also like to avoid in article 16 any strict or inflexible definition of the crime of genocide in the draft Code. He therefore proposed that the word "means" should be replaced by the word "includes". Secondly, in the main clause of the article, he proposed that the word "cultural" should be added after the word "racial". Thirdly, in subparagraph (c), he would like the words "calculated to" to be replaced by the words "intended to". Fourthly, article 16 was the only article in part two which did not include the word "crime". He therefore proposed that the title of the article should read "Crime of genocide" and that, as a consequential change, the word "acts" in the main clause of the article should be replaced by the word "crimes".

27. In making those proposals, he was fully aware that the article was taken from article II of the Convention on the Prevention and Punishment of the Crime of Genocide. In his view, however, the provisions of the Convention must be adapted to the draft Code.

28. Mr. THIAM (Special Rapporteur), replying to Mr. Idris' relevant and very discerning remarks, said that he could agree to his proposal that the title of the article should read: "Crime of genocide". He understood, however, that the authors of the Convention on the Prevention and Punishment of the Crime of Genocide had decided against the idea of "cultural genocide". It would therefore be better not to use it.

29. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), supporting the Special Rapporteur's last remark, read out paragraph (4) of the commentary to article 19 (Genocide) as adopted on first reading, in which it was explained that only acts of "physical genocide" and "biological genocide" were covered in the Convention on the Prevention and Punishment of the Crime of Genocide.⁶

30. Mr. TOMUSCHAT said that, while he found Mr. Idris' proposals very stimulating, it would be dangerous to change a set of established legal norms by enlarging the notion of "genocide". There was, however, no reason why the title of the draft article should not be amended as proposed. It would then be logical for the text itself to open with the words "The crime of genocide means". Those changes would not change the substance of the provision in any way.

31. Mr. BOWETT said he understood that there was no question of changing the text, which was taken from article II of the Convention on the Prevention and Punishment of the Crime of Genocide. He therefore wondered whether it was the Drafting Committee's view that the expression "racial group" embraced "tribal group". If so, that should be stated in the commentary.

32. Mr. THIAM (Special Rapporteur), replying to Mr. Bowett, said that, in his view, it was not excluded that tribes might wage a war for racial reasons or that one tribe might want to destroy another. He wondered, however, whether it was advisable to amend a provision in that way when it had already been adopted and which appeared in a convention. In his view, the expression "ethnic group" did embrace the concept of "tribal group" and that could be made clear in the commentary.

33. Mr. BOWETT said that, if he had understood the Special Rapporteur's reply, the commentary would include a statement that the draft article also covered the destruction of a tribal group.

34. Mr. YANKOV said that he was particularly pleased to support the proposal for the amendment of the title of the draft article, since the words "crime of genocide" appeared in the title of the Convention on the Prevention and Punishment of the Crime of Genocide and the wording of the article would thus be more complete and consistent.

⁵ See 2437th meeting, footnote 4.

⁶ Yearbook . . . 1991, vol. II (Part Two), p. 102.

35. Mr. FOMBA said that the terminology of international law was in general fairly vague as a direct consequence of the heterogeneous nature of international society.

36. With regard to the second proposal by Mr. Idris, he thought that it would be difficult to ascertain, for example, the degree of autonomy of a cultural group vis-à-vis the various categories of groups referred to. He himself had no solution to that problem, nor did he have any clearly defined position in that regard. He also noted that in the context of a possible revision of the Convention on the Prevention and Punishment of the Crime of Genocide, the problem arose of the definition of cultural genocide and political genocide. In the case of Rwanda, for example, the massacres of so-called “moderate” Hutus had been described by some as “genocide”. However, given that they had been killed not because they were Hutus, but because they were political opponents, it was difficult to speak of “genocide”. It was in that context that the problem of defining “political genocide” might arise. Those were questions of substance that called for a thorough debate.

37. He supported the proposed amendment to the title of the draft article. Mr. Bowett’s question about the interpretation of the term “racial group” was also a substantive one: what exactly differentiated the expression “tribal group” from the other expressions used in the draft article, such as “ethnic group” or “racial group”?

38. For all those reasons, he was inclined to retain the draft article in the form proposed by the Drafting Committee.

39. Mr. GÜNEY said he understood and shared the concerns of those members of the Commission who felt that it was dangerous to reconsider concepts on which agreement had already been reached. He noted, however, that the Commission was empowered by its statute to promote not only the codification of international law, but also its progressive development. He thought that, in order to address the concern expressed by Mr. Idris, it would be sufficient to use the words “crime of genocide” both in the title and in the body of the draft article.

40. Mr. PAMBOU-TCHIVOUNDA said that he supported the proposal that the title of the draft article should be amended to read: “Crime of genocide”. Furthermore, he could not but note that the Commission was a prisoner of its own methods of work: to say that it must not go back on the terminology used in a given instrument actually had the unfortunate effect of limiting its work of codification and, in practice, of compelling the codifiers to accept even things that might seem bizarre. It was a fact that the expressions used in the draft article under review were charged with subjective connotations. For example, what was to be understood by the expression “intent to destroy”? Must that intent be declared? How was it to be substantiated? Similarly, how was one to measure the seriousness of the harm and with reference to what yardstick? All those questions must be dealt with explicitly in the commentary if there was no other way of dealing with them.

41. Referring to the expression “any of the following acts”, he wondered about the level of apprehension and

characterization of the various acts listed in the draft article, since it meant that any one act triggered the same type of treatment as any other of those acts. Those acts were interdependent. But what if they were committed in a concerted fashion? Were the consequences the same in the case of the killing of members of a national, ethnic, racial or religious group, as such, and in the case of imposition of measures intended to prevent births within the group, regardless of whether the measures imposed were administrative measures, surgical interventions, the removal of organs, or other measures? All those problems would arise when the future instrument came to be applied.

42. The CHAIRMAN said that, during the consideration of draft article 2 *bis* it had been stressed that the seriousness of the punishment was linked to the character and nature of the crime considered. The solution to the problem of consequences referred to by Mr. Pambou-Tchivounda was thus to be found in that article.

43. Mr. EIRIKSSON said that he remained faithful to the results of the work of the Drafting Committee, of which he had been a member. With regard to the title of the draft article, the Drafting Committee had certainly had good reasons—albeit too subtle, perhaps—for keeping the title it proposed. It should be indicated in the commentary that there were crimes or acts enumerated in the Convention on the Prevention and Punishment of the Crime of Genocide that were not included in the draft article, but that were covered by the Code.

44. Mr. Sreenivasa RAO said he saw no disadvantages to the idea of amending the title of the draft article as proposed. He was satisfied with the explanations given regarding the Drafting Committee’s intentions and the incorporation in the commentary of an explanation of the cultural aspects of the acts covered.

45. As for the proposal by Mr. Idris that, in the *chapeau*, the word “means” should be replaced by the word “includes”, that would have the unfortunate effect of opening up the way for various interpretations, whereas what was needed was precision.

46. On a different matter, it was indisputable that the draft article should cover tribal groups. As to the terminology to be used for that purpose, it was necessary to adopt a flexible attitude and to avoid any terminology that might give rise to different interpretations, particularly as the question was the subject of intense debate in other bodies and no consensus had been reached. It would therefore be best to retain the text proposed by the Drafting Committee in its present form and it would suffice to indicate in the commentary that the article also covered acts of genocide committed against groups other than those specifically mentioned therein, such as tribal groups.

47. Mr. THIAM (Special Rapporteur), replying to a comment by Mr. Pambou-Tchivounda, said that it was for the courts to decide on intent and gravity. He did not see what could be added to article 16 to make it more explicit.

48. Mr. PAMBOU-TCHIVOUNDA, referring to the *chapeau* of the draft article, said that, in the present case,

it was the Commission that was defining acts of genocide. He proposed that the expression "with intent to" should be replaced by the expression "with the declared aim of". Intent must be deduced from declarations. In the absence of a declaration, how was responsibility for a crime of genocide to be imputed?

49. The CHAIRMAN said that the expression "with intent to" had given rise to no problems either during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide or when States had submitted their observations. He reiterated that the Commission could not revise the Convention on that point.

50. He said that if he heard no objections, he would take it that the Commission wished to replace the title of the draft article by the title "Crime of genocide".

It was so agreed.

51. The CHAIRMAN suggested that logically that amendment required a consequential amendment of the *chapeau*, to read: "The crime of genocide means". If he heard no objection, he would take it that the Commission wished to adopt article 16 proposed by the Drafting Committee with that amendment.

Article 16, as amended, was adopted.

ARTICLE 17 (Crimes against humanity)

52. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), introducing article 17, said that the corresponding article as adopted on first reading (art. 21) had been entitled "Systematic or mass violations of human rights". The Drafting Committee, heeding the advice given by the Special Rapporteur in his thirteenth report,⁷ had chosen to entitle the new article "Crimes against humanity", an established term used in several legal instruments adopted since the Second World War. The article differed in its structure from the one adopted on first reading because the issues of individual criminal responsibility and punishment were now dealt with in article 2.

53. The article as redrafted listed nine acts which, under the conditions spelled out in the *chapeau*, constituted crimes against humanity. The two requirements previously included, namely, that such acts must be committed "in a systematic manner or on a mass scale", had been retained, except that the adjective "mass" had been replaced by the adjective "large", which covered a greater number of situations. The Drafting Committee had added a third criterion, namely, that the action must be "instigated or directed by a Government or by any organization or group". It was thus expressly recognized that private individuals could be considered responsible for crimes against humanity only when their acts inserted themselves in the context of those three criteria. Acts committed by terrorists in such circumstances would thus qualify as crimes against humanity.

54. The five crimes listed in the article adopted on first reading had been retained. With regard to the French equivalent of the word "murder", which was also to be found in the article on war crimes, the Drafting Committee had considered it preferable to use the word *meurtre* in those cases rather than the word *assassinat* used in the French version of the texts on which the article was based. It would be explained in the commentary that the term *meurtre* was to be understood as meaning *homicide intentionnel*. The simpler term "enslavement", found in many legal instruments, had been used to refer to the crime of "establishing or maintaining over persons a status of slavery, servitude or forced labour", which had been included in the article adopted on first reading. As for the crime of persecution, the new text followed the texts of article 5, subparagraph (h), of the statute of the International Tribunal for the Former Yugoslavia⁸ and article 3, subparagraph (h), of the statute of the International Tribunal for Rwanda.⁹ In addition to persecution on political, racial or religious grounds, the texts now encompassed persecution on ethnic grounds, but they no longer included persecution on social or cultural grounds. It should also be noted that the crime of deportation or forcible transfer of population in subparagraph (g) was now qualified by the term "arbitrary" so as to exclude situations where such acts were committed for legitimate reasons, such as public safety and health, or for other reasons compatible with international law and human rights. That point would be explained in the commentary.

55. Four additional crimes had been included in article 17. First, the crime of extermination, which was to be found in a number of legal instruments such as the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, covered acts committed against a group of individuals, whereas murder, even when committed on a large scale or on a systematic basis, was nonetheless directed against a single individual. The criminal intent (*mens rea*) required for the two offences was therefore different. In addition, the act committed in order to carry out the offence of extermination involved an element of mass destruction which was not required for murder. In that regard, extermination was closely related to the crime of genocide in that both crimes were directed against a group of victims. However, the crime of extermination would apply to situations which would not be covered by the crime of genocide and in which criminal intent played an essential role. For example, extermination included killing members of a group which was not protected by the Convention on the Prevention and Punishment of the Crime of Genocide or of a group of individuals who did not share any common characteristics. It further applied to situations in which some members of a group were killed while others were spared.

56. A lengthy discussion had taken place in the Drafting Committee with regard to the crime listed in subparagraph (f). He stressed that the Committee was presenting the text of that subparagraph with very strong reservations on the part of some of its members. Some

⁷ See 2441st meeting, footnote 9.

⁸ See 2437th meeting, footnote 6.

⁹ *Ibid.*, footnote 7.

members had proposed the inclusion of the crime of “institutionalized racial discrimination” with the intention of covering the crime of apartheid under a more general designation. Others had expressed doubts and had felt that, if institutionalized discrimination were nevertheless to be included, it should not be limited to discrimination on racial grounds. In particular, some members had taken the view that the subparagraph should also include gender among the grounds for institutionalized discrimination because they considered that serious bodily harm and injury to very substantial numbers of women amounted to institutionalized discrimination on the ground of gender. Other members of the Committee had not been certain that such practices, abhorrent as they might be, were crimes against the peace and security of mankind. It had been agreed that gender should not be specifically mentioned in the text of the subparagraph, but that it should be stated in the commentary that such practices against women, when conducted in a systematic manner or on a large scale, would amount to a crime against humanity in accordance with subparagraph (f).

57. With regard to forced disappearance of persons dealt with in subparagraph (h), the Drafting Committee had found it appropriate to mention that crime expressly in the article in view of the fact of the rather wide commission of the crime and taking into account the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in resolution 47/133 and the Inter-American Convention on Forced Disappearances of Persons. The term “forced disappearance of persons” would be explained in the commentary. The explanation would be useful because the term might look rather unusual when translated into some languages, such as French.

58. Lastly, with regard to subparagraph (i), the Drafting Committee had decided, in accordance with the suggestion put forward by the Special Rapporteur in his thirteenth report, that “other inhumane acts” should be included in the definition of crimes against humanity. It had, however, decided to qualify the expression by the phrase “which severely damage physical or mental integrity, health or human dignity” and to give three examples of “other inhumane acts”, namely, mutilation, severe bodily harm and sexual abuse, which, as would be noted in the commentary, were similar in nature to the acts mentioned in subparagraphs (a) to (h).

59. The Drafting Committee recommended that the Commission should adopt article 17.

60. Mr. ROBINSON said that he understood the reasons for the Drafting Committee’s decision to add a third criterion for the definition of crimes against humanity to those already appearing in the text adopted on first reading. But what of acts such as rape that were not “instigated or directed”, but only acquiesced, by a Government, an organization or a group? In his view, such acts when committed for political ends could be qualified as crimes against humanity even if they did not meet the proposed criterion. He therefore wondered whether it might not be better to delete the new criterion from the text of the article and incorporate the idea in the commentary, developing it further and, in particular, explain-

ing that the acts in question could be committed not only at the instigation or under the direction of a Government, an organization or a group, but also with its acquiescence, and that those acts had to entail the criminal responsibility of the individual who committed them.

61. He further regretted that the only reference to sexual abuse was to be found in the context of “other inhumane acts” listed in subparagraph (i). It should be recalled that sexual abuses, often perpetrated against women, had been uncovered in the course of the events in the former Yugoslavia and in Rwanda and that a number of legal provisions relating to the protection of women’s rights had been drafted in the past few years. The Commission could, in his view, contribute to the construction of that edifice by making rape and other forms of sexual abuse a separate category of crimes against humanity. If it did so, the reference to sexual abuse in subparagraph (i) would, of course, have to be deleted.

62. For the same reasons, he would have no objection to gender being included among the grounds for institutionalized discrimination listed in subparagraph (f). That would be a way of promoting standards for the protection of women and he failed to see how, unless gender were expressly mentioned in the article, it would be possible to explain in the commentary that discrimination based on gender could be qualified as a crime against humanity.

63. Mr. IDRIS said that he shared Mr. Robinson’s views on the inclusion of rape and other forms of sexual abuse in the text of the article as a separate category of crimes against humanity and the inclusion of gender among the grounds for institutionalized discrimination in subparagraph (f). With regard to that subparagraph, he could not understand the absence of any reference to discrimination based on national origin, although that concept was included in the *chapeau* of article 16. He would appreciate some clarification of that point before taking a decision on the proposed article.

64. Mr. BOWETT said that he was concerned by the expression “in a systematic manner” which appeared in the *chapeau* of article 17. The concept was far too vague and could apply to acts other than crimes against humanity. What was really meant were acts committed in accordance with a preconceived policy. The phrase should therefore be replaced by the words “in pursuit of a preconceived policy”, or else it should be explained in the commentary that “in a systematic manner” was to be understood to mean that the act was committed, not in a methodical or efficient manner, but in accordance with a preconceived and deliberate policy. Acquiescence, which Mr. Robinson wanted to see mentioned in the *chapeau*, would be incompatible with that concept because it was subsequent to the act and he could therefore not endorse the proposal.

65. Lastly, he thought that to include gender among the grounds for discrimination listed in subparagraph (f) would be going too far. The fact that the compulsory retirement age was 60 years for women and 65 years for men, as was the case in his country, was clearly a form of institutionalized discrimination—in that

instance, against men—but it was hardly a crime against humanity.

66. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), referring to Mr. Bowett's comment in connection with the expression "in a systematic manner", recalled that, in paragraph (3) of the commentary to article 21 relating to systematic or mass violations of human rights adopted on first reading, it was stated:

The systematic element relates to a constant practice or to a methodical plan to carry out such violations. The mass-scale element relates to the number of people affected by such violations or the entity that has been affected.¹⁰

67. Mr. ROBINSON explained that he had not proposed that the criterion of acquiescence should be included in the *chapeau* of the article, but, rather, that the words "and instigated or directed by a Government or by any organization or group" should be deleted from it and that all three ideas should be explained in the commentary.

68. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had incorporated the criterion whose deletion Mr. Robinson was proposing in order to prevent serial murders committed by an individual, such as those which had recently occurred in the United Kingdom of Great Britain and Northern Ireland and Australia and which were acts committed on a large scale, from being considered crimes against humanity.

The meeting rose at 1.05 p.m.

¹⁰ *Yearbook . . . 1991*, vol. II (Part Two), p. 103.

2443rd MEETING

Tuesday, 18 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING³ (*continued*)

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

ARTICLE 17 (Crimes against humanity) (*continued*)

Subparagraph (f)

1. The CHAIRMAN, inviting the Commission to continue the consideration of draft article 17, recalled that at the previous meeting, subparagraph (f) had been criticized for being so broadly worded as to cover acts which could not be qualified as crimes against humanity or, indeed, as crimes at all. The feeling in the Commission had appeared to be that a more detailed identification was needed of acts of institutionalized discrimination on racial, religious or ethnic grounds which constituted a crime against humanity. As an informal suggestion, he wondered whether it might not be appropriate to revert to a modified version of the definition of apartheid to be found in article 20 (Apartheid) as adopted on first reading.⁴ Subparagraph (f) of article 17 might then read:

"(f) Institutionalized discrimination on racial, religious or ethnic grounds which consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial, religious or ethnic group over any other racial, religious or ethnic group and systematically oppressing it:

- "(i) Denial to a member or members of any of the above-mentioned groups of the right to life and liberty of person;
- "(ii) Deliberate imposition on any of the above-mentioned groups of living conditions calculated to cause its physical destruction in whole or in part;
- "(iii) Any legislative measures and other measures calculated to prevent any of the above-mentioned groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

⁴ See footnote 1 above.

- “(iv) Any measures, including legislative measures, designed to divide the population along racial, religious or ethnic lines, in particular by the creation of separate reserves and ghettos for the members of any of the above-mentioned groups, the prohibition of marriages among members of different groups or the expropriation of land and property belonging to such groups or to members thereof;
- “(v) Exploitation of the labour of the members of any of the above-mentioned groups, in particular by submitting them to forced labour;
- “(vi) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose institutionalized discrimination on racial, religious or ethnic grounds.”
2. All other subparagraphs of article 17 were, of course, still open for discussion. Emphasizing that the suggestion was purely tentative, he invited members to consider whether the text might serve as a basis for further discussion of subparagraph (f) and whether they wished to refer the matter back to the Drafting Committee or a working group.
3. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that the text suggested by the Chairman appeared to have some merits. It should be noted, however, that subparagraph (f) (vi) of the suggested text related to persecution, which formed the subject of subparagraph (e). A working group or the Drafting Committee might perhaps consider the possibility of combining (f) with (e), which, in his view, was in its present form a little too vague for inclusion in the Code of Crimes against the Peace and Security of Mankind.
4. The CHAIRMAN, replying to a query by Mr. TOMUSCHAT, said that the text he was suggesting for the Commission's consideration was an adaptation of article 20 adopted on first reading.
5. Mr. SZEKELY said that the text of article 20 adopted on first reading had itself been adapted from article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The text suggested by the Chairman was a definite improvement over article 17, subparagraph (f), as it stood, and deserved to be referred to a small working group for closer study. He did not, however, think it advisable to merge (f) and (e), a possibility the Drafting Committee had discussed at length and had ultimately rejected.
6. Mr. IDRIS, pointing out that members had not yet had time to familiarize themselves with the text suggested by the Chairman, proposed that the Commission should leave article 17 in abeyance and embark on the consideration of article 18. He was not opposed to the Chairman's text, but to discuss it immediately would be premature. The Commission could revert to the subject matter of subparagraph (f) at a later meeting, and, having duly considered the matter, it could refer the subparagraph back to the Drafting Committee or to a working group.
7. Mr. ROSENSTOCK said that he had sympathy with the plea for more time to consider the Chairman's text, which had come as something of a surprise. The suggested text was very lengthy when compared with the remarkably succinct subparagraphs (a) to (d), which obviously depended on the commentary for an explanation. The best course would be for the Drafting Committee to look into the whole matter, perhaps combining subparagraphs (e) and (f), but the Commission could complete its examination of the rest of the article.
8. Mr. THIAM (Special Rapporteur) said that the text suggested by the Chairman contained some interesting points, but the Commission should at least engage in a brief exchange of views before referring it to the Drafting Committee or a working group, which needed instructions on what direction their work on article 17, subparagraph (f), should take.
9. Mr. LUKASHUK said that he had nothing against the main idea embodied in the Chairman's suggestion but did not think the full text should be incorporated in article 17. The balance of the article would be completely destroyed. There were two possible ways around that problem. One way would be to replace (f) as proposed by the Drafting Committee by the *chapeau* of the text suggested by the Chairman and to put subparagraphs (i) to (vi) in the commentary. The other would be to place the full text in a new separate article 16 *bis*. He agreed that a preliminary discussion in plenary was needed before deciding to refer the matter to the Drafting Committee or a working group.
10. Mr. KABATSI said that he concurred with members who had argued in favour of deferring substantive consideration of the Chairman's suggestion until a later meeting. He also agreed that to include a text of such considerable length in an article in which the other subparagraphs were very succinct could well distort the article as a whole. The idea of merging (e) and (f) into a separate article on persecution and institutionalized discrimination was, at first glance, attractive.
11. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, when introducing article 17 (2442nd meeting), he had reported that a lengthy discussion had taken place in the Drafting Committee with respect to the crime listed in subparagraph (f). Some members had proposed the inclusion of the crime of “institutionalized racial discrimination”, with the intention of covering the crime of apartheid under a more general name, and others had expressed doubts and had felt that, if institutionalized discrimination were to be included, it should not be limited to discrimination on racial grounds. Views as to which grounds should be mentioned in the text had been divided, and the Committee presented the text of subparagraph (f) with very strong reservations on the part of some of its members. Accordingly, the Commission ought first to ascertain whether the prevailing feeling was that the crime of “institutionalized discrimination” should include discrimination on religious and ethnic as well as on racial grounds. If that proved to be the case, the Commission might go on to consider the text suggested by the Chairman. A majority of members might feel that only racial discrimination

should be referred to in subparagraph (f), the other aspects being covered by subparagraph (e).

12. Mr. BENNOUNA said he agreed with the point made by Mr. Lukashuk about the place to be given to the Chairman's suggestion, the full text of which would seriously affect the balance of the article as a whole. He was inclined to favour a separate provision on institutionalized discrimination. If a decision was taken on that issue, the matter could then be referred to the Drafting Committee.

13. Mr. VILLAGRÁN KRAMER said that the Commission did not want to use the term apartheid, yet it was difficult to speak of a crime which corresponded to the crime of apartheid without actually using the term. The Chairman's suggestion was certainly an interesting one, and he was in favour of referring it to the Drafting Committee or a working group, possibly with a view to including the substance as a separate article.

14. Mr. de SARAM said that the phrase "which consists of any of the following acts", in the *chapeau* of the text suggested by the Chairman, introduced a limitation that was inconsistent with the Drafting Committee's wording for article 17. The difficulty could be overcome by including subparagraphs (i) to (v) in the commentary. Subparagraph (vi) of the text suggested by the Chairman contained the words "because they oppose" which, again, imposed a substantial limitation compared with the broader formulation in the Drafting Committee's article 17, subparagraph (e). As to the possibility of merging subparagraphs (e) and (f), he was inclined to think that the two crimes in question should be kept separate, as persecution could exist in addition to institutionalized discrimination.

15. Mr. FOMBA said that, without prejudice to other solutions that might be reached in the Drafting Committee or in the Commission, he tended to the belief that the present wording of the *chapeau* of article 17 was satisfactory and self-sufficient. If the Commission decided that a more detailed definition of institutionalized discrimination was called for, he would accept that view. Like others, however, he deemed it more judicious not to expand subparagraph (f). Rather, it should be replaced by a separate, more explicitly worded, provision.

16. Mr. ROSENSTOCK said that it made excellent sense to consider whether subparagraphs (e) and (f) should be combined or left separate and also to explore in greater depth what was covered by subparagraph (f) that was not already covered by subparagraph (e). Given the events in Bosnia and the Great Lakes region of Africa, it was difficult to distinguish between racial, religious or ethnic discrimination. The world was plagued by those three types of discrimination, and probably others as well.

17. Mr. GÜNEY said that, in attempting to merge subparagraphs (e) and (f), the Chairman's suggestion was an improvement. However, notwithstanding the proposal made by Mr. Lukashuk and supported by Mr. Bennouna, he thought that a decision at the current time on how to incorporate the suggestion in the article would be premature.

18. Mr. HE said that, although he sympathized with the Chairman's suggestion, he agreed with Mr. Lukashuk that it would be impossible to include all the elements in subparagraph (f). The main ones should be singled out and the others left for inclusion in the commentary. It was unnecessary to refer the text back to the Drafting Committee, where it had already been discussed at length. As only two meetings remained to finish consideration of the draft Code of Crimes against the Peace and Security of Mankind, it would be wiser for several members to get together informally and produce a final text, which could be presented at the next meeting.

19. The CHAIRMAN said that, as the second reading of the draft Code was a matter of the highest priority, the Commission could, if necessary, allocate an additional meeting to the subject.

20. Mr. YANKOV said that the Chairman's initiative was a positive one, because subparagraph (f) was very vague as it stood. In the past two years, when the question of apartheid had been discussed, the Commission had broadly agreed on the need to find another solution, while retaining the definition used for apartheid. He concurred that racial discrimination should not be considered alone: institutionalized ethnic and religious discrimination were no less dangerous for international peace and security.

21. He was therefore in favour of condensing the wording, making it more general and leaving the details to the commentary. It would be difficult at the present time to merge persecution and institutionalized discrimination, for example, institutionalized forms of ethnic cleansing and remnants of various types of treatment akin to the traditional notion of apartheid.

22. Mr. MIKULKA said that the Chairman's suggestion deserved close study: there was general agreement that subparagraph (f) was too laconic and not as precise as the other elements in article 17. However, the text should be referred to the Drafting Committee, which should try and remove all elements that overlapped with other parts of the text, for example in the *chapeau* of article 17 and in the Chairman's suggestion on subparagraph (f) and in subparagraph (e), on persecution, and in the wording of article 16, subparagraph (c).

23. The Commission should not expatiate on racial, ethnic and religious discrimination, but should see where those elements were already covered elsewhere. Only then could it decide whether it needed to draft a separate provision or whether all elements could remain in article 17. He was against a separate provision and thought that the problem could be solved by restructuring article 17.

24. Mr. TOMUSCHAT welcomed the Chairman's thought-provoking suggestion, but agreed with Mr. Mikulka about the many overlapping elements, in particular the fact that subparagraph (f) (ii) was virtually identical with article 16, subparagraph (c). As he saw it, the text must be shortened. His preference was for setting forth in the commentary the various elements mentioned in the Chairman's suggestion.

25. He had considerable sympathy with the phrase “institutionalized discrimination” proposed by the Drafting Committee. It was not too vague. On the contrary, it was a comprehensive notion with clear contours. If the Commission sought to introduce too much detail, it ran the risk of not taking into account other cases which likewise deserved to be covered. Article 17 was concise. It would be noted that there was no definition, either, of “torture”, “enslavement”, “persecution” or “arbitrary”. Further development of subparagraph (f) would entail major changes and much additional work for the Drafting Committee. However, if so wished by a majority of members, the text could be returned to the Drafting Committee for the purpose of producing a wording that commanded a consensus.

26. Mr. EIRIKSSON commended the Chairman for his initiative, but wondered whether the original version might not be more appropriate. He agreed with Mr. Tomuschat that the present definition was not too vague. He feared, moreover, that the impact of the text suggested by the Chairman might be to limit the scope of the article unnecessarily, failing to cover some of the extreme forms of discrimination to which Mr. Rosenstock had referred.

27. Although subparagraphs (i) to (vi) in the Chairman’s suggestion would fall within the definition, the *chapeau* had the effect of producing a rather exclusive list. Moreover, the English translation of the text contained an error: in the *chapeau* the word “racial” before “segregation”, should be deleted. Even leaving the *chapeau* as it stood, the Commission would be limiting the scope of the article more than it had intended. On the other hand, he did not object to those elements being taken up in the commentary.

28. Mr. Sreenivasa RAO said that the Chairman’s suggestion reflected the basic difficulty that most members felt in dealing with article 17. The question of crimes against humanity was a broad one. Taken individually, the contents of the article appeared to be even broader than the concept itself. The Chairman had shown that the aspect of discrimination alone could easily be expanded into a further six or seven subparagraphs. Given the opportunity, the Commission could do the same for each of the other categories. There lay the real difficulty. He wondered whether the Commission should really include such wide-ranging and divergent concepts, some of them rooted in culture, history and practices unrelated to racial discrimination. If the text was expanded and made more specific, the widespread practice of religious and social discrimination around the world, even without institutionalized approval through legislation, would place many countries on trial.

29. It was necessary to introduce a high threshold that went beyond normal concepts of the promotion and implementation of human rights. The criterion had to be international repercussions of such dimensions that they could legitimately be regarded as a threat to the peace and security of mankind. If the Commission looked at discrimination, as opposed to segregation, or considered the prohibition of interracial marriages, then it was dealing with a fundamental reordering of society. Although some of the elements in the text deserved to be pro-

moted, he was not certain that the Code was the right place to do so. Were not the efforts made in various human rights forums adequate? Could the Commission simply bypass difficulties by calling them crimes and placing them in the Code? He was not sure that that was the answer to social ills. The longer and more detailed the Code was, the less acceptable it became.

30. Mr. BARBOZA said that, as there appeared to be a large majority in favour of reconsidering whether to retain the wording from article 20 adopted on first reading, the text must be sent to the Drafting Committee. The Commission itself was not the most suitable place for a careful comparison of the Chairman’s suggestion and article 17, subparagraphs (e) and (f). In the version now under discussion, institutionalized discrimination was restrictive, because it was condemned only where used for the purpose of establishing or maintaining the domination of a particular racial, religious or other group. But there were also other reasons for discrimination, such as plain hatred. The examples given should be included in the commentary. Otherwise, the balance of the text might be distorted.

31. Mr. IDRIS said that institutional discrimination occurred every day in many societies, without being based on government policy. He was therefore strongly opposed to the wording, in the beginning of the Chairman’s suggestion, which read: “Institutionalized discrimination ... based on policies”. Again, he had misgivings about subparagraph (f) (v). Subjecting persons to forced labour was not so much an exploitation of their labour as a violation of their basic human rights.

32. Mr. YAMADA said that the Chairman’s suggestion had clarified the notion of institutionalized discrimination, yet he had the impression that the *chapeau* raised the threshold. Also, an exhaustive list might have the effect of limiting the application of subparagraph (f). As Mr. Tomuschat and Mr. Mikulka had already pointed out, parts of the Chairman’s suggestion overlapped with other subparagraphs of article 17, as well as article 16. Furthermore, if the Commission agreed to the suggestion for clarifying subparagraph (f), what was one to do with terms used in other subparagraphs, such as “torture”, “enslavement” and “persecution”.

33. The Chairman’s suggestion should be referred to the Drafting Committee and the entire structure of article 17 should be reviewed.

34. Mr. ROBINSON said that the text suggested by the Chairman gave a broader picture of the acts that would constitute a crime against humanity, but he did not altogether agree with the exhaustive enumeration of those acts. In particular, the last part of the *chapeau*, referring to the domination by one racial, religious or ethnic group over any other group, was restrictive, though he appreciated that it was consistent with article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid. It would be better to have a form of wording that provided wider coverage. He therefore proposed that the *chapeau* should be reworded to read:

“(f) Institutionalized discrimination on racial, religious or ethnic grounds consisting of acts based on

policies or practices of racial segregation and discrimination.”

35. Mr. BOWETT said that he had spoken against the original wording of article 17, subparagraph (f), simply because he thought it was too broad. In his view, no institutionalized discrimination amounted to a crime against humanity. His concern could, however, be met by adding the words “involving denial of fundamental human rights” at the end of the subparagraph.

36. Mr. KUSUMA-ATMADJA said that the *chapeau* of the text suggested by the Chairman tended to weaken the provision. Subparagraph (vi) was nonetheless very useful and, if the text were redrafted, should be retained.

37. Mr. THIAM (Special Rapporteur) said the fact that a procedural debate had turned into a substantive one would facilitate the Drafting Committee’s work, since it would preclude any later need for a fresh substantive debate in plenary.

38. He did not favour the idea of a separate provision, as that would only lead to further endless discussion. The wisest course would be to retain the *chapeau*, and deal with the remaining items in the commentary. It was particularly important to shorten the provision and, he therefore proposed that the words “Institutionalized discrimination on racial, religious or ethnic grounds” should be replaced by “Institutionalized discrimination on racial grounds”. That would also take account of the concern felt in some quarters that the words “on religious grounds” could cause problems for those of the Muslim faith. With those considerations in mind, he recommended that the matter should be referred to the Drafting Committee, which should take account of the views expressed during the discussion.

39. The CHAIRMAN said it seemed that a consensus was emerging in favour of referring the provision to the Drafting Committee. The fact that the discussion had developed into a substantive debate was not a bad thing, since the Drafting Committee would have certain indications that should give it food for thought and perhaps enable it to propose a form of wording acceptable to the Commission. He therefore suggested that the provision should be referred to the Drafting Committee.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) asked whether the Drafting Committee would be precluded from considering the Special Rapporteur’s suggestion, namely, to replace the opening words of the *chapeau* by the words “Institutionalized discrimination on racial grounds”.

41. The CHAIRMAN said that, in his view, the Drafting Committee should be allowed the necessary leeway. It should start its work on the basis that the reference to racial, religious and ethnic discrimination would be retained but, if it were unable to agree on such wording, it should then fall back on the Special Rapporteur’s proposal. On that understanding, he suggested that subparagraph (f) should be referred to the Drafting Committee.

It was so agreed.

42. Mr. TOMUSCHAT said that, as explained by the Chairman of the Drafting Committee, the word “arbi-

trary” had been added to subparagraph (g), the intention being to take account of the fact that, in some limited circumstances and particularly for health reasons, it might be necessary to evacuate the population of a particular area. That could apply, for instance, in the case of the construction of a dam. The Commission certainly did not condone ethnic cleansing or massive expulsion of a population from its ancestral lands. The point should be clarified in the commentary.

43. The CHAIRMAN said it would indeed be useful to mention in the commentary cases such as serious flooding or industrial accidents, where transfer of the population would be permissible.

44. Mr. Sreenivasa RAO said that “arbitrary deportation or forcible transfer of population” denoted a massive movement of population whereas deportation usually applied to only one or two persons. It was generally used for instance, in cases of illegal entry, or where someone was an undesirable person, did not have the proper papers in his possession, or engaged in activities contrary to the law of the State. That point would presumably be properly dealt with in the commentary to avoid any confusion.

45. Mr. ROSENSTOCK said that, while he agreed in large measure with Mr. Sreenivasa Rao, the words “of population” in subparagraph (g) qualified the preceding words, which should take care of the matter. Also he agreed with the examples cited by Mr. Tomuschat, but regarded them as illustrative rather than exhaustive.

46. Mr. ROBINSON proposed that, for the reasons he had already given, a separate subparagraph reading “rape and other forms of sexual abuse” should be added to article 17 and that, as a consequential amendment, the words “and sexual abuse” should be deleted from subparagraph (i). A separate provision was fully justified, given the importance of the whole question of protecting women’s rights. The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda provided a precedent in that connection.

47. Mr. KABATSI said he supported the proposal but noted that, when Mr. Robinson had last raised the issue, he had also referred to the question of gender. He (Mr. Kabatsi) wished to make it clear that, should the matter of gender be discussed in the Drafting Committee, he would experience difficulty in including any provision on the matter in article 17. A reference to gender could cause problems for those who held certain religious beliefs or had certain social arrangements based on gender. Such beliefs and arrangements gave rise to certain duties and rights which, though perfectly acceptable to those concerned, were not acceptable to the rest of the world. The Drafting Committee should bear that in mind when considering the question of gender.

48. Mr. SZEKELY said that he strongly supported Mr. Robinson’s proposal and would have liked him to have raised the gender issue as well. The wording proposed by Mr. Robinson was, however, very clear and there should be no need to refer it to the Drafting Committee. The Commission could insert it in the article without further ado.

49. Mr. GÜNEY also supporting Mr. Robinson's proposal, said that the international community's recent bitter experience in the matter fully justified the inclusion of such a subparagraph.
50. Mr. TOMUSCHAT said he too agreed with the proposal. In his view, however, article 17 should refer not only to rape but also, in express terms, to enforced prostitution even though it was in fact already mentioned in article 18, subparagraph (f) (v). He therefore proposed a new subparagraph for article 17 preceding subparagraph (i), reading "rape, enforced prostitution and other forms of sexual abuse". The existing subparagraph (i) would become subparagraph (j).
51. Mr. Sreenivasa RAO said he was not opposed to the proposals. However, some of the acts enumerated would be covered by "torture" in article 17, subparagraph (c). Again, were others, such as enforced prostitution, sufficiently widespread or frequent enough to warrant inclusion in the article under discussion?
52. Mr. YANKOV said he supported the proposal made by Mr. Robinson as amended by Mr. Tomuschat. However, the words "such as mutilation, severe bodily harm" would add nothing to the preceding general formulation once the reference to "sexual abuse" was placed in a separate subparagraph. Those words should thus be consigned to the commentary, and subparagraph (j) should end with the words "human dignity".
53. Mr. BENNOUNA said that proposed new subparagraph (i) was justified by the problems that had lately arisen in the international arena. However, a problem still remained with regard to subparagraph (j). He personally was opposed to broad catch-all categories such as "other inhumane acts which severely damage physical or mental integrity, health or human dignity", particularly where the object of the exercise was to define a crime against the peace and security of mankind. In any case, that category overlapped with torture to a considerable extent. It seemed to him that to severely damage physical or mental integrity was to torture someone. The formulation should be added to the category "torture", or else be consigned to the commentary to subparagraph (c).
54. Mr. IDRIS said Mr. Yankov was right: if the Commission insisted on maintaining subparagraph (j), there would be no need to enumerate the "other inhumane acts". After listening to Mr. Bennouna's comments he would even go further. The reference to "other inhumane acts" could be deleted, and any listing could be dealt with in the commentary. On the new subparagraph (i), he fully supported the proposal by Mr. Robinson.
55. Mr. SZEKELY, referring to Mr. Sreenivasa Rao's assertion that Mr. Robinson's proposal referred to crimes that would be covered by the category of "torture", said that that assertion would be true only if an entirely new definition of torture were adopted. Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained a very precise definition of torture which was in no way compatible with the types of act included in the new subparagraph (i).
56. Mr. de SARAM noted that the Commission was now drafting in plenary, which was perhaps unavoidable. He agreed with those members who had difficulty in accepting a truncated version of subparagraph (j). If the examples following the word "dignity" were to be eliminated, the question would arise whether the Code would, for instance, encompass forms of punishment such as solitary confinement for long periods of time, which if practised systematically, were covered by the *chapeau* to the article. Such practices were abhorrent, but he was not sure that the Commission should seek to remedy them in article 17.
57. Mr. THIAM (Special Rapporteur) cautioned against deletion of the words "other inhumane acts". To begin with, the most recent statutes, those establishing the International Tribunal for the Former Yugoslavia⁵ and the International Tribunal for Rwanda,⁶ had set a precedent by using the expression, thereby allowing those bodies some latitude in determining what constituted an inhumane act. Secondly, if the expression were deleted, the Commission would then be faced with the impossible task of ascertaining that no inhumane act had been omitted from the enumeration in the remainder of the article.
58. The CHAIRMAN said Mr. Robinson's proposal was clearly warranted, given the prominence that the phenomenon had recently assumed in international life. But to eliminate the examples of inhumane acts would weaken subparagraph (j) and might also broaden its scope unduly. Such acts might indeed constitute crimes, but not necessarily crimes against the peace and security of mankind within the meaning of the Code. As a compromise, would Mr. Robinson be prepared to accept a reference to "rape, enforced prostitution and other forms of sexual abuse" in the original subparagraph (i)? The importance the Commission attached to that phenomenon could then be highlighted in the commentary.
59. Mr. ROBINSON said he commended the Chairman for his proactive chairmanship. However, he had as yet heard no objection to the proposal to make the issue of rape, enforced prostitution and other forms of sexual abuse the subject of a separate subparagraph, an approach he preferred before deciding, when the Commission subsequently came to consider proposed new subparagraph (j), whether the latter required some amendment. In that regard, he favoured retention of subparagraph (j), since he did not believe that the enumeration in subparagraphs (a) to (h) covered all inhumane acts.
60. As to the point raised by Mr. de Saram, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained a saving clause in article 1 stating that the term "torture" did not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. The commentary should make that point absolutely clear.
61. The CHAIRMAN said that in effect the Commission was already considering subparagraph (j), since

⁵ See 2437th meeting, footnote 6.

⁶ *Ibid.*, footnote 7.

there had been no objection to Mr. Robinson's proposal. However, adoption of that proposal as a separate subparagraph had a knock-on-effect, since it created problems with regard to the wording of subparagraph (j).

62. Mr. KABATSI said that Mr. Robinson's proposal should stand alone as a separate subparagraph (i). In his view, proposed new subparagraph (j), would not be weakened in consequence, since the *chapeau* to article 17 made it clear that the reference was to other inhumane acts "committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group". Whether the provisions in subparagraph (j) would all be covered by the category of "torture" was debatable. There might be other inhuman acts that severely damaged physical or mental integrity, health or human dignity—especially if perpetrated in a systematic manner or on a large scale. He agreed with Mr. Yankov that the words "such as mutilation, severe bodily harm" were superfluous and should be deleted.

63. Mr. BENNOUNA said that, whatever solution was adopted, the form in which the article was cast posed a problem. To provide an explicit enumeration of the acts that constituted crimes against humanity and to end that enumeration with the catch-all category of "other inhumane acts" was self-defeating. A restrictive definition of "other inhumane acts" was called for, and to leave the issue wide open was to fail seriously to address the task of codification.

64. Mr. Sreenivasa RAO thanked Mr. Szekely for drawing his attention to the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It certainly did not cover the acts referred to in proposed new subparagraph (i), since it focused on acts of a public official, presumably perpetrated for purposes of State. The definition contained in the *chapeau* to article 17 referred not only to acts "committed in a systematic manner or on a large scale and instigated or directed by a Government", but also to acts of "any organization or group"—the intention having been to include acts of autonomous power cliques functioning within the system in spite of the best efforts of the Government, in situations where law and order had broken down. However, the question then arose: what forms of implementation and prosecution could there be with respect to those groups? Would some world government or peace-enforcement operation bring the culprits to book? Such an idealistic scenario seemed far removed from practical considerations, and only served to highlight his concern that, in seeking to define crimes against humanity, the Commission might be seeking to address social ills that could not in fact be solved by means of criminalization procedures.

65. Mr. SZEKELY said he felt it would be a great pity simply to incorporate Mr. Robinson's proposal in the existing subparagraph (i). An important feature of the proposal was to confer special importance on that category of crimes by making it the subject of a separate subparagraph. Mr. Robinson's proposal should thus form the subject of a new subparagraph (i). As for subpara-

graph (j), it should be kept in its entirety—minus, of course, the reference to sexual abuse.

66. The CHAIRMAN suggested that the Commission should continue its consideration of proposed new subparagraphs (i) and (j) at the next meeting.

It was so agreed.

The meeting rose at 1 p.m.

2444th MEETING

Wednesday, 19 June 1996, at 10.15 a.m.

Chairman: Mr. Ahmed MAHIOU

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (*continued*)

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

ARTICLE 17 (Crimes against humanity) (*continued*)

Subparagraphs (i) and (j)

1. The CHAIRMAN recalled that, at the initiative of Mr. Robinson (2443rd meeting), it had been proposed that a separate subparagraph on rape and sexual abuse

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

should be added to the crimes against humanity listed in article 17. Accordingly, the Commission had before it a draft text in which the original text of subparagraph (i) had been broken up into two separate subparagraphs reading:

“(i) Rape, enforced prostitution and other forms of sexual abuse;

“(j) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.”

He emphasized, however, that the proposed new wording might give rise to drafting problems and wondered whether it would not be better to maintain a single subparagraph adding rape to the list of other inhumane acts. The main thing was surely that the Code of Crimes against the Peace and Security of Mankind should specifically refer to that crime so that judges might be able to punish it. Notwithstanding the special treatment given to rape and sexual abuse in certain legal reference texts, what mattered most was the practical usefulness of the Code.

2. It was his understanding that Mr. Robinson, Mr. Szekely and the other members who had supported the proposal under consideration would be prepared to accept such a solution in a spirit of compromise.

3. Mr. SZEKELY confirmed that he would not oppose the adoption of the solution proposed by the Chairman if that was the wish of the majority. Before they took a decision, however, the members of the Commission should bear in mind that the proposal before them had been submitted in the light of the importance of following the international practice of States, which was moving more and more in that direction. In the statute of the International Tribunal for Rwanda,⁴ for example, the crime of rape was mentioned separately in article 3 (g). Rape was also one of the crimes against humanity listed separately in article 5 of the statute of the International Tribunal for the Former Yugoslavia.⁵

4. The General Assembly itself, which was the Commission's parent body, at its fiftieth session, had adopted resolution 50/192 reaffirming that, under certain circumstances, rape was a crime against humanity.

5. The international community might therefore find it surprising if the Commission proposed a draft Code of Crimes against the Peace and Security of Mankind in which rape and sexual abuse did not form the subject of a separate provision.

6. Mr. ROSENSTOCK said that, while he entirely sympathized with the arguments put forward by Mr. Szekely, he saw no need to complicate matters by adding a new subparagraph to article 17 that was likely to cause drafting problems. There was no reason why the crime of rape should not be mentioned among the inhumane acts listed in the original text of subparagraph (i), whose text he found satisfactory except for the fact that he could not see the difference between an act which

severely damaged physical or mental integrity and one which severely damaged health. Be that as it might, he would go along with the majority view.

7. Mr. PAMBOU-TCHIVOUNDA said that he fully shared Mr. Rosenstock's view that there was no need to complicate matters by adding a new subparagraph. He therefore supported the solution suggested by the Chairman, but proposed a more sober wording for subparagraph (i), in which the reference to “physical or mental integrity” would be deleted. The subparagraph would then begin with the words “Other inhumane acts which severely damage physical or mental health or human dignity” and continue with the enumeration as it stood, with the addition of rape and enforced prostitution, which were, moreover, essentially infringements of human dignity.

8. Mr. KABATSI said that he agreed with the arguments put forward by Mr. Szekely. If there were separate subparagraphs for murder or extermination, should not the very serious crimes of rape or sexual abuse also be placed in a separate category? The typographical separation would draw attention to the horror of such acts, which were perpetrated on a large scale against defenceless women. However, he would not stand in the way of a decision to revert to the solution of a single subparagraph. He did nevertheless have some reservations about the use of the term “human dignity”, which was a little too vague.

9. Mr. ROBINSON said that he, too, would go along with the general view. However, he failed to see why the proposed new wording would give rise to particular drafting problems. There were in fact a number of legal and political reasons in favour of the adoption of the new presentation. By highlighting the crimes of rape and other forms of sexual abuse in a separate paragraph, the Commission would be discharging one of the duties that should be particularly close to its heart, that of promoting the development of rules relating to the protection of women.

10. If the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda had deemed it useful—admittedly, in situations of armed conflict—to regard rape as a separate category of crimes, why could not the Commission do the same? Everyone was aware that rape committed for political ends did not take place only in situations of armed conflict.

11. Setting aside a separate subparagraph for the problem of rape was a way of drawing the attention of the international community to the problem. He also wondered whether a consensus was really forming within the Commission in favour of the solution suggested by the Chairman, namely, the maintenance of a single subparagraph.

12. The CHAIRMAN said that there finally seemed to be agreement on the advisability of having a separate subparagraph on rape and sexual abuse. He said that if he heard no objections, he would take it that the members of the Commission wished to adopt the proposed new subparagraph (i).

New subparagraph (i) was adopted.

⁴ See 2437th meeting, footnote 7.

⁵ *Ibid.*, footnote 6.

13. Mr. MIKULKA said that it should be clearly understood that the decision just taken would have no effect on the wording of draft article 18, where the same problem arose. That article was based on Additional Protocols I and II to the Geneva Conventions of 12 August 1949, whose wording could not be amended lightly. He would appreciate an assurance on that point from the other members.
14. The CHAIRMAN said that the problem of article 18 would be considered in due course.
15. Mr. THIAM (Special Rapporteur) noted that the reason for the Commission's decision to have two separate subparagraphs would have to be explained in the commentary.
16. Mr. VILLAGRÁN KRAMER said that, if the statute of the International Tribunal for the Former Yugoslavia qualified rape as a crime against humanity and not as a war crime, it was important that the point should also be made clear in the draft Code.
17. The CHAIRMAN referred Mr. Villagrán Kramer to the heading of article 17 (Crimes against humanity).
18. Mr. TOMUSCHAT questioned whether there was really any difference between physical integrity and health. Would it not be possible to drop the reference to one of the two from subparagraph (j)?
19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that the Drafting Committee had worked on the basis of the texts of instruments in force.
20. Mr. LUKASHUK said that he supported the text of subparagraph (j), but suggested that the reference to human rights, proposed by Mr. Bowett (2443rd meeting), might be added to it.
21. Mr. FOMBA said that he had no objection to subparagraph (j) as proposed. The terms "physical integrity" and "health" did seem to him to duplicate one another, but if the wording was taken from the text of the Additional Protocols to the Geneva Conventions of 12 August 1949, he was not opposed to maintaining it.
22. While not fundamentally against Mr. Bowett's suggestion for the inclusion of a reference to human rights in the subparagraph, he wondered whether it was justified; the human rights dimension seemed to be implicitly contained in the word "inhumane".
23. Mr. GÜNEY said that, in the light of the explanation given by the Chairman of the Drafting Committee, he was prepared to accept subparagraph (j) in its current form.
24. Mr. YAMADA said that he wished to formulate the same reservations as Mr. Mikulka. While having no fundamental objection to making rape and other sexual abuse the subject of a separate subparagraph, he would point out that the solution was not without consequences for the remainder of the text. In drafting the original text of subparagraph (i), the Drafting Committee had based itself on the principle that there was a link between acts damaging to human dignity and rape or other sexual abuse. That link was to be found in subparagraphs (d) and (f) of article 18, where rape was listed among "outrages upon personal dignity". That wording was directly inspired by the Additional Protocols to the Geneva Conventions of 12 August 1949.
25. Now that the reference to sexual abuse had been deleted from subparagraph (j), it would be logical also to delete the reference to "human dignity". However, he warned the members of the Commission against the temptation of doing drafting work in plenary, as that was always liable to have repercussions on other articles.
26. Mr. PAMBOU-TCHIVOUNDA said that it would have been better to replace the words "other forms" in subparagraph (i) by the words "all forms". Referring to subparagraph (j), he said, first, that the adjective "severe" before the words "bodily harm" could be dispensed with because the acts in question were already qualified as acts "which severely damage physical or mental integrity". Secondly, he proposed that the concepts of mental integrity and health should be dropped, so that the text would read: "which severely damage integrity or human dignity, such as".
27. The CHAIRMAN recalled that the text was taken from the Additional Protocols to the Geneva Conventions of 12 August 1949 and only a major reason could justify changing it.
28. Mr. PAMBOU-TCHIVOUNDA said that the Additional Protocols to the Geneva Conventions of 12 August 1949 related to the law of war and that the context was therefore different.
29. Mr. THIAM (Special Rapporteur) said that, in practice, as demonstrated by case law, a war crime could also be a crime against humanity. The Commission should avoid drawing distinctions that were too subtle.
30. Mr. ROSENSTOCK pointed out that the wording of subparagraph (j) was not to be found in either of the Protocols and was, in particular, substantially different from that of paragraphs 1 and 4 of article 11 of Protocol I. He therefore proposed that the Commission should adopt wording closer to those provisions of Protocol I or of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, if the other members of the Commission thought that the expression "physical or mental integrity" had some meaning, he would not insist on having subparagraph (j) amended.
31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he saw no great difference between the wording of subparagraph (j)—which seemed sufficiently clear—and the words "the physical or mental health and integrity of persons" which appeared in article 11 of Protocol I. In his view, revising the text would be justified only if there were a real problem.
32. Mr. ROBINSON said that he had three comments to make. First, he would be in favour of dropping the words "such as mutilation and severe bodily harm". Secondly, he was not in favour of adding a reference to fundamental human rights. Lastly, he would prefer it if

in subparagraph (j) the Commission reproduced literally the wording of article 11 of Protocol I as quoted by the Chairman of the Drafting Committee and, possibly, omitted the reference to “human dignity”.

33. With regard to the first of his comments, he explained that the deletion of the reference *ejusdem generis* to mutilation and severe bodily harm was justified because such acts were exclusively physical in nature, whereas the text also covered acts of a different nature in that it referred to damage to mental integrity and health. In order to get round that illogicality, the Commission therefore had either to delete the last part of the sentence or add to it some examples of acts not exclusively physical in nature.

34. Mr. HE wished to place on record that he supported the insertion of a subparagraph relating specifically to rape, in conformity with the statutes of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda, as well as with the development of the law on the protection of women. With regard to subparagraph (j), he thought that the wording was clear and that there was no need to add an express reference to the violation of fundamental human rights, the idea being already contained in the text.

35. Mr. KABATSI said that, while he was prepared to accept the wording of subparagraph (j) as a whole, he did not consider it necessary to single out certain acts such as mutilation or severe bodily harm. He also noted that, although the practice of reproducing the wording of existing conventions was undoubtedly a very valid one, it was not necessarily appropriate in all cases. In the case in point, a distinction could be drawn between human rights conventions, whose wording could stand a certain degree of generality, and a code of crimes, which required greater precision. The term “integrity” and even the term “dignity” were thus too vague. On the other hand, an expression such as “physical and mental health”, which was more precise, would be more readily grasped by both prosecutors and judges.

36. Mr. TOMUSCHAT said that he was against the idea of deleting the words “such as mutilation and severe bodily harm” because such a deletion would make the text too vague. Generally speaking, he agreed with the Chairman of the Drafting Committee that it was inadvisable to amend a text which was based on international instruments in force, themselves backed up by rules of customary law, and which was the result of lengthy efforts in the Drafting Committee.

37. Mr. YANKOV said that he was prepared to withdraw the proposal he had made at the preceding meeting for the deletion of the last part of the sentence and to accept the view of the majority.

38. Mr. SZEKELY noted that the terms used in subparagraph (j) had an antecedent and that, for that reason, it was difficult to change them without a precise explanation. With regard to the expression “physical and mental integrity”, he shared Mr. Rosenstock’s view and thought that the term “health” would be more appropriate. However, bearing in mind the wording used in existing international instruments, the Commission might confine itself to reversing the order of the words, so that

health would come first and integrity second. As to the reference to “human dignity”, its deletion would not seem to be justified.

39. Mr. Sreenivasa RAO said that some of the acts which the Commission wished to mention in the draft Code undoubtedly had their place in the context of the promotion of human rights and the improvement of the well-being of mankind, but did not, perhaps, lend themselves to indictment or criminal prosecution. In his view, it was essential that all crimes covered by the text should meet the criteria of generality and gravity required by the Code and that, furthermore, they should be such as to give rise to the widest condemnation on the part of the international community. The Commission should therefore not refer to acts or activities whose character was localized, peripheral or even transitory.

40. Mr. YAMADA said he agreed with Mr. Tomuschat that the enumeration of a certain number of examples at the end of the text underscored the gravity of the crimes referred to in subparagraph (j) and should be maintained. The illogicality pointed out by Mr. Robinson had not existed in the original text prepared by the Drafting Committee and was the result of the proposal, made in plenary, for a separate subparagraph relating to rape.

41. Mr. de SARAM took the view that the purpose of article 17 was to cover crimes so massive as to come under the *chapeau* of the article, namely, crimes against humanity committed in a systematic manner or on a large scale.

42. Mr. MIKULKA said he regretted that, in amending the text proposed by the Drafting Committee, the Commission had, as pointed out by Mr. Robinson and Mr. Yamada, helped to make it unbalanced.

43. Mr. THIAM (Special Rapporteur) said that no text could be entirely satisfactory, especially in the area of law under consideration. At the preceding meeting, one of the members had criticized the expression “other inhumane acts” on the grounds that, in criminal law, an enumeration was necessary. Reference to the corresponding provisions of the statutes of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda had shown that they spoke only of “other inhumane acts”. The Drafting Committee had therefore made an effort in relation to those existing instruments by trying to give the concept of “other inhumane acts” content by means of an illustrative and non-exhaustive enumeration. That did not mean that the expression itself was insufficient; the Drafting Committee had merely tried to explain it further. He would have no particular objection if the Commission deleted the enumeration, but to do so without a valid reason would amount to condemning the Drafting Committee’s efforts. He therefore proposed that the Commission should quite simply retain the proposed text.

44. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt subparagraph (j).

Subparagraph (j) was adopted.

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

The meeting rose at 11.20 a.m.

2445th MEETING

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

Chairman: Mr. Ahmed MAHIOU

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

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

ARTICLE 17 (Crimes against humanity) (concluded)

Subparagraph (f) (concluded)*

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

* Resumed from the 2443rd meeting.

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

² Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

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

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

12. Mr. SZEKELY said that, having first considered whether some of the elements enumerated in the subparagraphs of paragraph 3, which were applicable to articles 16, 17 and 18, would also be applicable to article 15, the group had ultimately concluded that all of

those subparagraphs were applicable. In other words, an individual would be responsible for the crime of aggression in any of the circumstances set out in paragraph 3, subparagraphs (a) to (g).

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

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

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

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

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

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

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

*** Resumed from the 2438th meeting.

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

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

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

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

22. As to Mr. Bowett's remarks, the concept of attempted aggression was a debatable one. The matter had been discussed at length in the past and the Commission had decided that, since it was unable to agree as to when an attempt existed, it should be left to the court to decide in each case whether an attempt was possible. With regard to the comment about providing the means to carry out aggression, his fourth report⁴ set out an abundance of case law from the military tribunals established at the end of the Second World War, which had found, for example, that an industrialist who had supplied a State with the means to commit aggression was at least an accomplice—and thus a participant—in aggression. Unless Mr. Bowett could offer more convincing arguments, there was no reason to discuss the matter further. The texts could not spell out everything, and it must be left to those applying them to decide whether or not they were applicable. He himself would be tempted to leave the text as it stood.

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

24. Mr. CALERO RODRIGUES, speaking as a member of the Commission, said that, like many other members, he did not favour the proposed change. The exist-

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

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

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

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

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

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

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

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

31. Mr. de SARAM said aggression was different from ordinary crimes, such as murder, and that was the reason why the Drafting Committee had correctly decided not to attempt to define the term of aggression as employed in the Charter of the United Nations. He said that similar attempts by other United Nations bodies had been fruitless. It had therefore been decided that no such attempt should be undertaken in the present context, but that article 15 and article 2, paragraph 2, should define the relationship that had to exist between an individual and an act of aggression in order for that individual to be held responsible for such an act. Obviously, that relationship

could not be as wide as would be the case with other crimes, such as murder in national law. It was the Commission's customary practice to proceed by consensus, and emphasizing the importance of that practice in a body called upon to legislate for States, he said that, in his view, the Commission should decide to maintain the provisions contained in article 2, paragraph 2, and article 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

system would have very clear criteria for determining the scope of the concept.

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

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

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

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

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

⁷ General Assembly resolution 3314 (XXIX), annex.

⁸ See 2441st meeting, footnote 7.

⁹ See 2439th meeting, footnote 5.

⁶ See 2437th meeting, footnote 3.

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

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

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

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

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

59. As to the other points raised in Mr. Szekely's proposal, would the words "leader or organizer", which appeared in article 15, suffice to cover all individuals likely to be involved in a crime of aggression? The only way out of the Commission's difficulty would be to deal with the various elements of Mr. Szekely's proposal in the commentary. In that way, it would be possible to cover all situations that might arise so far as individual criminal responsibility for the crime of aggression was con-

cerned. He could not, however, agree that the matter should be referred back to the Drafting Committee.

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

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

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

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

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

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

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

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

It was so agreed.

Article 2, as amended, was adopted.

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

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

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

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

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

The meeting rose at 1 p.m.

2446th MEETING

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

Chairman: Mr. Ahmed MAHIOU

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

Cooperation with other bodies (*concluded*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

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

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

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

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

* Resumed from the 2433rd meeting.

make unjust enrichment a crime under their internal law and to cooperate in the recovery of ill-gotten property.

5. The Convention also dealt with the problem of extradition which was apparently insuperable on a continent where there was a firmly rooted right of asylum. Although that right had not been affected, it could no longer be used to protect any person who tried to evade the law after committing an act of corruption. Also, the requested State could not refuse its assistance by invoking banking secrecy. The requesting State undertook in return not to use information protected by banking secrecy for purposes other than the legal proceedings concerned, unless the requested State so authorized. Lastly, under article 17 of the Convention, the fact that property obtained by corruption was actually or allegedly intended for political purposes was not of itself enough to make the corruption a political offence or an offence under the ordinary law which was linked to a political offence.

6. The Committee had also given much thought to the effective exercise of representative democracy. In the resolution on the matter which it had adopted, it had decided to examine the possibility that acts which distorted or endeavoured to distort electoral results by interfering with free elections and also by tampering with the results of the vote, were unlawful in international law. That question had been included in the Committee's agenda in acknowledgement of the fact that not only classical coups d'état, but also electoral fraud and anything that interfered with free elections were prejudicial to representative democracy. The right of electors to express their will freely and the right to make elections the authentic foundation of the representation of Governments were in keeping with representative democracy's requirement of consistency, ethics and logic that was intrinsic to the inter-American system.

7. The Committee had also taken note of a report on the legal aspects of the foreign debt and had considered a proposal to bring the matter before ICJ, from which the United Nations General Assembly would if necessary seek an advisory opinion. That initiative was based on the work of the European Council for Social Research on Latin America, the Advisory Council of the Latin-American Parliament and the recommendations of the Twelfth European Union/Latin America Inter-Parliamentary Conference. The consideration of the proposal had begun in the framework of the Group of 77 at the fiftieth session of the United Nations General Assembly.

8. Referring to the usual international law course at Rio de Janeiro, Brazil, which the Committee organized in collaboration with the OAS legal secretariat, he said that the twenty-second course had been attended by 38 students and had had the privilege of welcoming 2 members from the Commission. Various topics had been taken up, such as the settlement of disputes in American regional integration procedures, international human rights protection, the legal aspects of foreign debt, democracy in the inter-American system, the legal system of the European Union, the development of international law in OAS, humanitarian intervention, privileges and immunities of international agencies, the application of

international law in internal law, the law of the sea, cooperation in the fight against terrorism, international responsibility of States, and WTO, and the students had studied the two topics of dispute settlement and the inter-American system for the protection of human rights in a working group. In future, the course would focus on a central theme to prevent an excessive number of subjects from detracting from the depth of the analyses. The topic selected for the twenty-third course was therefore "Justice and international law".

9. The session the Committee held in January and February 1996 had had the following agenda: preparation and approval of inter-American legal instruments within the framework of OAS; legal dimension of the integration of international trade; administration of justice in America; environmental law; peaceful settlement of disputes; and inter-American cooperation to combat terrorism. The Committee would also consider other subjects such as national jurisdiction and the legal personality of legal persons, the composition of ICJ, and the obligations provided for in the United Nations Convention on the Law of the Sea, as well as the request by the OAS General Assembly that it should examine as a matter of priority the validity, in international law, of the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), signed into law by the United States of America.

10. The serious question of terrorism had been on the Committee's agenda since 1994. A number of reports had been prepared on inter-American cooperation to combat the scourge. More recently, in April 1996, the Inter-American Specialized Conference on Terrorism had been held in Peru at which the strategies set forth in the Declaration of Lima to Prevent, Combat and Eliminate Terrorism had been formulated. The Declaration stipulated that international law, human rights and fundamental freedoms, the sovereignty of States and the principle of non-intervention provided the framework for action to combat terrorism. Terrorist acts must be treated as particularly serious offences under ordinary law. The Committee would consider the need and advisability of having an inter-American convention on the question in the light of existing international instruments.

11. The Committee had also started to hold meetings with the legal advisors of the ministries for foreign affairs of the OAS member States. Thus, in Brazil, in August 1995, the two parties had had a fruitful exchange of information and experience. It should be noted that, at the invitation of the Brazilian Government, the Committee was shortly to have its headquarters in Brazil.

12. The Committee was to embark on consideration of a document from the OAS General Secretariat entitled "The law in a new inter-American order". It was auspicious that the United Nations had proclaimed the Decade of International Law¹ at the very time when there had been renewed interest in legal matters in America, as was apparent from the significant number of candidatures submitted by States members to fill the vacancies on the Committee.

¹ See 2433rd meeting, footnote 2.

13. The Committee welcomed the fruitful relations established between the Commission and itself and the presence of the Commission's representatives from time to time at its sessions in Rio de Janeiro, Brazil. The importance of those relations had been underlined by the OAS General Assembly in the Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law, which it had just adopted and paragraph 11 of which invited it to strengthen OAS coordination and cooperation with the other international institutions that dealt with the codification and development of international law and, in particular, with the United Nations.

14. Mr. BARBOZA said he was surprised that there were so many topics on the agenda of the Committee. The most interesting from the Commission's point of view were integration and free trade in a continent whose countries were in the process of regrouping (MERCOSUR came to mind in that connection), the drafting of the Inter-American Convention against Corruption and work on the standardization and codification of inter-American law relating to terrorism, the new inter-American order and the new role of the Committee itself. The relevance of all those topics testified to the importance of the contribution which the Committee was making to the codification and development of international law.

15. Mr. VARGAS CARREÑO welcomed the fact that Mr. Espeche Gil had informed the Commission of the Committee's work, thereby enabling both bodies to avoid any duplication. Of the many topics on the Committee's agenda, two in particular stood out. The first was the drafting of the Inter-American Convention against Corruption. In 1994, the Heads of Government of the member States of OAS, meeting in Miami, had decided to prepare an instrument of that kind. The Committee had done a great deal of work in that connection and had made a most valuable contribution to the drafting of the text. After countless meetings and more than a year of work, the text of the Convention had been adopted in Caracas at the end of March 1996. The Convention was the first of its kind.

16. The second topic was one which the OAS General Assembly, held in Panama, had entrusted to the Committee, namely, the Helms-Burton Act, which involved the freedom of the Cuban people. Many American States took the view that the Act was contrary to international law. They had therefore sought the opinion of the Committee, whose value would be only consultative, but which the Governments awaited with interest because of the prestige and authority the Committee enjoyed.

17. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his statement and noted that regional bodies were in some ways ahead of international bodies, such as the Commission, which had to take a universal view. The Committee therefore opened up perspectives for the Commission, if only through the topics on its agenda.

Draft Code of Crimes against the Peace and Security of Mankind² (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3³)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING⁴ (continued)

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

ARTICLE 18 (War crimes)

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of article 18 before the Commission was substantially different from the text of article 22 (Exceptionally serious war crimes), adopted on first reading both in terms of approach and in terms of structure. A revision of the article had been found necessary in view of comments and observations received from Governments⁵ and of the debate in the Commission at its forty-seventh session.

19. As to the approach, it would be recalled that the article, as adopted on first reading, had established two processes through which war crimes came under the Code. First, in paragraph 1 of the article, it had set out the criterion of "exceptionally serious war crimes". It had then defined that criterion in paragraph 2. Secondly, it had listed in paragraph 2 a selected number of war crimes that, once committed in a manner which could be characterized as exceptionally serious, would come under the Code. It would be recalled that some Governments had criticized the whole approach because of the absence of a clear dividing line between "grave breaches" and "exceptionally serious war crimes".

20. The Special Rapporteur had in turn proposed a revised text, in his thirteenth report,⁶ based on articles 2 and 3 of the statute of the International Tribunal for the Former Yugoslavia.⁷ The Drafting Committee had agreed with the new approach which had been proposed by the Special Rapporteur and which abandoned the "exceptionally serious war crimes" model and, with some modifications, followed the model of the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.⁸

21. The opening clause of the article made it clear that not all war crimes, abhorrent as they might be, were crimes against the peace and security of mankind. In order to be characterized as a crime against the peace and

² For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

³ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

⁴ For the text of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, see 2437th meeting, para. 7.

⁵ See 2437th meeting, footnote 7.

⁶ See 2441st meeting, footnote 9.

⁷ See 2437th meeting, footnote 6.

⁸ *Ibid.*, footnote 7.

security of mankind, a war crime had to be committed either "in a systematic manner" or "on a large scale".

22. In terms of structure, the article comprised seven subparagraphs. Subparagraph (a) dealt with grave breaches under the Geneva Conventions of 12 August 1949; subparagraphs (b) and (c) with breaches under article 85 of Additional Protocol I to the Geneva Conventions of 12 August 1949; subparagraph (d) with breaches under common article 3, paragraph (1) (c), of the Geneva Conventions of 12 August 1949 and article 4, paragraph (2) (e), of Additional Protocol II to the Geneva Conventions of 12 August 1949; subparagraph (e) with violations of laws and customs of war, known as the "Hague law"; subparagraph (f) with breaches of international humanitarian law applicable in armed conflict not of an international character, namely, breaches under article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Additional Protocol II; and subparagraph (g) with damage to the environment. The reason for dealing with those various war crimes in seven separate subparagraphs was that each set of crimes had a different origin and each subparagraph had been drawn from different legal instruments.

23. The Drafting Committee had decided not to refer to the instruments from which each subparagraph was taken, for two reasons. First, in the view of some members of the Drafting Committee, most of the acts listed were at the present time war crimes, not only because of the existence of the treaties making them crimes, but also under customary international humanitarian law. Thus, a specific reference to a particular legal instrument might, in some ways, actually reduce the current status of the law on the crimes in question. Secondly, since States, by virtue of becoming parties to the Code, would be bound by its provisions, it would be unnecessary to refer to other treaties to which those States might not be parties. That could create the presumption that, by becoming parties to the Code, States would become parties to those instruments as well, and that might damp down their willingness to accede to the Code. It had been agreed, however, that the commentary to the article would refer to the legislative history of the crimes covered by it and identify the origin of each subparagraph.

24. He drew attention to the opening clause of the first six subparagraphs, which indicated that the act had been committed in violation of international humanitarian law. The only exception was subparagraph (g), which he would introduce separately later.

25. Turning more specifically to subparagraph (a), he said that the eight grave breaches of the Geneva Conventions of 12 August 1949 listed therein were also listed in article 2 of the statute of the International Tribunal for the Former Yugoslavia.

26. The CHAIRMAN suggested that, in the interests of orderly debate, article 18 should be considered paragraph by paragraph. He invited the members of the Commission to comment on subparagraph (a).

Subparagraph (a)

27. Mr. IDRIS said that, before making any comments on substance, he would prefer to take time to reflect on

the introduction of the article just given by the Chairman of the Drafting Committee. Could the text of the introduction perhaps be distributed? It seemed to him that the introduction, with its references to the various international instruments which the Drafting Committee had drawn on in drafting the article under consideration, was very important as it touched on a complex area of treaty law. The Commission should take time to consider the paragraphs one by one so as to analyse all their implications and to make sure that they were as clear and precise—and also as reasonable—as possible. Only after such methodical consideration of each of the proposed provisions could the Commission, in his view, go on to consider the title of the article itself.

28. Mr. PAMBOU-TCHIVOUNDA said that he fully endorsed the comments by Mr. Idris; he, too, reserved his comments on the substance. For the time being, he would simply draw attention to a drafting problem in the *chapeau* of the article. Would it not be better to say: "Any of the war crimes covered by one of the following categories"? After all, it was categories of crimes that were under consideration.

29. Mr. Sreenivasa RAO noted that, in his introduction, the Chairman of the Drafting Committee had explained that the Drafting Committee had not deemed it useful to refer to the provisions of the various international conventions which it had used because their content had become part of customary international law. If that was truly the case with the Geneva Conventions of 12 August 1949, given the number of States parties to them, he would be curious to know how many States had ratified Protocols I and II thereto and with what reservations. That might serve as a useful indication for the members of the Commission. Could the Chairman of the Drafting Committee or the secretariat provide information on that subject?

30. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, unfortunately, he could not give Mr. Sreenivasa Rao an answer for the moment, but stressed that the Drafting Committee had not used in the text any provision taken from Protocols I and II that was not regarded as generally accepted.

31. Mr. ROSENSTOCK said that he fully agreed with the comments by Mr. Sreenivasa Rao. In his introduction, the Chairman of the Drafting Committee had rightly pointed out that, in the view of many members of the Drafting Committee, the provisions on which the Drafting Committee had based itself were part of customary international law; that showed that everyone had not shared that point of view.

32. Mr. LUKASHUK said that the discussion might well take a turn which was as strange as the structure of the article itself; that seemed rather illogical to him, whereas logic was supposed to be the basis of law. As the Chairman of the Drafting Committee had explained, the disjointed structure was the result of the fact that the Drafting Committee had relied on various instruments relating to humanitarian law. He did not object to the use of the Convention respecting the Laws and Customs of War on Land (The Hague Convention (IV) of 1907) or the Geneva Conventions of 12 August 1949, but, as to the Protocols which, as the term indicated, were only

“additional”, that would inevitably give rise to problems.

33. In his view, the entire structure of the article should be reviewed. As a basis for discussion, he proposed designing three new articles on the following questions: (a) criminal violations of the laws and customs of war; (b) crimes against protected persons and property; and (c) criminal violations of international humanitarian law applicable in armed conflict not of an international character. That would make the text much clearer.

34. Mr. FOMBA said that he wanted to make a number of general comments before considering the substance of subparagraph (a). First of all, concerning the title of the article (War crimes), he was pleased that the Commission had abandoned the old legal interpretation of that concept, which classically had applied only to serious offences committed in the context of international armed conflicts. He welcomed that effort to modernize the text and bring it into line with recent instruments.

35. The Drafting Committee had had the choice between an analytic and a synthetic approach to the problem. He would have preferred a synthetic approach and would have drafted the article to read:

“Any war crime constitutes a crime against the peace and security of mankind when it is committed in a systematic manner or on a large scale;

“War crime means any act qualified as a serious violation of international humanitarian law applicable to:

“(a) International armed conflicts;

“(b) Non-international armed conflicts.”

That wording might not be irreproachable from the point of view of drafting logic in criminal matters or the harmonization of the entire text, but it seemed to him to be more concise and clearer.

36. Concerning subparagraph (a), the Chairman of the Drafting Committee had said that the proposed draft had in substance repeated the material scope of the Geneva Conventions of 12 August 1949, which distinguished between two categories of offence: “grave breaches” and “other offences”. The criteria followed in the Conventions for characterizing “grave breaches” were acts which, first, “were not justified by military necessity” and, secondly, were “carried out unlawfully and wantonly”. Those criteria corresponded in the draft Code of Crimes against the Peace and Security of Mankind to the systematic or massive nature of the acts committed and the criminal intent itself, even if it was not expressly mentioned in the provisions of all the articles.

37. Bearing in mind those criteria, he wondered whether the crimes listed in subparagraph (a) should not remain open to take account not only of positive international humanitarian law, but also of the prospects for change in that regard, which should be of concern to the Commission. But in that case, why not also repeat in the introductory phrase that violations of international humanitarian law were involved, since it was precisely one

of the criteria which the Commission wished to emphasize?

38. He would have preferred to have article 18 start with a clearer introductory phrase more in tune with the articles already adopted and setting forth the subject in a more methodical way. The introductory phrase might, for example, read:

“War crime means any of the following acts committed in a systematic manner or on a large scale in violation of international humanitarian law.”

A list of the crimes would then follow. Of course, such wording would entail the deletion of subparagraph (a).

39. The CHAIRMAN noted Mr. Fomba’s suggestion with interest. But making the expression “international humanitarian law” in the introductory phrase applicable throughout might pose drafting problems later on, if only with regard to subparagraph (e), which covered acts committed “in violation of the laws or customs of war”.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that it had not in fact, been easy to structure article 18, but the result was not as illogical as it appeared. The reason why there was an introductory phrase for each of those paragraphs was that they had different sources and meanings and each category of crimes listed therein had its intrinsic characteristics. For example, the crimes under subparagraph (b) were different from those under subparagraph (a) in that they led to death or caused serious injury to physical integrity or health, whereas those under subparagraph (c) were collective crimes and those under subparagraph (d) were violations of human dignity. Subparagraphs (e), (f) and (g) dealt specifically with acts committed in time of armed conflict.

41. In fact, it seemed to him that the way the crimes were listed had little practical importance. What was essential was that they appeared in the article and that judges could cite them and impose punishment for them. Everything else was an academic exercise.

42. Mr. ROBINSON said he wondered whether it had really been necessary to state at the beginning of article 18 that the crimes referred to had to have been committed in a systematic manner or on a large scale. He understood the Drafting Committee’s concern not to identify as “war crimes” isolated acts or acts of limited scope. But it should not go to the opposite extreme and set too high a threshold. The systematic or mass nature of the crimes listed in the article would probably be very difficult to prove in practice. Had consideration been given to the problem of the burden of proof?

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Robinson’s questions were pertinent and legitimate. The Drafting Committee had decided to specify that the war crimes included in the draft Code had to have been committed in a systematic manner or on a large scale because only on that condition could they constitute crimes against the peace and security of mankind. While some of those crimes, such as the transfer of population or delay in repatriation of prisoners, already included that element, in other cases it

would have been necessary to specify that condition after each act enumerated. It had thus been deemed preferable to insert that criterion at the very beginning of the article.

44. The CHAIRMAN said that that question had been debated very extensively during the consideration of the provision on first reading. The idea was that, if the crimes referred to were not committed in a systematic manner or on a large scale, they remained war crimes and punishable as such, but did not fall within the purview of the Code. The justification for that approach was the desire not to make any and every crime a crime against the peace and security of mankind and to ensure that only the most serious war crimes would be covered by the Code.

45. Mr. BARBOZA said that he personally found the structure of the article acceptable in the form submitted and that, in any case, the present meeting was neither the time nor the place to reconsider it.

46. The crimes covered by the Code must, of course, be extremely serious. War crimes were not crimes against peace, since, in a state of war, peace had already been shattered. So they could not be crimes against humanity unless they were genuinely crimes of sufficient seriousness to justify their inclusion in the Code.

47. Although the general comments that had been made, including those on custom, were not without interest, he hoped that the Commission could consider each point on the merits and decide in each case whether or not international custom was involved.

48. Mr. FOMBA said that he nevertheless wished to make one last general comment. In order to tackle the question of war crimes, the Commission had apparently adopted as a criterion for classification the diversity and disparity of the legal sources and of the instruments in force, with the result that the text was long, often disjointed and somewhat confused, at least at first glance. That manner of proceeding implied that there was a hierarchy in the sources of international law, whereas it was the principle of equality that must prevail. That was established, *inter alia*, by Article 38, paragraph 1, of the Statute of the International Court of Justice. The Secretary-General had also confirmed the dialectical link between the conventional source and the customary source of international humanitarian law in connection with the jurisdiction *ratione materiae* of the International Tribunal for the Former Yugoslavia.

49. In his view, the only rational criterion for classification should be a distinction, not between the legal sources, but between international and non-international armed conflicts.

50. Mr. TOMUSCHAT said that one could add to the substantive response already given to Mr. Robinson's legitimate question another explanation, taken from procedural law. Articles 7 and 8 of the draft Code, dealing with jurisdiction and the obligation to extradite or prosecute, imposed very heavy obligations on States that could be justified only by acts of a mass character that genuinely jeopardized international peace and security. That was why a restrictive criterion was warranted.

51. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt subparagraph (a). Replying to comments by Messrs. PAMBOU-TCHIVOUNDA, LUKASHUK, ROBINSON and ROSENSTOCK, he said that the adoption of subparagraph (a) did not imply the concomitant adoption of the *chapeau* to article 18, which the Commission would reconsider when it had adopted all the subparagraphs of that article, in order to ensure the coherence of the article as a whole.

Article 18, subparagraph (a), was adopted.

Subparagraph (b)

52. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (b) listed certain breaches enumerated in article 85, paragraph 3 of Protocol I, which had been subjected to some modifications necessitated by their insertion in the draft Code. For example, all the cross-references to the Geneva Conventions of 12 August 1949 and other provisions of Protocol I had been deleted. Furthermore, some crimes listed in the Protocol had been omitted: for example, article 18, subparagraph (b) (i) of the draft Code did not include article 85, paragraph 3, subparagraphs (d) and (e), of the Protocol, but the actions they referred to were nevertheless not excluded from the draft Code. Article 85, paragraph 3 (d), of Protocol I was covered by article 18, subparagraph (e) (iii).

53. The violations listed in article 18, subparagraph (b), of the draft Code were qualified, as they were in article 85, paragraph 3 of Protocol I, by the requirement that they should be committed wilfully and cause death or serious injury to body or health.

54. Mr. VILLAGRÁN KRAMER thought that the expression "civilian objects" used in subparagraph (b) (ii) was too vague and general.

55. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that that expression was taken from article 85 of Protocol I, which the Drafting Committee had not deemed it necessary to revise.

56. Mr. PAMBOU-TCHIVOUNDA said that, while not wishing to question the Commission's practice of reproducing the text of instruments that were in force, the wording of subparagraph (b) (v) on the perfidious use of the distinctive emblem of the red cross and other signs lacked precision, particularly in the context of the *chapeau* to subparagraph (b). No one supposed that the perfidious use of the emblem of the red cross could have any connection whatever with the disappearance of groups of population. It should therefore be specified that such use involved the disappearance of persons.

57. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had not reproduced the provisions of existing instruments automatically; there had been a discussion in each case. In the event, the Drafting Committee had asked itself whether the perfidious use of the distinctive red cross emblem or other emblems was of sufficient gravity to appear in the Code. Although that had not been the decisive consideration, ICRC would certainly have been

unhappy had the provision been omitted. But the Drafting Committee had above all taken the view that such an act would be of sufficient gravity if two requirements were met, namely, the use of the emblem must have resulted in death or serious injury to body or health, and that must have occurred in a systematic manner or on a large scale.

58. The CHAIRMAN said that, in order for the acts listed in subparagraphs (i) to (v)—which already figured in existing conventions—to be regarded as crimes against the peace and security of mankind, they must have an additional degree of gravity, in other words, they must meet the twin requirements set forth in the opening clause of subparagraph (b) and, in addition, the requirement which appeared in the introductory provision to the article.

59. Mr. ROSENSTOCK said that, if the red cross emblem was perfidiously misused, the troops who were injured as a result would not respect it in future. Use of the emblem therefore had an extrinsic consequence that might undermine the entire regime. That was why it was extremely important to include such a provision.

60. Mr. TOMUSCHAT, agreeing with that viewpoint, said there was a danger that soldiers, posing as ICRC workers, might open fire on troops who were not expecting it. That was the link between abuse of the red cross emblem and human losses.

61. Mr. ROBINSON said the only subparagraph of article 85, paragraph 3, of Protocol I not included in article 18, subparagraph (b), was subparagraph (d) concerning attack on non-defended localities and demilitarized zones. He wondered whether the inclusion in subparagraph (b) of cases in which such acts were committed in a manner that met the three criteria referred to by the Chairman would not be justified.

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the provision had not been restated in subparagraph (b) as it was covered by subparagraph (e) (iii).

63. Mr. KABATSI, noting that the best was the enemy of the good, said that article 18, given its size, would always be open to improvement, but to find fault with a text which had been drawn up at the end of a long discussion in the Drafting Committee, far from solving the problems, might create new ones.

64. Mr. ROBINSON pointed out that subparagraph (e) (iii), unlike article 85, paragraph 3 (d) of Protocol I, did not refer to demilitarized zones. He wondered whether the intention was to exclude such zones or whether they were supposed to be covered by the term “undefended buildings”.

65. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that that difference would be explained in the commentary. In point of fact, in drafting subparagraph (e) (iii), the Drafting Committee had used another source. But the “Hague law” necessarily applied to demilitarized zones.

66. Mr. MIKULKA said that, while he recognized the relevance of Mr. Robinson’s remark, he would point out

that subparagraph (e) referred to zones, whereas subparagraph (b) dealt with persons, death and health. The difference which had been noted should therefore be explained in the commentary to subparagraph (e).

67. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (b).

Article 18, subparagraph (b), was adopted.

Subparagraph (c)

68. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (c) listed two of the five violations enumerated in article 85, paragraph 4, of Protocol I. Subparagraphs (c) (i) and (c) (ii) corresponded to paragraphs (a) and (b) of that paragraph. Paragraph 4 (d), which referred to making historic monuments, places of worship, and so on, the object of an attack, was covered by subparagraph (e) (iv), which dealt with violations of the laws and customs of war. Paragraph 4 (e), which made depriving a protected person of the right to a fair trial punishable, was also not covered in subparagraph (c) because it was already covered in subparagraph (a) (vi).

69. Subparagraph (c) (ii) included only the first half of paragraph 4 (a) of article 85 of Protocol I because the second half was already covered by subparagraph (a) (vii). Furthermore, paragraph 4 (c), which related to the practices of apartheid and other inhuman and degrading practices involving outrages on personal dignity, based on racial discrimination, had also not been included there because it came under the broader category of “outrages upon personal dignity”, which was covered by subparagraph (d). Lastly, the acts listed in subparagraph (c) must have been committed wilfully.

70. The CHAIRMAN, speaking as a member of the Commission, said that the only conditions governing unjustifiable delay in the repatriation of prisoners of war or civilians, as referred to in subparagraph (c) (ii), were those set forth in the opening clause of article 18. He would therefore like to know whether holding thousands of prisoners for a period of 10 days, for example, would amount to a crime against the peace and security of mankind.

71. Mr. THIAM (Special Rapporteur) said that that was a question of fact which it would be for the court hearing the case to decide in each particular case. It was, of course, impossible to set a deadline. Not all delays in the repatriation of prisoners of war or civilians would amount to a crime under the Code; they might be just incidents.

72. Mr. ROBINSON said he found it difficult to see how an act which was a crime under international humanitarian law and was committed in a systematic manner and on a large scale could not constitute a crime against the peace and security of mankind. More generally, he would like the Chairman of the Drafting Committee to explain why a particular provision of international humanitarian law had been omitted by the Drafting Committee.

73. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he could not possibly go through all the provisions of international humanitarian law not included in the draft Code and explain in each case why some had not been included. Any member who considered that a provision had been wrongly omitted could propose that it should be included.

Subparagraph (d)

74. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (d) was taken from article 4, paragraph 2 (e), of Protocol II and the Drafting Committee had incorporated it into article 18 for a number of reasons. The list in article 18, subparagraph (f), which dealt with war crimes committed during armed conflict not of an international character, was taken from article 4 of the statute of the International Tribunal for Rwanda. The crimes listed in article 4 were in turn taken from article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Protocol II. One of the crimes in article 4 of the statute of the International Tribunal for Rwanda consisted of outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. Since it was recognized that such outrages upon personal dignity were crimes under international humanitarian law applicable to armed conflict not of an international character, they must surely be a crime if committed during an armed conflict of an international character. An *a contrario* interpretation would lead to the absurd conclusion that such acts were crimes if committed during internal armed conflict, but not during an international armed conflict. Hence the inclusion of subparagraph (d).

75. Subparagraph (d) had the added advantage that the broad language of the first part—"outrages upon personal dignity, in particular humiliating and degrading treatment"—was very close to the wording of article 85, paragraph 4 (c), of Protocol I, which related to apartheid and racial discrimination and thus included that kind of practice, which amounted to a crime in the circumstances covered by article 18.

76. Mr. FOMBA said that the Commission of Experts established pursuant to Security Council resolution 935 (1994), on Rwanda, having had information that women had been abducted and raped, had decided, after considering the matter, that rape was both an offence under international humanitarian law and a crime against humanity.⁹ In the case of the former Yugoslavia, the Special Rapporteur of the Commission on Human Rights appointed to consider the situation of human rights in the territory of the former Yugoslavia had brought out clearly, in his fifth periodic report,¹⁰ in 1993, the relations that existed between rape as a tool for controlling society and ethnic cleansing. He had established that there had been obvious cases when rape, which undeniably severely damaged physical or mental integrity, had been committed on the orders of the responsible authority as a systematic policy or which was additional to part

of a wider policy aimed deliberately at destroying all or part of a national, ethnic, racial or religious group as such. For that reason, he therefore welcomed the inclusion of subparagraph (d) in article 18.

77. Mr. ROBINSON said he regretted that the terms of article 85, paragraph 4 (c), of Protocol I, on apartheid and other inhuman and degrading practices, involving outrages upon personal dignity, based on racial discrimination, were not reflected in subparagraph (d). True, in introducing subparagraph (c), the Chairman of the Drafting Committee had stated that the practices in question were implicitly covered by the notion of an outrage upon personal dignity, but, in his own view, that was not enough. He therefore proposed that, in subparagraph (d), express reference should be made if not to apartheid, then to "institutionalized discrimination".

78. Mr. de SARAM recalled that Protocol I concerning international armed conflict had been adopted in 1977, when the objective had been to make the provisions applicable to armed conflicts in which peoples fought "against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (Protocol I, article 1, paragraph 4). That explained the express reference to apartheid and racial discrimination in article 85, paragraph 4 (c) of the Protocol. Since 1977, however, the notion of crime against humanity had been developed and accepted and was now applied not only in the case of armed conflict of an international character, but also in the case of internal armed conflict and even in times of peace. The provisions of article 85 concerning racial discrimination and apartheid had therefore been used, in an amplified and broadened form, in article 17, subparagraph (f) of the draft Code. It would, therefore, not be inconsistent to refer to "institutionalized discrimination" in article 18, subparagraph (d).

79. Mr. ROSENSTOCK, supported by Mr. TOMUSCHAT, said that he was opposed to Mr. Robinson's proposal because its adoption would limit the scope of subparagraph (d).

80. Mr. THIAM (Special Rapporteur), supported by Mr. GÜNEY and Mr. Sreenivasa RAO, said that he did not see how a reference to institutionalized discrimination in subparagraph (d) would limit the scope of that paragraph. It would be but one example among others of an outrage upon personal dignity.

81. The CHAIRMAN suggested that Mr. Robinson should submit a written proposal to the secretariat for the Commission's consideration at the next meeting.

The meeting rose at 1.10 p.m.

⁹ See S/1994/1405, annex.

¹⁰ E/CN.4/1994/47.

2447th MEETING

Tuesday, 25 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

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

ARTICLE 18 (War crimes) (continued)

Subparagraph (c) (concluded)

1. The CHAIRMAN drew attention to a new subparagraph (c) (iii) for article 18 submitted by Mr. Robinson, which read:

“(iii) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population.”

He invited Mr. Robinson to introduce that proposal.

2. Mr. ROBINSON said that he had previously raised the question (2446th meeting) of including in article 18 the provision set forth in article 85, paragraph 4 (c), of Additional Protocol I to the Geneva Conventions of 12 August 1949, which referred to practices of apartheid and degrading practices involving outrages upon personal dignity, based on racial discrimination. It had been

suggested at the time that the same idea was to some extent reflected in article 18, subparagraph (d), but it had ultimately been decided that the reference to “outrages” in that subparagraph was too wide and did not capture the concept set forth in paragraph 4 (c) of article 85 of Protocol I. It had further been decided to refer to institutionalized discrimination rather than to practices of apartheid. That was acceptable to him and he therefore believed it would be very useful to include as a new subparagraph (c) (iii) the same wording as had been adopted for article 17, subparagraph (f).

3. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that crimes against humanity could be committed either in peacetime or in wartime. The proposed new subparagraph was therefore quite unnecessary.

4. Mr. FOMBA said that he tended to share the position of the Chairman of the Drafting Committee. It was unnecessary to recall the need, in the context of crimes against the peace and security of mankind, to stipulate firmly for a proscription of institutionalized discrimination. Yet, the question had to be weighed up in the light of the relevant international humanitarian law, and in particular of article 85, paragraph 4 (c), of Protocol I, and of the global scope of the draft Code of Crimes against the Peace and Security of Mankind. The scope of article 85, paragraph 4 (c), was more restricted in that it was limited to racial motives. *A contrario*, therefore, religious and/or ethnic motives were excluded, subject, of course, to including ethnic criteria. The *chapeau* to paragraph 4 of article 85 of Protocol I regarded practices of apartheid, when committed wilfully, as “grave breaches”. Accordingly, various questions arose. What was the actual scope of institutionalized discrimination in times of war? Would the answer be the same in the case both of an international war and of a non-international war? What was the likelihood of the emergence of such a situation, according to whether the war lasted for a day, for weeks or for years? And did not the interpretation of the concept of institutionalization pose a problem?

5. As to the matter of its place in the draft Code, institutionalized discrimination was already dealt with in article 17, subparagraph (f). There was also an obvious link between a crime against humanity and a war crime as a result of their scope *ratione temporis*, for the special characteristic of crimes against humanity, which included institutionalized discrimination, was that they could be committed in times of peace and of war. Hence there was no pressing need to refer to institutionalized discrimination in a new subparagraph (c) (iii). In the circumstances, he considered that subparagraph (c) of article 18 should remain unchanged, though he would not oppose a consensus to the contrary should one emerge.

6. Mr. CRAWFORD said that, for the reasons stated by the Chairman of the Drafting Committee, he considered that the proposed addition was unnecessary. The principle of a crime against humanity was equally applicable whether in time of war or in time of peace. Indeed, ICJ had even implied that it might be more applicable in time of war than in time of peace.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

7. Mr. YAMADA said that he too agreed with the Chairman of the Drafting Committee. He saw no need to have precisely the same provision in article 18 as in article 17 when the latter applied both in wartime and in peacetime. There was also a difference of threshold as defined in the two *chapeaux* to articles 17 and 18 and that could create confusion.

8. Mr. KABATSI said the proposed provision already appeared in article 17, subparagraph (f), and he agreed that crimes against humanity could be committed in both peacetime and wartime. For lawyers, that might be enough. Mr. Robinson's proposal, however, was addressed not so much to lawyers and judges as to those actually responsible for waging war, who should know in advance that institutionalized discrimination on racial, ethnic or religious grounds was specifically prohibited as a war crime. Further, Mr. Yamada had referred to a difference in the threshold levels in the *chapeaux* to articles 17 and 18. Actually, that difference was another reason for adopting the proposal. Admittedly, it would involve repetition, but it would not be the first instance of repetition in the draft Code—article 18, subparagraph (a) (viii), and subparagraph (f) (iii), "taking of hostages", being a case in point.

9. Mr. LUKASHUK said that, while he understood and was not opposed to the idea behind Mr. Robinson's proposal, he considered that any systematic comparison of the proposal with article 17 could have adverse results since it could be interpreted as limiting other crimes against humanity to times of peace.

10. Mr. GÜNEY said that he, too, experienced some difficulty with the proposed provision. First, it would be redundant in that the same provision already figured in article 17, subparagraph (f), but also because the *chapeaux* to articles 17 and 18, as well as the crimes covered in those articles, were different.

11. Mr. THIAM (Special Rapporteur) said that he was in favour of the proposal, since a particular act could be characterized in two ways. For instance, an act committed in peacetime would be characterized as a crime against humanity whereas, if it was committed in wartime, it would constitute a war crime. That twofold characterization, which was universally recognized, existed even in internal law and was supported by a long line of jurisprudence. Also, since there could be two aspects to the same act, there was absolutely no reason for arguing that, because the provision already figured in article 17, it could not be included in article 18 as a war crime. It would be a great pity if Mr. Robinson's proposal was not adopted, as the question would inevitably arise why apartheid, of all the breaches listed as constituting a war crime in article 85 of Protocol I, had been left out of the Code. For once he had to disagree completely with the Chairman of the Drafting Committee: he supported Mr. Robinson's proposal even if he was in a minority.

12. Mr. PAMBOU-TCHIVOUNDA, endorsing the Special Rapporteur's comments, said that the Commission must be consistent and logical in its approach. The proposed provision, which had his support, should be placed after subparagraph (c) (i) of article 18 rather than after subparagraph (c) (ii). It should also be couched in

more concise terms and he therefore suggested that it should be redrafted to read

"Institutionalized discrimination on racial, ethnic or religious grounds that could seriously disadvantage a part of the population;"

13. Mr. PELLET said that he agreed with the substance of the idea underlying Mr. Robinson's proposal, namely, that apartheid should be punished even if it was committed in wartime, but he thought that adoption of the proposal would be highly counterproductive. Incorporation of Mr. Robinson's provision in article 18 would mean, *a contrario*, that if a crime against humanity was committed in wartime, it was not punishable if it was not enumerated. It was an extremely dangerous course and a step backwards to Nürnberg, where crimes against humanity and war crimes had been linked together. It was particularly important for it to be understood that crimes against humanity were punishable whether they were committed in times of war or times of peace. In the circumstances, he was strongly opposed to implementing Mr. Robinson's proposal.

14. Mr. VILLAGRÁN KRAMER said that the Drafting Committee's provision on war crimes enlarged somewhat on the understanding of those crimes since the time of the Charter of the Nürnberg Tribunal.⁴ Having regard to that enlargement, he believed that Mr. Pellet was right and consequently he was not sure that he could support Mr. Robinson's proposal.

15. Mr. ROBINSON said he was not sure it was correct to say that, *a contrario*, other crimes against humanity listed in article 17 would not be punishable if committed in time of war because they were not expressly listed in article 18. It was true that they would not be punishable as war crimes; but they would certainly be punishable as crimes against humanity, if committed during an armed conflict. The essence of his proposal was that institutionalized discrimination should be designated as a war crime *eo nomine*, irrespective of whether it was a crime against humanity, and would for that reason also be punishable as such if committed in time of war. Such an assertion had an entirely different legal character from an assertion that an act which was a crime against humanity was punishable equally in wartime and in peacetime. Did the Commission believe that institutionalized discrimination, *eo nomine*, warranted designation as a war crime? If that was the case, then the mere fact that it was already included in article 17 as a crime against humanity did not suffice to achieve that purpose, and he very much doubted that a reference in the commentary would solve the problem.

16. Mr. CRAWFORD said that the difficulty with incorporating the elements of article 17 in article 18 was that the preconditions for the commission of a crime against humanity differed from those for a war crime. The opening words of subparagraph (c) of article 18 were words not of description but of qualification. They therefore implied that, if all or any part of article 17 was incorporated therein, international humanitarian law might possibly exculpate in the context of an armed

⁴ See 2439th meeting, footnote 5.

conflict—which in respect of crimes against humanity was simply not the case. So, for the reasons given by Mr. Pellet and which he himself had expressed in a rather different form, he believed that Mr. Robinson's intention could be adequately spelt out in the commentary to article 17, and also usefully referred to in the commentary to article 18. However, to try textually to incorporate parts of article 17 in article 18, which had a different *chapeau* containing words of qualification, was a dangerous undertaking.

17. Mr. TOMUSCHAT said that, in spite of Mr. Robinson's lengthy explanation, he could still see no difference in essence between crimes against humanity and war crimes. They were all crimes against the peace and security of mankind and thus fell within the purview of the Code. Furthermore, if the proposal was inserted as subparagraph (c) (iii), the subject-matter would apply only to international conflicts, with the misleading implication that it did not apply to internal conflicts. The proposal was thus wrongly placed.

18. Mr. de SARAM said that Mr. Robinson had made it clear (2446th meeting) that his proposal was made on the basis of article 85 of Protocol I, which contained a provision concerning apartheid. Protocol II contained no such provision. For that reason, any suggestion that Mr. Robinson's provision should also be included in the section of article 18 dealing with internal armed conflicts would be ill-considered, since its inclusion therein would certainly not be possible in terms of existing law.

19. Mr. THIAM (Special Rapporteur) noted that many members who were opposed to the proposed provision wished him to state in the commentary that the provision was applicable in time of war. In that case, that statement might as well be placed in the main body of the article. It seemed to him that, whenever members were unable to agree on a provision, they asked the Special Rapporteur to deal with the matter in the commentary. That was very much easier said than done.

20. Mr. ROBINSON said that, notwithstanding the Special Rapporteur's reservations, he agreed with Mr. Crawford that a carefully worded comment on the question in the commentary to article 17 and also to article 18 would be a satisfactory solution.

21. Mr. Sreenivasa RAO said that, like Mr. Robinson, he believed that if provisions from certain sources were being incorporated, they should be incorporated as fully as possible and that, where matter was deleted from those sources, the deletion must be explained. In the present case the explanations given appeared to be slightly contradictory. However, if a consensus could be built around them he would not oppose it.

22. Mr. PAMBOU-TCHIVOUNDA apologized for reverting to a provision that had already been adopted by the Commission. However, the idea that crimes against humanity could be committed in peacetime as well as in time of war was of such crucial importance that it should appear in the *chapeau* to article 17, rather than merely being consigned to the commentary to that article.

23. Mr. PELLET said he agreed with the substance of Mr. Pambou-Tchivounda's remarks. The Special Rap-

porteur, on the other hand, was guilty of putting words into some members' mouths. He was not asking the Special Rapporteur to take on the task of expressing Mr. Robinson's concerns in the commentary; indeed he continued to be opposed to recourse to the commentary as a means of resolving genuine problems. What he had actually envisaged was that the commentary, or the *chapeau* to article 17, should explain, first, that crimes against humanity were crimes against the peace and security of mankind whether committed in peacetime or in time of war; secondly, that if the Commission had not taken up in article 18, the equivalent of article 85 of Protocol I, the reason that it was drafting, not a Protocol to the Geneva Conventions of 12 August 1949, but a code of crimes against the peace and security of mankind, and since the crime was already covered in article 17, there was no need to repeat it in article 18. If the matter was tackled in that way it would be possible to eliminate the very serious risk that acts not listed in article 18 might go unpunished in time of war. Apartheid, like all crimes against humanity, should be punishable in peacetime and in wartime. War crimes, as distinct from crimes against humanity, were *lex specialis*.

24. Mr. YANKOV said he was becoming convinced that Mr. Robinson's proposed amendment would only lead to greater difficulties in interpretation and application of the provisions of article 18.

25. Mr. VILLAGRÁN KRAMER said that, in the first place, the task of the Commission was not to expand on the Additional Protocols to the Geneva Conventions of 12 August 1949 or on the International Convention on the Suppression and Punishment of the Crime of Apartheid but to regulate specific crimes against the peace and security of mankind. Secondly, he still doubted whether all the acts characterized as crimes against humanity could be reputed war crimes in time of war. If only some of those acts could be regarded as war crimes, that was a different matter, but to claim that all such acts could be so regarded was perhaps to extrapolate. Thirdly, the Commission must tread warily with regard to the question of ethnic and religious groups in wartime. It was doubtful whether Mr. Robinson's proposal was a positive contribution in the context of war crimes, nor should the commentary clarify an issue on which the Commission itself was far from clear. The Special Rapporteur should not be asked to interpret a consensus that did not exist.

26. Mr. THIAM (Special Rapporteur) agreed with Mr. Villagrán Kramer's comments. He reiterated that one and the same act could have two different characterizations in international as well as internal law. If it was possible to consider that one and the same act constituted both a war crime and a crime in peacetime, it should be covered by both articles 17 and 18. That was the case in the present instance. If Mr. Robinson withdrew his proposal, he would try to reflect it in his commentary. In any case, he was convinced that it was wrong to say that one and the same act could not be covered in the framework of crimes against humanity and in the framework of war crimes when that act had a twofold characterization.

27. Mr. ROSENSTOCK said he agreed with Mr. Pellet's comment. The absolutely essential point to be made was that crimes against humanity applied both in peacetime and in time of war. Nobody had ever doubted that they applied in time of war, so the present discussion was somewhat astonishing. The question was: did they apply in peacetime? Since 1945 it had been clearly established that they did indeed apply in peacetime as well as in wartime, which meant that the perpetrators could be punished for the crime. The designation to be given to the crime did not go to the essence of the matter and to worry about it would lead only to muddle. The Commission should make things clear in the commentary.

28. Mr. LUKASHUK said that two questions were not clear. First, he had a purely legal difficulty with Mr. Robinson's proposal, for subparagraph (c) covered crimes that represented violations of international humanitarian law. He did not think, however, that apartheid was a part of international humanitarian law. Secondly, if the Commission wished to include apartheid among war crimes, logically, it would also have to include genocide among war crimes. He would be grateful if the Special Rapporteur would clarify that issue.

29. The CHAIRMAN asked whether Mr. Robinson was prepared to agree that his proposal should be reflected in the commentary to article 17, along the lines proposed by Mr. Pellet. Mr. Pambou-Tchivounda had also proposed amending the *chapeau* of article 17, but that, perhaps, was too far-reaching a proposal.

30. Mr. ROBINSON said he would be content with an appropriately worded commentary.

31. Mr. PAMBOU-TCHIVOUNDA said he wished formally to propose that, in order to confer on the issue the importance it deserved, the words “, in time of peace or in time of war” should be added to the *chapeau* to article 17, after the word “group”. It was not his intention, however, to bulldoze the Commission into accepting his proposal.

32. The CHAIRMAN noted that Mr. Pambou-Tchivounda did not insist on his proposal, and that the alternative proposal, namely that the matter should be dealt with in the commentary, was acceptable to Mr. Robinson.

33. Mr. HE said that the concept of crimes against humanity stemmed from the Charter of the Nürnberg Tribunal. Originally, it had applied to offences committed in peacetime. The scope of such crimes had now been extended to cover offences committed in time of war. The Commission should exercise caution on that point, and he would therefore prefer the explanation to appear in the commentary, rather than in the actual article itself.

34. Mr. YANKOV said that, if the additional wording proposed by Mr. Pambou-Tchivounda was inserted in the *chapeau* of article 17, on crimes against humanity, similar action would have to be taken in respect of article 16, on genocide. To embark on such changes at the current advanced stage of the proceedings was extremely risky, and he appealed to Mr. Pambou-Tchivounda to exercise wisdom and restraint.

35. Mr. PAMBOU-TCHIVOUNDA said that shortage of time ought not to prevent the Commission from considering important issues. Points that were shelved at the present stage were bound to come up elsewhere in the form of criticisms levelled at the Commission by Governments. He himself, when he came to act as his Government's representative rather than as a member of the Commission, would not hesitate to draw attention to any shortcomings he might find in the Commission's draft.

36. Mr. THIAM (Special Rapporteur) said that he would have no objection to accepting Mr. Pambou-Tchivounda's proposal, but if the majority view was that an explanation in the commentary would suffice he would, of course, comply.

37. Mr. KABATSI wondered whether to explain that crimes against humanity could occur in time of peace as well as in time of war would not be to state the obvious. Besides, if such an explanation was included in the commentary to article 17, a similar one should also be added to the commentary to article 16. However, he would not oppose the wish of the majority of members.

38. The CHAIRMAN, supported by Mr. Sreenivasa RAO, said that the general sentiment appeared to be to incorporate a clarification in the commentary to article 17, to the effect that the definition of crimes against humanity applied both in peacetime and in wartime. He said that, if he heard no objection, he would take it that the Commission so agreed.

It was so decided.

39. Mr. VILLAGRÁN KRAMER said that, if the Special Rapporteur concurred, it might also be useful for the commentary to article 17 to make it clear that crimes against humanity committed in war time did not necessarily have to be judged as war crimes. The point could be of importance to countries where it was the rule to impose the lesser penalty applicable.

40. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (c).

Article 18, subparagraph (c), was adopted.

Subparagraph (d) (concluded)

41. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (d).

Article 18, subparagraph (d), was adopted.

Subparagraph (e)

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of subparagraph (e) was modelled on article 3 of the statute of the International Tribunal for the Former Yugoslavia⁵ in that it covered five breaches of The Hague Convention (IV) of 1907 and the Regulation annexed thereto and the Charter of the International Military Tribunal.

⁵ See 2437th meeting, footnote 6.

43. The list of violations of the laws or customs of war in article 3 of the statute of the International Tribunal for the Former Yugoslavia was not exclusive. The opening clause of that article provided that: "Such violations shall include, but not be limited to". The Drafting Committee, however, had felt that the degree of certitude necessary for the Code made it imperative to avoid, to the extent possible, an open-ended list of crimes. For that reason, such a proviso was not included in the opening clause of subparagraph (e).

44. Mr. IDRIS asked for clarification of the words "unnecessary suffering" in subparagraph (e) (i). Was there such a thing as necessary suffering, and should not acts calculated to cause suffering be avoided in any case?

45. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the concept was a familiar one in humanitarian law and the law of war. War was a series of acts designed to put the enemy *hors de combat*, and the suffering that resulted was considered to be necessary if it formed an essential part of the act of war. In the case of certain weapons, such as bullets which did not simply kill but in addition caused prolonged agony, the suffering was considered to be unnecessary. The Drafting Committee had certainly not coined the phrase, which was to be found in many documents pertaining to humanitarian law. He personally did not think that an explanation was called for, but the Special Rapporteur could no doubt be asked to provide one in the commentary if members of the Commission so desired.

46. Mr. ROBINSON said that, in the consideration of subparagraph (b) (2446th meeting), he had drawn attention to the omission of the reference to demilitarized zones to be found in paragraph 3 of article 85 of Protocol I, which had served as the basis for subparagraph (b). He proposed that the words "demilitarized zones or" should be inserted before the word "undefended" in subparagraph (e) (iii).

47. Mr. CRAWFORD asked if the Chairman of the Drafting Committee would explain why the reference to demilitarized zones did not appear in the subparagraph under consideration.

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 85 of Protocol I, in which that reference was to be found, was not the source of the text under consideration and had never been contemplated in connection with the drafting.

49. Mr. ROBINSON said that, when he had raised the point previously in connection with subparagraph (b), there had seemed to be general agreement that a reference to demilitarized zones should be included at an appropriate place. Without venturing to say whether subparagraph (e) (iii) was or was not that place, he strongly held to the view that the provision on demilitarized zones appearing in Protocol I should be reflected somewhere in the article on war crimes of the draft Code.

50. Mr. ROSENSTOCK said that he would see no objection to explaining in the commentary that the form of language used in subparagraph (e) (iii) encompassed demilitarized zones. If, as Mr. Robinson was proposing, a

reference to demilitarized zones was included in the article itself, the commentary would have to make it very clear that the departure from the text of article 3 of the statute of the International Tribunal for the Former Yugoslavia in no way implied that the statute failed to cover demilitarized zones.

51. Mr. THIAM (Special Rapporteur) said that he would prefer the latter of the two possible courses outlined by Mr. Rosenstock.

52. Mr. de SARAM said the issue had a technical aspect to which the Commission could not afford to be insensitive. The matters dealt with in subparagraph (e) pertained to battlefield conditions. Members of the Commission, who were not experts in the laws of war and were unacquainted with the reasons why the reference to demilitarized zones had not been included in the text of the statute of the International Tribunal for the Former Yugoslavia, should hesitate before making any change from the statute, which was the most recent provision on the subject. A reference in the commentary would therefore be preferable to the addition proposed by Mr. Robinson.

53. Mr. IDRIS, referring to subparagraph (e) (iv), proposed that the words "works of art" should be replaced by "literary and artistic works", thus bringing the text more closely into line with the Berne Convention for the Protection of Literary and Artistic Works.

54. Mr. FOMBA, referring to subparagraph (e) (iii), commented that the concept of demilitarized zones seemed to him to be covered by the words "undefended towns, villages, dwellings or buildings". He therefore failed to see the need for the proposed addition, but would be prepared to go along with the majority view.

55. Mr. KABATSI said that he was inclined to agree with the arguments advanced by Mr. de Saram. With regard to Mr. Fomba's point, a demilitarized zone that was really completely demilitarized would indeed be covered by the provision as it stood, but in practice it was never possible to tell whether such a zone had not been infiltrated by combatants.

56. Mr. GÜNEY and Mr. TOMUSCHAT said that they expressed support for Mr. Robinson's proposal.

57. Mr. PAMBOU-TCHIVOUNDA said he too supported Mr. Robinson's proposed insertion, but was against using the commentary as a hold-all.

58. Mr. KABATSI said that it would be preferable to insert the words at the end of subparagraph (e) (iii). The first category of protected areas, namely, undefended towns, villages, dwellings or buildings, should take precedence.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he agreed with Mr. Kabatsi. Subparagraph (e) (iii) would read:

"(iii) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or demilitarized zones."

60. Mr. BARBOZA said that he endorsed the comments by Mr. Kabatsi. A demilitarized zone was legally defined as such, but it could be defended and could have troops in it, in which case it could not be considered as a sanctuary.
61. Mr. de SARAM said that, as he understood the insertion, it meant that it would be an undefended demilitarized zone.
62. Mr. ROSENSTOCK said that it would be preferable for the end of the subparagraph to read: "dwellings or buildings or of demilitarized zones", the "of" serving to set off demilitarized zones from "undefended", bearing in mind a situation in which, for example, peacekeeping forces might be involved. Presumably, everyone would agree on the need to make it clear in the commentary that the addition was in no way indispensable for the concept to be encompassed by the existing formulation.
63. Mr. GÜNEY said that he did not object to the insertion, but did not agree with Mr. Rosenstock's proposal for an explanation in the commentary.
64. Mr. BARBOZA asked whether that meant that a zone which had been declared demilitarized but in fact was defended by military forces fell within the purview of subparagraph (e) (iii). If so, it was unacceptable. It must be understood that the demilitarized zone was actually demilitarized. He might be wrong, but he did not think that the presence of peacekeeping forces could be considered a violation of the demilitarization of the zone. The idea of "undefended" was very important, because a demilitarized zone was not a sanctuary to be used by military forces in order to defend it.
65. Mr. ROSENSTOCK said that he would only be able to accept the insertion of "demilitarized zones" if the commentary made it clear that the Commission did not regard the text as not including them in the absence of that express form of language. Otherwise, it would lead to an *a contrario* implication for the International Tribunal for the Former Yugoslavia, which was the last thing the Commission ought to be doing.
66. Mr. TOMUSCHAT said that one of the preconditions of article 60 of Protocol I was that all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated. Only then could a zone be called demilitarized. Therefore, a zone with troops could not be so termed. The presence of United Nations peacekeeping contingents was a different matter altogether, and he did not think that they constituted an obstacle, because they were not combatants and therefore did not change the nature of the demilitarized zone.
67. Mr. IDRIS said that he fully supported Mr. Tomuschat's remark. It was important not to confuse the context of the provision under consideration with the legal status of peacekeeping. The terms of reference of peacekeeping were totally different and had no bearing on the subject under discussion.
68. Mr. BARBOZA said that he was grateful to Mr. Tomuschat for his explanation, but then it must be clearly stated that a demilitarized zone must be declared as such, because otherwise any empty piece of land would be a "demilitarized zone". There must be some way of saying that its status as a demilitarized zone had not been violated. A zone which had been declared demilitarized did not cease to be a demilitarized zone just because it had been occupied. It had been occupied in violation of its status of demilitarized zone.
69. The CHAIRMAN said that, as the notion of demilitarized zone was already defined in article 60 of Protocol I, he wondered whether there was any need to produce a new definition.
70. Mr. CRAWFORD said that, on the contrary, the commentary must refer to demilitarized zones as interpreted in article 60 of Protocol I. That would of course be picked up in the *chapeau* of the subparagraph on violations of the laws and customs of war, and to the extent that article 60 now reflected laws and customs of war, it would be incorporated by reference. It was not a question of making any changes to the substance of the article, but of making it clear. Although he had no objection to inserting "demilitarized zones" as defined in article 60 of Protocol I, the Commission must be very careful about any change suggesting either that such zones, as defined, were not already covered or that the Commission was somehow qualifying article 60.
71. Mr. Sreenivasa RAO said that the more it was discussed, the more blurred the concept of a demilitarized zone became. There was no need to redefine existing texts or what was generally acceptable. Mr. Barboza had made a good point, but it was clear that violation of a demilitarized zone would come under the laws of war themselves. The matter need not be addressed in the present context. As Mr. Idris had pointed out, peacekeeping had its own parameters. It was preferable simply to set out the article and leave the commentary to the Special Rapporteur.
72. Mr. YAMADA said he did not object to Mr. Robinson's proposal, but there was an additional element. The purpose of subparagraph (e) (iii) was to protect the victims of war. In speaking about undefended localities, one assumed that there were protected persons inside them, that is to say civilians. If the Commission added "demilitarized zones", presumably it was clear that there were also protected persons within the demilitarized zones. However, in the case of the demilitarized zone on the Korean peninsula between the north and the south, it was a no-man's-land, and he did not think an attack on that zone would constitute a war crime. In his opinion, the concept of demilitarized zone should be defined in the commentary.
73. Mr. BARBOZA said that he was willing to accept the inclusion of demilitarized zones in subparagraph (e) (iii) together with clarification of the concept in the commentary, but it should take the form suggested by Mr. Crawford, namely with a specific reference to article 60 of Protocol I.
74. Mr. IDRIS said that there appeared to be agreement on Mr. Robinson's proposal as amended by Mr. Rosenstock. Mr. Crawford had been stating the obvious: that in the commentary, the Commission should reiterate what article 60 of Protocol I stated. In his opin-

ion, the two proposals, namely regarding the article itself and the commentary, could be adopted.

75. Mr. KABATSI said that he had misgivings about the concept of a demilitarized zone. Mr. Yamada's point was well taken: the purpose of subparagraph (e) (iii) was to protect non-combatants and their property. Demilitarized zones often had no buildings or civilians but, for example, a strip of desert. For that reason, he was not sure that an attack on a demilitarized zone would constitute a crime against the peace and security of mankind.

76. Mr. GÜNEY said that, as he understood it, Mr. Rosenstock had suggested not an amendment to Mr. Robinson's proposed insertion, but the inclusion of certain points in the commentary. If the Commission agreed to the insertion, then there was no need for the commentary to be altered.

77. Mr. HE said that, unless a clear and unambiguous definition of the term "demilitarized zones" could be found, the Commission should be cautious about inserting it in the subparagraph, because it might give rise to abuse in an armed conflict or a war.

78. Mr. CRAWFORD said that the point made by Mr. He and other members showed why it was so important for the commentary to refer to Protocol I, article 60, paragraph 7, which stated that "If one of the Parties to the conflict commits a material breach of the provisions of paragraph 3 or 6, the other Party shall be released from its obligations" and that "In such an eventuality, the zone loses its status" as a demilitarized zone. Such status could, of course, be reaffirmed subsequently, but it disappeared in the event of a material breach. Therefore, the concerns voiced had in fact been incorporated in the carefully drafted provision of article 60.

79. Mr. VILLAGRÁN KRAMER said he was afraid that the addition of certain acts as crimes would create an obstacle to approval of the draft Code. He was putting himself in the place of countries that might think the Charter of the United Nations prohibited the use of force, only to authorize it in certain circumstances. Thus, war was banned. Except in specific cases, it was a crime. The proposed insertion led the Commission to forget the nature of the weapons currently used by armed forces. He had in mind what everyone had seen on television in connection with Iraq, where in the Gulf war there had been no demilitarized zones or areas in which weapons had been prohibited.

80. Again, ICJ had not yet resolved the question whether the use of atomic weapons was illegal or not. In his view, the Commission should be realistic and should not add too many elements, but should leave it to the working group that would be appointed by the Sixth Committee or the General Assembly to elucidate those highly technical and military questions.

81. Mr. THIAM (Special Rapporteur) said that, in his view, the draft article had been considered long enough. The discussion should be closed, since a reference would be made in the commentary, as pointed out by Mr. Crawford, to Protocol I, article 60.

82. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he agreed. However, the commentary should address not only Mr. Crawford's point, but also the very concept of a demilitarized zone. The commentary to article 60 stated that the expression was not in itself very accurate and went on to refer to islands such as those ceded by Italy to Greece and those situated between Sweden and Finland, as well as to the demilitarized zones in Korea and in the Middle East between Israel and its neighbours. In that regard the commentary said:

It is quite clear that the drafters of Article 60 did not have such zones in mind, even though they provided that demilitarized zones could be created already in time of peace. In fact, such different types of demilitarized zones, created by treaty, as mentioned above, are not created for wartime but for peacetime, or at least for an armistice.⁶

Then came what should be placed in the Commission's commentary:

In fact, this is the essential character of the zones created in Article 60: they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks.⁷

83. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (e) (iii) with the proposed addition, and explanation in the commentary.

It was so agreed.

84. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (e), as amended.

Article 18, subparagraph (e), as amended, was adopted.

85. Mr. KABATSI said he hoped that the proposal by Mr. Idris concerning the protection of literary works, and which basically had the protection of libraries in mind, had also been included in the text as adopted.

86. Mr. CRAWFORD said it was his understanding that the sole addition had been the one proposed by Mr. Robinson.

87. Mr. IDRIS said that the commentary should emphasize the need to protect literary works, but his suggestion had not been meant as an amendment to the article itself.

88. Mr. ROSENSTOCK said it was clear to him that the reference in subparagraph (e) (iv) to "works of art and science" also included literary works.

The meeting rose at 1.05 p.m.

⁶ C. Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Geneva, ICRC, Martinus Nijhoff, 1987), p. 709.

⁷ Ibid.

2448th MEETING

Wednesday, 26 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

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

ARTICLE 18 (War crimes) (concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of draft article 18.

Subparagraph (f)

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (f), which dealt with war crimes committed during armed conflict not of an international character, followed the model of article 4 of the statute of the International Tribunal for Rwanda.⁴ The wording of that article was closer to that of article 4, paragraph 2, of Additional Protocol II to the Geneva Conventions of 12 August 1949 than to the wording of article 3 common to those Conventions. The Drafting Committee had decided to follow the provision of the statute of the International Tribunal for Rwanda because, in its view, that was the most recent statement of the relevant law. It was a step, moreover, that took ac-

count of the reality of contemporary armed conflict and that had already been endorsed by the Security Council. Not to follow the model of the statute of the International Tribunal for Rwanda might have been considered regressive.

3. Subparagraph (f) (i) corresponded to article 3, paragraph 1 (a), common to the Geneva Conventions of 12 August 1949 and to article 4, paragraph 2 (a), of Protocol II. Subparagraph (f) (ii) corresponded to article 4, subparagraph (b), of the statute of the International Tribunal for Rwanda and to article 4, paragraph 2 (b), of Protocol II. Subparagraph (f) (iii) corresponded to article 4, subparagraph (c), of the statute of the International Tribunal for Rwanda, to paragraph 1 (b) of article 3, common to the Geneva Conventions, and to article 4, paragraph 2 (c), of Protocol II. Subparagraph (f) (iv) corresponded to article 4, paragraph 2 (d), of Protocol II. Subparagraph (f) (v) was taken from article 4, subparagraph (e), of the statute of the International Tribunal for Rwanda, which, in turn, was taken verbatim from article 4, paragraph 2 (e) of Protocol II. It also corresponded to article 3, paragraph 1 (c), common to the Geneva Conventions. The difference between subparagraph (f) (v) and paragraph 1 (c) of common article 3 was that the latter did not give examples of such outrages upon personal dignity, whereas article 4, paragraph 2 (e), of Protocol II, and article 4, subparagraph (e), of the statute of the International Tribunal for Rwanda did give examples of such practices. Subparagraph (f) (v) was also the same as article 18 (d). Subparagraph (f) (vi) corresponded to article 4, subparagraph (f), of the statute of the International Tribunal for Rwanda and to article 4, paragraph 2 (g), of Protocol II. Subparagraph (f) (vii) corresponded to article 4, subparagraph (g), of the statute of the International Tribunal for Rwanda, which was taken verbatim from article 3 (d) common to the Geneva Conventions. Subparagraph (f) thus codified provisions of existing law.

4. Mr. FOMBA noted that, as the Chairman of the Drafting Committee had stated, article 18, subparagraph (f), modelled on article 4 of the statute of the International Tribunal for Rwanda, with the slight difference that the latter provision gave the International Tribunal for Rwanda the possibility of dealing with other offences by specifying that "These violations shall include, but shall not be limited to" the offences listed therein. The difference deserved an explanation. In drafting the provision, the authors of the statute of the International Tribunal for Rwanda had followed in the footsteps of the Commission of Experts established pursuant to Security Council resolution 935 (1994), on Rwanda, which had in order to determine the legal foundations for the Tribunal's jurisdiction, considered several provisions for the purposes of the legal qualification of alleged acts whose commission it had proved possible to establish. The Commission of Experts had concluded that systematic, massive and flagrant violations had been committed of article 3 common to the Geneva Conventions of 12 August 1949 and of several provisions of Protocol II. It had therefore a broader concept of grave breaches committed in armed conflict not of an international character. It would of course be for the International Tribunal for Rwanda to confirm or to invalidate that conclusion by the Commission of Experts.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

⁴ See 2437th meeting, footnote 7.

5. Mr. LUKASHUK said that he accepted the text of subparagraph (f), but would like the word “protected” to be added before the word “persons” in the second line of subparagraph (f) (i) for the sake of clarity.

6. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), explaining that the Drafting Committee had not considered that point and that he was therefore speaking as a member of the Commission, said that Mr. Lukashuk’s proposal was, at first sight, a judicious one, even if the reference to protected persons was implicit in the *chapeau* of the subparagraph, which referred to “international humanitarian law applicable in armed conflict not of an international character”. Article 3, paragraph 1, common to the Geneva Conventions of 12 August 1949 contained the following definition of protected persons:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The article went on to state that the acts which it listed “are and shall remain prohibited . . . with respect to the above-mentioned persons”. The addition of the word “protected” would make explicit what was already implicitly contained in the text; it could be indicated in the commentary that, in that particular case, the words “protected persons” referred to persons covered by article 3, paragraph 1, common to the Geneva Conventions of 12 August 1949.

7. Mr. THIAM (Special Rapporteur) associated himself with the comments of Mr. Calero Rodrigues. By referring to international humanitarian law applicable in armed conflict not of an international character, the *chapeau* of subparagraph (f) indicated that protected persons were the only persons referred to.

8. Mr. PAMBOU-TCHIVOUNDA said he wondered whether it was appropriate to single out protected persons in such a way. He was not sure whether any “unprotected” persons existed and what the effect of thus singling out the “protected” ones would be. He proposed that the word *par* should be inserted after the word *particulier* in the French text of subparagraph (f) (i) and that the word “well-being” should be replaced by the word “integrity” to bring the text into line with article 17, subparagraph (j).⁵

9. Mr. TOMUSCHAT, supported by Mr. FOMBA, said that he had serious doubts about the advisability of adding the word “protected” before the word “persons”. As previous speakers had said, the concept was implicit in the text and he feared that such singling out might pave the way for interpretations *a contrario* and could oblige the Commission to review other provisions of subparagraph (f), in particular subparagraph (f) (v).

10. Mr. de SARAM associated himself with the comments made by the Chairman of the Drafting Committee and said that it was preferable to leave subparagraph (f)

(i) as it stood, the explanations given on the subject of article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Protocol II being reproduced in the commentary.

11. Mr. ROSENSTOCK said that he, too, thought that it would be better to reproduce in the commentary the terms used in article 3 common to the Geneva Conventions of 12 August 1949 rather than to refer to “protected persons” in subparagraph (f) (i).

12. Mr. LUKASHUK said that he was not convinced by Mr. Tomuschat’s arguments, if only because the application of international humanitarian law in armed conflict not of an international character represented a special case and a relative novelty. Furthermore, subparagraph (i) was different from the other subparagraphs of subparagraph (f) because the acts covered by those other subparagraphs were prohibited in respect of all persons, including those that were not protected. They were crimes of a general nature. However, he would not oppose the consensus provided that the explanations given by Mr. Calero Rodrigues were reproduced in the commentary.

13. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (f).

Article 18, subparagraph (f), was adopted.

Subparagraph (g)

14. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that the Commission had referred to the Drafting Committee (2431st meeting) a text dealing with the issue of damage to the environment in the context of armed conflict, to be placed in the article on war crimes. The result of the Drafting Committee’s work on that text appeared as subparagraph (g). Having failed to reach consensus, the Committee was proposing two alternatives. There had been general agreement in the Drafting Committee that the Commission, in proposing such a provision, was engaged in progressively developing the law. For that reason, the opening clause of the subparagraph, contrary to the subparagraphs preceding it, did not speak of violations of international humanitarian law. The wording used, “in the case of armed conflict”, indicated that the provision was *lex ferenda*. The expression “armed conflict” appeared with no further qualification because the Commission had agreed that the provision should apply to armed conflict of an international as well as a non-international character.

15. With regard to the text of the provision, both versions were inspired by paragraph 1 of article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949. Both texts referred to “using methods or means of warfare not justified by military necessity”. It should, however, be mentioned that some members of the Drafting Committee, while consenting to the retention of the words “not justified by military necessity”, would have preferred their deletion.

16. The most significant difference between the two texts was related to *mens rea*, or criminal intent. In alter-

⁵ For the text of article 17, subparagraphs (i) and (j), see 2444th meeting, para. 1.

native A, the use of methods and means of warfare was specified as being with the intention to cause widespread, long-term and severe damage to the natural environment, while, in alternative B, it would suffice to use such methods and means of warfare in the knowledge that they would cause widespread, long-term and severe damage to the natural environment.

17. In both alternatives, the damage to the environment had to gravely prejudice the health or survival of people. Moreover, in order for the act to come under the Code, it had to possess some degree of gravity. In alternative A, the requirement of intent also extended to causing grave prejudice to human health. In alternative B, however, the requirement of knowledge did not extend to the fact that such damage would occur. Both alternatives required that damage to the environment and prejudice to human health should have occurred in order for a particular use of methods and means of warfare to come under subparagraph (g).

18. There was one other difference between the two alternatives. In alternative A, the object of prejudice to health or survival was "the" population. The definite article implied that the population was that of the place where damage to the environment had occurred. That was the formula adopted in article 55 of Protocol I. Alternative B, however, spoke of "a" population, with the intention of including not only the population of the place where the environmental damage occurred, but also the population outside the immediately affected zone.

19. As previously explained, the Drafting Committee had been divided on the issue and had felt that a decision of such importance should be made by the Commission, in the hope that the Commission would be able to agree on a single text.

20. Mr. THIAM (Special Rapporteur) said that the Commission obviously could not submit two alternatives to the General Assembly. His own preference was for alternative A because it took account of intent. A provision of criminal law was involved and criminal intent was a constituent element of a crime; there would be no crime in the event of environmental damage caused by negligence or lack of due care.

21. Mr. HE said that, in his view, crimes against the environment should be included in the draft Code of Crimes against the Peace and Security of Mankind. Both alternatives A and B were modelled on article 55 of Protocol I and two comments were called for in that regard.

22. The first point was whether the word "environment" covered man-made environmental installations such as dykes and dams. Damage caused to such installations could have serious consequences for the health and survival of the civilian population. The commentaries to article 55 of Protocol I⁶ stated that changes to the "environment" could form part of means of warfare. In that context, not only objects protected under article 54 of Protocol I, entitled "Protection of objects indispensable to the survival of the civilian population" but

also those protected under article 56, entitled "Protection of works and installations containing dangerous forces", could be regarded as "environmental installations". Yet, in the wording of alternatives A and B as proposed by the Drafting Committee, the term "natural environment" appeared. Were man-made environmental installations, such as dams and dykes, therefore covered by the notion of "natural environment". At the very least, an explanation should be given in the commentary to clarify the precise meaning and scope of the notion of "environment" and "natural environment".

23. Secondly, for severe damage to the environment to constitute a war crime, two conditions had to be met: means of warfare "not justified by military necessity" must have been used, and they must have been used "with the intent" to cause damage. Those two elements should be included in the provision adopted. Another important factor should also be taken into consideration, namely, that environmental damage could be caused by a State in the exercise of its right of self-defence or for the purpose of maintaining its territorial integrity and independence. In such a case, a derogation from the prohibition set forth in the provision under consideration would be necessary. In that connection, the commentaries to articles 54, 55 and 56 of Protocol I cited examples of severe damage to the environment, such as, the scorched earth policy followed by China during the Sino-Japanese war (1937-1945) and other examples that justified the use of such means of warfare to slow down the invasion of the aggressor. In such cases, the party to the conflict defending its territory had to take such extreme measures due to an imperative military necessity, but it had no intent to cause damage to the life and survival of its own people.

24. In view of the foregoing, the Commission should adopt alternative A and it should be explained in the commentary that the acts punishable under subparagraph (g) would be justified if they were committed by a State in the exercise of its right of self-defence or to maintain its territorial integrity and national independence.

25. Mr. CRAWFORD said that, in his view, the expression "not justified by military necessity", which appeared in both alternatives, suggested that the acts covered in the provision could sometimes be lawful. Unless that wrong impression were corrected in the commentary, subparagraph (g) would be unacceptable. A related concern raised by Mr. He was that self-defence was not the only situation involving military necessity: the aggressor also had his own military necessity. But, aggression of course constituted a crime in itself and came within the ambit of another provision in the draft Code. He could therefore accept alternative A provided that the commentary reflected his concerns.

26. Mr. ROSENSTOCK said that he wished to record his agreement with the comment made by Mr. Pellet (2430th meeting) that crimes against the environment were lacking in any legal basis either in internal law or in international law. But, as already noted, the events that had taken place in the Gulf war had had a considerable influence on the views with respect to that crime that had led to General Assembly resolution 47/37,

⁶ See Pilloud and others, *op. cit.* (2447th meeting, footnote 6).

which stated that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”. A number of conferences, meetings and symposia had subsequently been held following which the Secretary-General had decided that the international community was not prepared to create a new body of international rules and that it wished to abide by the existing law.

27. In his view, therefore, extreme caution was required when characterizing crimes against the environment: punitive provisions should be confined to the most heinous acts, those that were truly unacceptable. It was important not to try to make subparagraph (g) say too much.

28. Although he was not altogether convinced by alternative A and had reservations about the subparagraph itself, he was prepared to join in any consensus reached on its wording provided, as Mr. Crawford had said, that the necessary explanations were given in the commentary.

29. Mr. LUKASHUK said he considered that the draft Code should include a provision like that in subparagraph (g). The bases for that provision lay in positive law, such as the Convention on the Prohibition of Military or Any Other Hostile use of Environmental Modification Techniques or even Protocol I. The Commission was therefore bound to cover environmental damage in the draft Code. Furthermore, at the fiftieth session of the General Assembly, the majority of Member States had come out in favour of characterizing “ecocide” as a crime, and only three States, France, Brazil and the Czech Republic were against it.

30. Mr. TOMUSCHAT pointed out that breaches of the terms of articles 35 (Basic rules) relating to methods and means of warfare and 55 (Protection of the natural environment) of Protocol I were not covered by article 85 (Repression of breaches of this Protocol), as they did not constitute “grave breaches” within the meaning of that article. There had, however, been many developments since the adoption of Protocol I. Subparagraph (g) had its bases in the general principles of law. No country could agree to see its environment destroyed and the survival of its people placed in jeopardy. It also had bases in positive law, as already noted.

31. The two proposed alternatives provided for an element of intent and rightly so, since intent was the basis of a crime. The difference between the two alternatives derived from the fact that the first provided for two levels of intent: the intent “to cause widespread . . . damage” and the intent to “gravely prejudice the health . . .”. That twofold requirement seemed to set a very high threshold, whose elements would in any event be almost impossible to prove.

32. Even if the Commission did not opt for alternative B, it had already agreed, in articles 18, subparagraph (a) (iv), to make “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” a crime. For example, setting fire to forests as part of a scorched earth strategy would fall within the scope of that subparagraph. Ecological crime was already therefore partly covered.

33. As Mr. Crawford had pointed out, the expression “not justified by military necessity” was somewhat awkward, as it suggested that it was sometimes lawful to place the survival of a population in jeopardy. If absolutely necessary, that expression could be retained in alternative B, but, if alternative A was adopted, it would have to be omitted unless the necessary explanations were given in the commentary.

34. Mr. He had rightly wanted to introduce a distinction between the aggressor and the victim of aggression in an armed conflict. International humanitarian law, however, knew no such distinction. Nonetheless, the victim state should at least have the right, in the case of self-defence, to harm its own environment. His preference was for alternative B.

35. Mr. KABATSI said that subparagraph (g) commanded his full support, as it was inconceivable to think of protecting international peace and security without also protecting the environment. The choice between alternatives A and B actually depended on how bold the Commission would want to be. Alternative A underlined the twofold intent the perpetrator of the crime should have: to cause damage and gravely to prejudice the survival of the population. That, however, as Mr. Tomuschat had pointed out, was a very high level of intent and would in any event be difficult to prove in practice.

36. Consequently, although alternative A placed the emphasis on specific intent and alternative B provided for responsibility by deduction in actual fact the difference between the two was not so great: in both instances, the facts of the particular case would have to be weighed to determine whether there had been “intent” or “knowledge”. However, even in the case of self-defence, a State could not, when at war, use a means, such as poisoning waters, which no “military necessity” could justify.

37. He would prefer alternative B, but would like the words “a population” to be replaced by the words “the population”. If the Commission chose alternative A, he would go along with the consensus, but it should be noted that that alternative clearly raised the problem of the exception of “military necessity”. Was it possible to have the intent to do something and at the same time be obliged to do it by necessity?

38. It did not seem advisable to refer expressly in the Code to the case of installations containing dangerous forces, which Mr. He had raised, because anyone who damaged installations of that kind necessarily caused environmental damage.

39. Mr. FOMBA said that the category of crimes in question was certainly no myth and very much a reality. It was therefore amenable to a provision in the Code. Such a provision, however, raised the problem of its basis in law and of its degree of positivity: was it, in that particular case, a matter of *lex lata* or *lex ferenda*? For his own part, he was prepared to go along with the argument that the field to be codified actually fell in between the two, in that the legal basis for making the acts in question a crime had not really been consolidated. Yet it existed, in Protocol I (in particular, articles 35 and 55), in Protocol II (in particular, articles 13 and 14) and also

in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. It had just been said that the crimes in question did not fall within the ambit of article 85 of Protocol I, but the opening clause of paragraph 3 of that article did indeed refer to "acts . . . causing death or serious injury to body or health"; that wording should be compared with the wording of alternatives A and B, which laid down the same criteria, namely, intent and the consequence.

40. The two alternatives proposed were not in fact very different. It was difficult to have the intent to cause damage without knowing that one would in fact cause it and, conversely, it was difficult to commit an act without intent when one knew the consequences in advance. But, since the concept of intent was hallowed in legal writings, in his view, alternative A should be chosen.

41. There remained the problem of "military necessity" as an exception to the obligation to protect the environment. It was a difficult concept to interpret in a general way. Moreover, it raised the problem of evidence: how could the court be persuaded of the existence of "military necessity"? If, therefore, the Commission retained that exception—although it would be better to drop it—it could perhaps limit its scope by referring to "imperative military necessity" to raise further the threshold of applicability. That qualification was in fact used in article 54, paragraph 5, of Protocol I.

42. Even though there was no very solid basis in positive law, moral and legal reasons dictated the need to include subparagraph (g) in the draft Code and, for his part, he would prefer alternative A.

43. Mr. YAMADA said that his preference was for alternative B. He could see a difference between the two proposed alternatives, which the Special Rapporteur had brought out clearly: it was easier to prove that the perpetrator of an act had had the intent to commit that act than to establish that he knew the consequences in advance. But the difference was blurred when it came to substance, since, if a person knew the consequences of his act and committed it none the less, he certainly had the intent to commit it. The Commission had in any event already recognized the element of "knowledge" in the definition of crimes by providing for individual responsibility in article 2, paragraph 3 (d), of the draft Code.

44. In his view, subparagraph (g) was a very important provision of the Code. As to the choice of alternative, despite his inclination, he would join in the general consensus of opinion if alternative A commanded a consensus.

45. Mr. GÜNEY said that, while he was very much alive to the arguments in support of alternative B, he had a distinct preference for alternative A, quite simply because the element of intent was, as a general rule, a constituent part of a crime and that was stated unambiguously in alternative A. He would, however, accept that alternative only if the Commission agreed to Mr. Crawford's proposal on the explanation to be given in the commentary with regard to the interpretation of "military necessity".

46. Mr. Sreenivasa RAO said that the Commission could clearly not overlook widespread and long-term damage which might be caused to the natural environment, although the military context in which it had been decided to place such acts was very particular. He was nevertheless not entirely satisfied with either of the proposed alternatives. The question of the threshold of gravity was not stated correctly in either one. In addition, the relationship between the acts committed and the resulting consequences and the point at which such consequences should be considered to come within the scope of the Code were not specified clearly enough. He recalled that the purpose of the Code was to be an instrument of dissuasion by preventing the future commission of acts which could be prosecuted under the Code, as well as a basic reference to make the international community aware of the problem, provide it with guidelines in that area and encourage it to be vigilant in preventing that type of crime. The Code was meant to be applied in actual situations and, in those circumstances, it was very unfortunate that the proposed provisions were not more precisely targeted.

47. It was probably too late to draft new proposals and, if a choice had to be made between alternative A and alternative B, he would choose the latter for the same reasons as Mr. Tomuschat. Alternative B had the advantage of eliminating the idea of "intent", which, because of its subjective nature, gave rise to problems of both interpretation and proof.

48. Mr. VARGAS CARREÑO said that he fully supported the inclusion in the draft Code of the crimes mentioned in article 18, subparagraph (g). At the same time, both of the proposed alternatives contained a subjective element which was essential to the characterization of the crimes in question. In alternative A, it was intent and, in alternative B, it was knowledge. While it was often necessary in criminal matters to base the definition of crimes on subjective elements, it was better in drafting an international instrument to place as much emphasis as possible on an objective description of the acts in question in order to avoid problems of application, interpretation and proof.

49. There was, as Mr. Sreenivasa Rao had noted, probably not enough time to revise the text substantially, but the Commission might wish to consider the following wording, which would help eliminate those subjective elements:

"using methods or means of warfare not justified by military necessity and which cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population, and such damage occurs."

50. Nevertheless, if the Commission adopted one of the two proposed alternatives, he would be more in favour of alternative B, with the idea, once again, of attenuating the subjective element. In the event of war, the belligerents' objectives were, by definition, always military objectives and the perpetrator of the harmful acts could argue that he had never "intended" to cause damage.

51. Mr. VILLAGRÁN KRAMER said he welcomed the fact that the Commission had decided to include environmental damage in the Code. He regretted, however, that the question had been raised only in the context of armed conflict. Jurists from developed countries probably had concerns that were different from those of jurists in the third world, who were dismayed at the fact that it was possible, in time of peace, to cause damage to the environment that was comparable to a genuine crime against humanity.

52. The members of the Commission who, like himself, had participated in the debates in the Sixth Committee at the fiftieth session of the General Assembly could not have failed to notice how much importance delegations attached to that problem. He none the less respected the Commission's decision to take account only of crimes against the environment in time of war and, like Mr. Fomba, therefore had some doubts about the applicable law in that regard in the context of armed conflict. He was not a specialist in military law, but he had not found provisions in the texts on the laws of war that he had been able to consult which applied expressly to the environment. That might be the result of the fact that, until recently, the environment had not been regarded as an asset to be protected by legal provisions. He had, moreover, been struck by the fact that, during the Second World War, the belligerents, which had, moreover, carried out horrible massacres, had never thought to burn down forests.

53. If there were no applicable rules of positive law, the Commission might establish such rules with a view to *lex ferenda*. To that end, it should, in his view, take account of several criteria. Were the natural resources which were damaged renewable or non-renewable? Was the damage caused to those resources permanent or reversible? In that connection, it might be useful to use wording similar to that of article 18, subparagraph (e) (i), and refer to the employment of poisonous weapons for the purpose of damaging the environment. The international community had been moved by the excessive exploitation of the Amazonian forest, but what about the destruction by napalm of the forests of Viet Nam? The industrialized countries, which had a formidable array of technical resources for preventing environmental damage caused by natural catastrophes, as well as for inflicting enormous damage on the environment of neighbouring countries, needed to propose a more convincing wording for that subparagraph. He had listened with interest to the arguments put forward by the previous speakers in favour of each alternative; he personally had no preference.

54. Mr. MIKULKA said he was glad that the Commission had decided against its original idea of treating intentionally caused damage to the environment as a separate crime. In so doing, it would have strayed much too far from its mandate, which was basically to codify the law in force. The two alternatives proposed seemed to him to represent a step forward from that point of view. While preferring alternative B, he would agree to go along with alternative A if that would help the Commission reach a consensus, which was always desirable from the standpoint of the progressive development of the law.

55. Mr. CALERO RODRIGUES, speaking as a member of the Commission, said that he also preferred alternative B, but was willing to accept alternative A. In both texts, the central element was damage caused to the environment, which had to be widespread, long-term and severe. The term "crime" always involved an element of intent, but did it have to be a requirement that the person who had done the damage had to have "intended" to cause it? It would be both sufficient and more logical to specify that the person must have been aware of what he was doing. He took note of the comment by Mr. Crawford on the expression "not justified by military necessity", which might imply *a contrario* the obligation to obtain an authorization, for example, to use certain substances as means of warfare.

56. Mr. LUKASHUK, reaffirming the view he had expressed in his earlier statement, said that he tended to prefer alternative A, which appeared to be more in keeping with positive law. The proposal made by Mr. Vargas Carreño would define as a crime under international law any act which resulted in widespread, long-term and severe damage to the environment, even where such damage had not been caused either intentionally or even consciously. He pointed out that the subjective element was very important in criminal law.

57. On another matter, he fully understood Mr. Villagrán Kramer's concerns and sincerely hoped that the Commission would be able to respond to them. That would, however, mean starting all over and he was afraid that the Commission would not have enough time to do so.

58. Mr. de SARAM said that the provisions of article 18, subparagraph (g), had not been drafted to protect the environment or in an attempt to codify in an international instrument the decisions of the United Nations Conference on the Human Environment⁷ and the United Nations Conference on Environment and Development.⁸ That was the work of UNEP. The Commission was concerned in the current case with a much more limited issue—that of damage caused to the environment in time of armed conflict. It was not, of course, easy to know what was justifiable in wartime. The two alternatives under consideration were based mainly on article 55 of Protocol I, but articles 54 and 56 would also be relevant. Moreover, as Mr. He had rightly pointed out, the question of self-defence could not be avoided in the case of an international armed conflict.

59. In fact, alternatives A and B both seemed to him to leave too much room for interpretation. As they stood, they could end up defining as criminal behaviour acts which might not be on the level of gravity implied by the idea of a "crime against the peace and security of mankind". In short, the two proposed texts were too imprecise, had too broad a scope to be applicable in practice and did not reflect existing law. Thus, while he under-

⁷ See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum).

⁸ See *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda).

stood the Commission's concern to take account of environmental issues, he preferred to abstain and would not choose either one alternative or the other.

60. Mr. YANKOV said that he had already made his views known as a member of the Drafting Committee. He was personally convinced that, under the pressure of international public opinion, widespread, long-term and severe damage to the environment would, one day or another, be regarded as a crime against humanity. It was, moreover, of little importance whether such a crime was committed in wartime or in peacetime.

61. He nevertheless understood that the Commission had to bow to practical considerations and draft texts not for its own satisfaction, but to serve as instruments in relations between States. He was accordingly prepared to support either alternative A or alternative B, with a slight preference for the latter, for the various reasons given by those who had spoken before him.

62. Mr. KUSUMA-ATMADJA said that he had already had an opportunity to point out, both in the working group on the issue of wilful and severe damage to the environment (art. 26)⁹ and in the Drafting Committee, that, by "criminalizing" acts such as those referred to in subparagraph (g), the Commission was, in his view, going too far given the current state of international law. In such circumstances, it was understandable that he should be tempted to abstain and not choose either of the alternatives. He had never, however, been opposed to the idea of including preliminary provisions in the draft Code which could later be improved on as the situation changed. If the proposed texts were thus seen as working tools, he was willing to support them in order to facilitate consensus, taking account, however, of the comments by Mr. Crawford and Mr. He. In that case, he had a slight preference for alternative B.

63. Mr. THIAM (Special Rapporteur), referring to the circumstances which had led the Commission to include a text on the environment, said that, on first reading, he had proposed a text applicable to the environment in general and not exclusively to damage to the environment in the case of war crimes. Since most Governments had held the view that it was too early for a text on the environment, he had, with regret, put aside his draft. One member had then requested that the Commission should reconsider the question of damage to the environment; the debate had been reopened in a plenary meeting and the question had been referred to the Drafting Committee. The Commission had before it the results of the Drafting Committee's work and he noted that the members were divided. In his view, if the Commission wished to propose a text to the General Assembly, that text must not, if it was not to be weakened, reflect too much disagreement. The problem was actually more one of expression than of a real difference of opinions, since no one was excluding intent. Everyone acknowledged that guilty intent was an absolute prerequisite for a crime. Some members wanted intent to be referred to expressly, while others wanted to deduce it from the words "in the knowledge that". The disagreement was therefore not one of substance and it was up to the Chairman

to find wording that would enable the Commission to reach a consensus.

64. The CHAIRMAN, speaking as a member of the Commission, said that he tended to be in favour of alternative B, for the reasons expressed by Mr. Tomuschat and Mr. Yankov. Like them, however, he was open to consensus solutions.

65. Speaking in his capacity as Chairman, he said that he did not think that there was a real substantive disagreement within the Commission. On so new and sensitive a topic, it was normal that there should be differences in approach to crimes against the environment in the framework of the draft Code. Thus, some members would have preferred that such crimes should be referred to in both wartime and peacetime; however, it was necessary to take account of the views of States and to propose to them a draft which would be acceptable.

66. It was clear from the statements by the members of the Commission that there was a preference for alternative B, but that those in favour of it were willing to accept alternative A in order to arrive at a consensus. The Commission was in fact dealing with an area that involved both the codification and progressive development of international law and it would be reasonable to refer a consensus text to the General Assembly. As part of that consensus, the point made by Mr. Crawford must be taken into account. The expression "not justified by military necessity" gave rise to a serious problem because it could be concluded that the Commission might be saying that the acts in question were lawful in other circumstances. It might be suggested that Mr. Crawford should include an explanation in the commentary which would clearly show that that was not the Commission's intention, because that was an important point. On that basis and taking account of the reservations and preferences of each member, he suggested that the Commission should adopt by consensus a provision which could carry weight with States when they received the draft Code. He therefore requested the members of the Commission to support alternative A for the purpose of consensus.

67. Mr. CRAWFORD said he agreed with the idea that it was more important to arrive at a consensus on alternative A, with or without amendment, than to perpetuate a dispute over two alternatives which, for the reasons given by Mr. Fomba and others, were not as far apart as some speakers had said. He wondered whether, as part of a consensus, it might not be possible to dispel the doubts he and others had about the reference to military necessity by taking up Mr. Fomba's idea of adding the word "imperative" used in Protocol I and he expressly invited the members of the Commission to adopt that proposal.

68. Mr. TOMUSCHAT said that, if a person intended to cause widespread, long-term and severe damage to the natural environment and thereby gravely to prejudice the health or survival of the population, the acts committed by such a person could never be justified by military necessity. In a spirit of consensus, he was therefore prepared to go along with alternative A in preference to alternative B. In the same spirit of consensus, however, he believed the advocates of alternative A should agree to

⁹ See 2427th meeting, footnote 1.

the deletion of the words “not justified by military necessity”.

69. Mr. ROSENSTOCK said the fact that all texts in related areas of the law, and most importantly, those of ICRC, referred to military necessity justified the retention of that phrase in subparagraph (g). If the Commission were to begin amending that subparagraph in an attempt to describe the military necessity involved in each specific case, that would raise more problems than it would solve. On the other hand, the Commission could certainly indicate in the commentary that the degree of military necessity must be very high indeed.

70. Mr. IDRIS said that he supported alternative A as it stood. The Commission might specify in the commentary the degree of military necessity that would justify the results referred to in subparagraph (g), but, if it started discussing whether the phrase in question should be deleted or the word “imperative” should be added, it would be calling the content of the entire text into question.

71. Mr. AL-BAHARNA congratulated the Drafting Committee on having succeeded in including in the draft Code of Crimes subparagraph (g) in the form of two alternatives. It was entirely understandable and justified that it should have decided, for the purposes of the draft Code, to limit the effect of that subparagraph to armed conflict. When he had read the two alternatives, namely, alternative A dealing specifically with intent (*mens rea*) and alternative B relating to knowledge, he had initially thought that he supported alternative A, but, hearing the viewpoints expressed by other members, he was convinced that it was advisable and appropriate to adopt alternative B, which apparently had more supporters than alternative A. Mr. Crawford had made a very useful comment on the words “not justified by military necessity”. He shared Mr. Crawford’s concerns and agreed with the Chairman’s suggestion that they should be referred to in the commentary.

72. In view of the two proposals on alternative A, made by Mr. Crawford and by Mr. Tomuschat, he had the impression that the deletion of the words “not justified by military necessity” might enable members who were in favour of alternative B, including Mr. Tomuschat, to support alternative A. That would be a very good way of achieving consensus and the text would read well without the qualification relating to military necessity. He was therefore prepared to support that solution.

73. He also had two other comments to make. First, in view of the explanations by the Chairman of the Drafting Committee on the difference between the definite article before the word “population” in alternative A and the indefinite article before that word in alternative B, he proposed that, at least in the English text of alternative A, the Commission should delete the word “the” before the word “population”. The subparagraph would then refer to any population, whether in or outside the area under consideration. Secondly, in the English text, the words “and such damage occurs” were not very clear and should be replaced by the words: “provided such damage occurs”.

74. Mr. THIAM (Special Rapporteur) said that the Commission had now looked at the question from every angle. He suggested that it should agree to the very wise suggestion by the Chairman for the adoption of the text and the inclusion in the commentary of all the comments and reservations made, particularly with regard to the idea of adding the word “imperative”. The words “military necessity” were found in all the conventions, but had been criticized in many works on international law.

75. Mr. CRAWFORD said that he was willing to draft the commentary, incorporating the comment by Mr. Rosenstock that, in the context of the type of damage covered by subparagraph (g), the degree of military necessity must be very high: the reservation would thus already be implicitly contained in the text. On that basis and on that basis alone, he was prepared to withdraw his proposal.

76. The CHAIRMAN said the debate showed that the Commission wanted to adopt alternative A, on the understanding that explanations would be included in the commentary to reflect the views expressed and the proposals made.

Alternative A of subparagraph (g) was adopted, on that understanding.

77. Mr. TOMUSCHAT pointed out that, before adopting subparagraph (g), the Commission had not defined the meaning of the word “long-term”. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, some representatives had maintained that the term should be understood to mean about 10 years.¹⁰ The Commission had simply used that term in its text without specifying what it actually meant and it would now be up to judicial bodies to define it. Since the Commission had not discussed the matter, it could not be said to have endorsed the interpretation given by certain representatives at that Conference.

78. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), noting that the Commission had adopted all the subparagraphs of article 18, proposed that the article as a whole should be adopted. He recalled that the title had been amended and now read: “War crimes”. Since any reference to exceptional gravity had been deleted from the text, the Drafting Committee had removed it from the title as well.

79. Mr. de SARAM said that, in his view, the title “War crimes” did not adequately reflect the basic distinction made in existing law between international armed conflict and armed conflict not of an international character. Subparagraph (f) which the Commission had just adopted dealt with armed conflict not of an international character and the text was based on article 3 common to the Geneva Conventions of 12 August 1949 and the relevant provisions of Protocol II, particularly article 4 on fundamental guarantees. Subparagraphs (a) to (e) relating to international armed conflict were taken mainly from The Hague Convention (IV) of 1907 and its

¹⁰ The fourth session was held in Geneva from 17 March to 10 June 1977.

annex (Regulation concerning the Laws and Customs of War on Land), as well as from the provisions on grave breaches contained both in the Geneva Conventions of 12 August 1949 and in Additional Protocol I thereto.

80. The distinction in existing law between international armed conflict and armed conflict not of an international character was relevant in terms of jurisdiction. In the case of armed conflict not of an international character, international law provided that crimes came under the national jurisdiction of the State in which the violation of the applicable international humanitarian law had occurred. In the case of international armed conflict, however, violations of existing law came under both national jurisdiction and obligatory universal criminal jurisdiction. That was the important distinction. In that connection, he was not referring to the International Tribunal for the Former Yugoslavia¹¹ or to the International Tribunal for Rwanda, both of which were governed by and derived their authority from their statutes.

81. The expression "war crimes" applied under existing law exclusively to violations of The Hague Convention (IV) of 1907 and its Regulation and to the provisions on grave breaches in the Geneva Conventions of 12 August 1949 and Protocol I. Applying that expression to non-international armed conflicts or, in other words, to internal conflicts would not be in line with its meaning under existing law. It would have been infinitely preferable to use the wording "Crimes in armed conflict" for the title, which would have covered both situations. He stressed that he had no argument with any substantive provision in article 18, subparagraph (f), and he endorsed the idea that, when the acts it referred to were committed as indicated in the *chapeau* of the article, they were international crimes. The point he wanted to make was that, if the Commission made no distinction between international armed conflict and armed conflict not of an international character, that would certainly create confusion, in the public mind at least, about how the wording of article 18 accorded with existing law. Readers might wonder whether the Commission had not been unduly innovative in using the phrase "War crimes" to describe violations committed as part of internal armed conflicts.

82. If the title of article 18 had been amended along the lines he had suggested, the same amendment would have had to have been made in the *chapeau* of the article. In conclusion, he noted that the statute of the International Tribunal for Rwanda, which dealt with an internal armed conflict, referred only to genocide and crimes against humanity and used the provisions of article 3 common to the Geneva Conventions of 12 August 1949, which, under existing law, applied to internal armed conflict.

83. Mr. ARANGIO RUIZ endorsed the point of view expressed by Mr. de Saram and said that it would have been preferable to amend the title of article 18 and the wording of the *chapeau* as well.

84. Mr. THIAM (Special Rapporteur) said the question raised by Mr. de Saram had been extensively debated

several years earlier and he himself had questioned in his seventh report¹² whether the word "war" should be retained or whether it should be replaced by the words "armed conflict". At that time, the Commission had felt that, while war was regarded as unlawful, the expression "war crimes" had become so commonplace that it should be retained in the title. It was, however, only a title and the commentary could explain what was meant. In any event, the Commission had already decided the matter.

85. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt the title of article 18 as proposed by the Drafting Committee.

It was so decided.

86. The CHAIRMAN invited the Commission to adopt the *chapeau* of article 18.

87. Mr. IDRIS said the statement in the *chapeau* that each of the war crimes covered by the article "constitutes a crime against the peace and security of mankind" was illogical, since it gave the article an entirely different treatment from the other substantive articles in the draft Code, such as article 16 (Genocide) or article 17 (Crimes against humanity). Furthermore, since the phrase "crimes against the peace and security of mankind" appeared in the title of the draft Code, it seemed useless to repeat it in a rather arbitrary way in only one article. That was not a legal problem, but merely one of drafting.

88. He also wanted to make it clear that he would have wished article 18, like articles 16 and 17, to contain a clear-cut definition, which might read: "War crime means any of the following acts, when committed in a systematic manner or on a large scale".

89. The CHAIRMAN said that it was difficult to draft that provision along the lines of articles 16 and 17 because war crimes were not all of such gravity as to make them crimes against the peace and security of mankind under the Code. There were some war crimes, as defined in humanitarian law conventions, which were not covered by the Code. The same was not true of genocide and crimes against humanity, for which there was only one definition. It was thus a drafting matter that accounted for the difference in the wording of the *chapeau* of article 18.

90. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt the *chapeau* of article 18.

It was so decided.

Article 18, as a whole, was adopted.

91. The CHAIRMAN recalled that the Commission still had to take up Mr. Rosenstock's proposal on crimes

¹¹ See 2437th meeting, footnote 6.

¹² See *Yearbook . . . 1989*, vol. II (Part One), p. 82, document A/CN.4/419 and Add.1.

against United Nations and associated personnel (ILC (XLVIII)/CRD.2 and Corr.1).

The meeting rose at 12.50 p.m.

2449th MEETING

Thursday, 27 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING³ (*continued*)

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

ARTICLE 19 (Crimes against United Nations and associated personnel)

1. The CHAIRMAN said that, following the adoption of the articles of the draft Code of Crimes against the Peace and Security of Mankind proposed by the Drafting Committee, the Commission at the current time, would begin its consideration of a proposal for a new article on crimes against United Nations and associated personnel contained in a memorandum (ILC(XLVIII)/CRD.2 and Corr.1). The revised text of the proposal, submitted by

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

Mr. Rosenstock at the suggestion of the Drafting Committee, read:

“Crimes against United Nations and associated personnel

“1. A crime against United Nations and associated personnel means the intentional commission of:

“(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

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

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

The Commission also had before it a memorandum by Mr. Pellet on the same subject (ILC(XLVIII)/CRD.5).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he wished to draw the Commission’s attention to an issue discussed in the Drafting Committee, namely the inclusion of an additional crime in the draft Code. One member of the Drafting Committee, Mr. Rosenstock, had proposed that crimes committed against United Nations and associated personnel should be included as a fifth crime under the draft Code and had referred to General Assembly resolution 49/59, which had adopted the Convention on the Safety of United Nations and Associated Personnel. The Drafting Committee had considered that it was not entitled to discuss the proposed article because it had only had a clear mandate concerning a number of specific articles. The proposal for the inclusion of attacks on United Nations and associated personnel had received support from some members of the Drafting Committee. It had been noted that such attacks and the threat they posed to international peace and security were of concern to the Security Council, the General Assembly and the Secretary-General. The possibility of including crimes against United Nations personnel had also been discussed in the Preparatory Committee for the Establishment of an International Criminal Court. However, the Drafting Committee had not found it appropriate to take a decision on the issue of including that crime in the draft Code, because it had not been discussed in plenary.

3. Mr. ROSENSTOCK, briefly summarizing his memorandum, pointed out that nothing could be said to be more clearly an attack against the peace and security of mankind than an attack on the personnel of an organization whose first purpose was to maintain international peace and security. By and large, as the Secretary-General had pointed out in a note on the matter,⁴ that in the past the fact of working under the banner

⁴ A/AC.242/1.

of the United Nations provided personnel with safe passage and an unwritten guarantee of protection. Unfortunately, that was no longer the case. In response to the growing number of attacks on United Nations personnel and calls from the Secretary-General and the Security Council to take action, the General Assembly had established a working group to elaborate a convention. Upon the recommendation of the Sixth Committee, the General Assembly had adopted and opened for signature the Convention on the Safety of United Nations and Associated Personnel.

4. It would be difficult to explain how another United Nations body, one which reported to the Sixth Committee, could produce a draft Code of Crimes against the Peace and Security of Mankind that ignored the Convention. There were crimes, such as genocide, which were so terrible that they intrinsically required inclusion in any list of crimes against the peace and security of mankind. Other crimes, such as some war crimes, were so grave because of extrinsic factors.

5. The consequences of tolerating attacks against United Nations personnel or failing to treat attacks against them as one of the most serious crimes meant failing to perceive the threat posed to the very existence of the institution of peacekeeping. Peacekeeping by interposition or military observers could not endure for long if the international community did not protect the United Nations personnel involved and take every opportunity, including the draft Code, to give evidence of the seriousness of its commitment.

6. The proposed additional article replicated provisions of the Convention on the Safety of United Nations and Associated Personnel that dealt with individual criminal responsibility for those who committed attacks against United Nations personnel. Paragraph 1 of the proposed article was based on article 9 of the Convention, which was entitled "Crimes against United Nations and associated personnel". Paragraphs 1 (a) and 1(b) of the proposed article repeated article 9, paragraphs 1 (a) and 1 (b), respectively, of the Convention. Subparagraphs (c), (d) and (e) of paragraph 1 of article 9 of the Convention were substantially covered by article 2 of the draft Code. In that respect, the scheme was structurally the same as one used by the Commission to handle, for example, the Convention on the Prevention and Punishment of the Crime of Genocide. The scope of the phrase "United Nations and associated personnel" and the activities covered must be understood as being identical to the coverage of article 9 of the Convention. The use of identical formulations in the same context, the *travaux préparatoires* that the Commission was creating at the current time and the commentary could underline that understanding and make it explicit. The meaning of the term "United Nations personnel" was straightforward and scarcely needed further explanation, but again, could and should be underlined in the commentary.

7. Paragraph 2 of the proposed new article repeated verbatim article 2, paragraph 2, of the Convention on the Safety of United Nations and Associated Personnel, which had been agreed to by all concerned only after lengthy negotiations and consultations. The precise wording should be retained. As his memorandum stated,

the function of paragraph 2 was to ensure that, while providing needed coverage to United Nations personnel, conduct would not be made a crime on the grounds that it was directed against personnel involved in a United Nations operation which was mandated to take part and was, in fact, taking part in a combat situation against organized armed forces to which the laws of international armed conflict applied. United Nations personnel would be covered by the Convention and by the draft Code unless they were covered by the law on international armed conflicts.

8. Mr. Pellet, in his memorandum, argued that since attacks on United Nations personnel had not been included in the Charter of the Nürnberg Tribunal,⁵ the Commission should omit them. But at that time, United Nations peacekeeping had not existed. For that matter, genocide had not been included in the Charter of the Nürnberg Tribunal either. Personally, he preferred to include both genocide and attacks on United Nations personnel in the draft Code. Mr. Pellet argued that the problem of United Nations personnel was not included in the statute of the International Tribunal for the Former Yugoslavia⁶ and the statute of the International Tribunal for Rwanda.⁷ As in the case of Nürnberg and of genocide, the Convention had come later. Likewise, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda did not include aggression, but he was not sure there was wide agreement that that constituted grounds for excluding aggression from the draft Code.

9. Attacks against United Nations and associated personnel were attacks committed against persons who represented the international community and protected its interests. Such attacks were committed against the international community itself. United Nations and associated personnel were often involved in situations in which the national law enforcement or criminal justice systems were not fully functional or capable of dealing with such crimes, for example, in the case of failed States. If it did not take the necessary step to protect those acting on behalf of the organized international community, what kind of message was the Commission, as a United Nations body, sending forth? For all those reasons, he urged adoption of the proposed article.

10. Mr. PELLET said that, although no one in the Commission would reasonably deny that Mr. Rosenstock's proposal was based on excellent intentions, in his view the proposal was built upon an alarming and serious intellectual mistake: not all international offences were crimes against the peace and security of mankind.

11. Crimes against the peace and security of mankind were the "crimes of crimes", the most serious of all crimes, and were anchored as such in the international legal consciousness of humanity. It was perfectly obvious that that was not the case with Mr. Rosenstock's proposed new offence, even if the offence had been legitimately created by the Convention on the Safety of United Nations and Associated Personnel. Incidentally,

⁵ See 2439th meeting, footnote 5.

⁶ See 2437th meeting, footnote 6.

⁷ *Ibid.*, footnote 7.

it was interesting to see that the French text of the Convention did not speak of crime, but of *infraction* (offence). The text had been drafted in several official languages, and Mr. Rosenstock could not impose his language upon the world. The choice of words was very significant: the intention had been to create not a crime in the legal sense of the term, but an offence.

12. At the current time, the Commission was being told that more than a simple *jus gentium* crime, indeed a crime against the peace and security of mankind, was involved. The inclusion of such an offence in the draft Code would call into question the entire exercise, and in so doing the Commission would revert to a catch-all Code and abandon the great progress made in confining the Code to four crimes against the peace and security of mankind. It was unacceptable simply to add to the list of such crimes any troublesome offence that one wished.

13. Mr. Rosenstock had put words in his mouth. He had not said that crimes against the peace and security of mankind were such because they had been included in the Charter of the Nürnberg Tribunal, but that the evolution of thought which had begun at Nürnberg and which had led to the adoption of the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda had resulted in the view that those crimes were different from other international crimes. As he saw it, Mr. Rosenstock's proposal would change the very nature of the exercise, and instead of producing a code of crimes against the peace and security of mankind, that is to say of exceptionally serious crimes which called into question the very foundations of the international legal system, the Commission would then be defining international crimes, *jus gentium* crimes. But a *jus gentium* crime was not necessarily a crime against the peace and security of mankind.

14. It was unreasonable to regard as a crime against the peace and security of mankind an invention which was legitimate and laudable but which had definitely not acquired such status in positive law. Mr. Rosenstock was wrong from a legal point of view, and for his own part, if any additional crime whatsoever was added to the "big four", he would unfortunately be compelled to vote against the draft Code as a whole.

15. Mr. LUKASHUK said that the question of the inclusion of crimes against peacekeeping forces could not be more topical. United Nations personnel carried out crucial peacekeeping functions. The dimensions of those operations were growing, as were the number of victims, self-sacrificing persons who served the cause of peace. They must receive appropriate protection.

16. Mr. Pellet's emotional and philosophical memorandum was disappointing. As to the use of the term "crime" in the Convention, he would point out that, in the Russian version, the word used (*prestuplenie*) meant precisely that. Logically, an attack against peacekeeping forces should be included among war crimes. Opponents of such a move contended that United Nations peacekeeping forces were not party to armed conflicts and did not wage war and that therefore it was not a question of humanitarian law. But in cases of self-defence or when an attempt was made by armed forces to hinder the implementation of the mandate of

peacekeeping forces, the latter became party to an armed conflict, were entitled to use force, and the standards of international humanitarian law extended to them. To give one example, the rules for the United Nations Peacekeeping force in Cyprus stipulated the obligation to comply with the principles and spirit of conventions on international humanitarian law.

17. He had misgivings, however, about paragraph 2 of Mr. Rosenstock's proposed article. It was a true reflection of the relevant United Nations documents, but it also seemed that United Nations forces should have a special status—much like a policeman who used a weapon and needed special legal protection. United Nations armed forces were unusual parties to a conflict and therefore needed an appropriate legal status.

18. The Convention on the Safety of United Nations and Associated Personnel required States to incorporate the crimes listed therein in their national law and to contemplate criminal prosecution and punishment, bearing in mind the serious nature of such crimes. In the circumstances, the Commission had every reason to consider crimes against United Nations personnel, and especially against peacekeeping forces, as a violation of international humanitarian law. That view was widespread in the literature. For an example, the Director of the Department of International Law of the Netherlands Ministry of Defence had written that an attack upon United Nations forces must be regarded as a war crime. United Nations forces must receive support. The international community would find it difficult to understand any rejection by the Commission of the proposal now before it.

19. Mr. BOWETT said that, in a sense, Mr. Pellet was right: if one looked at attacks on premises or personnel, they did not seem to be crimes as grave as those dealt with in the draft Code. But the gravity of the crime lay not so much in its effect on the personnel involved but rather in the way in which it could impair the effectiveness of United Nations peacekeeping operations. For example, it had been seen in Bosnia how attacks, although not serious in themselves, could undermine the effectiveness of a United Nations operation. Furthermore, if United Nations personnel were not protected, Member States would be less likely to contribute contingents. Hence, if the effect on the United Nations operation as a whole, and not simply on the personnel, was borne in mind, there was a good case for including that crime in the draft Code. Therefore, on balance, he supported the proposal.

20. Mr. HE said that, notwithstanding Mr. Rosenstock's good intentions, it would not be appropriate to take up the proposal. As Mr. Pellet had pointed out, if the Commission decided to do so, it would create an imbalance in the draft Code, which should cover only the most indisputable crimes defined by international law originating in the Charter of the Nürnberg Tribunal and affecting the very foundations of international society.

21. Mr. Rosenstock's proposal was based on the Convention on the Safety of United Nations and Associated Personnel. However, the Convention had not yet entered into force, many States were not happy with it, and it was doubtful whether the Convention would command wide acceptance. It seemed obvious that the proposed

crime, based on the Convention, had not acquired a legal status similar to crimes which, owing to their serious nature, had been classed as crimes against the peace and security of mankind.

22. Again, the range of the concept of protected persons was controversial. Although paragraph 2 of the proposed article, based upon article 2, paragraph 2, of the Convention on the Safety of United Nations and Associated Personnel, specified that it excluded personnel engaged as combatants in United Nations operations authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations, the intended scope was still too wide and vague to be productive. The crucial problem was that the notion of United Nations personnel had not been confined to its traditional bounds, but had been enlarged to cover associated personnel engaged or deployed in a United Nations operation and persons assigned by Governments or government organizations, with the agreement of competent United Nations bodies, to carry out activities in support of the fulfilment of the mandate of the United Nations operation. The precise meaning and scope of expressions such as "operation", "mandate", "persons engaged or deployed" were open to broad interpretation, despite the definitions in article 1, paragraph 1, of the Convention. If the scope of "United Nations and associated personnel" was unduly broadened, it could only create confusion in application, especially for the hostile State. Accordingly, to add the proposed article would merely upset the present balance and create obstacles to wide acceptance of the Code.

23. Mr. YAMADA said he shared Mr. Bowett's view and pointed out that acceptance had been growing rapidly for the recently adopted Convention on the Safety of United Nations and Associated Personnel. Hence, he was sympathetic to Mr. Rosenstock's proposal, but would like clarification on two points. First, in the original memorandum (ILC(XLVIII)/CRD.2), the last part of paragraph 1 of the article had ended with the phrase "when the personnel are carrying out activities in support of the fulfilment of the mandate of a United Nations operation", which was missing from the revised version. He would have preferred it to be retained and asked why it had been deleted. Secondly, in article 17 (Crimes against humanity) and article 18 (War crimes) of the draft Code, the Commission had raised the threshold by including elements such as "systematic" and "on a large scale". Would Mr. Rosenstock be prepared to accept raising the threshold of his proposed article as had been done in articles 17 and 18?

24. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that violent acts committed against United Nations personnel engaged in peacekeeping operations deserved a place in the draft Code. However, he experienced the same problem as did Mr. Yamada with regard to the question of the scale of an attack on United Nations personnel. As the proposal stood, the murder of an ordinary soldier who was a member of a peacekeeping operation would be considered a crime against the United Nations. It would therefore be necessary to include words such as "systematic", "in an organized manner" or "on a massive scale". He also had reservations about the drafting of paragraph 1 (b) of

the proposed article and, like Mr. Yamada, preferred the wording used at the end of the first paragraph of Mr. Rosenstock's original proposal. Thus, he was in favour of the proposal, but it should be redrafted.

25. Mr. PAMBOU-TCHIVOUNDA said that he was unable to respond favourably to Mr. Rosenstock's appeal for a new type of criminal conduct to be included in the Code, for four reasons. In the first place, it would have been advisable to hold an initial debate on the scope *ratione personae* as far as the maintenance of international peace and security—the apparent basis of Mr. Rosenstock's proposal—was concerned. Specifically, why should only United Nations staff be covered and why should personnel working within the regional framework be left aside? He was thinking, for example, of the African contingents which, within the framework of OAU, were fighting in Liberia and had been victims of abhorrent crimes. The inclusion of a definition encompassing both the universal and the regional aspects of the maintenance of international peace and security would make for a better understanding that it was not just the United Nations that was involved but the international community as a whole, in both its universal and its regional component.

26. His second point pertained to the actual nature of crimes against United Nations personnel—which the Convention on the Safety of United Nations and Associated Personnel had been careful not to characterize at all. One question that arose was whether offences included minor offences and whether, say, an attack on a car should be treated in the same way as a shot fired at a person. He did not know, but all such matters certainly called for close consideration. In particular, it was essential for the Commission to characterize the offences concerned and, in that connection, great care was needed, for it was common knowledge that work on the Convention had been done hastily, something which was not always a recipe for success. It was essential to be aware of the extent of the harmful effects that politics could have on an exercise such as the preparation of a legal instrument, and that applied equally to States and to the United Nations. Essential matters which should have been taken into account in 1994 had been overlooked in the desire for rapid progress.

27. Thirdly, the Commission should ask itself why Mr. Rosenstock had excluded from the scope of his proposed new article any United Nations operation authorized as enforcement action under Chapter VII of the Charter of the United Nations. Not all of those operations were conducted on the same scale—one only had to compare the "Desert Storm" operation with "Operation Restore Hope" carried out in Somalia. Was the latter to be regarded as coming within the ambit of Mr. Rosenstock's concern? That matter would have to be clarified before he could concur with Mr. Rosenstock's proposal.

28. Fourthly, if the proposed new category of crimes was to be incorporated in the draft Code, the Commission might also wish to give some thought to mercenarism, which destabilized States and undermined international security and, by extension, the peace and security of mankind. The hijacking of aircraft and piracy of scientific information could also affect the military

security of States. For all those reasons, he had major reservations about including the proposed article in the draft Code.

29. Mr. ARANGIO-RUIZ said that he agreed with Mr. Bowett, who had settled the matter from the standpoint of principle and also shared the concerns expressed by Mr. Yamada and the Chairman of the Drafting Committee. In addition, he had a problem with the words "attack" and "violent attack" which appeared in paragraphs 1 (a) and 1 (b), respectively. He therefore suggested that all such drafting points should not be discussed in plenary but should be referred to a small working group.

30. Mr. BARBOZA said he had to confess that he had had doubts about accepting Mr. Rosenstock's proposal and thought that Mr. Pellet had put forward some important technical arguments in his memorandum. He would, however, have preferred to incorporate in the draft Code an offence that was supported by practice to enable the Commission to codify it as custom. The practice referred to by Mr. Rosenstock, however, though not of long standing, concerned matters that had caused worldwide indignation. No one would ever forget the televised pictures of United Nations personnel from the peacekeeping forces, taken hostage and used as human shields, nor the impression which had thus been created that those forces had been unable to deal with the situation. An attack on United Nations peacekeeping forces was symbolic, for it was an attack on the maintenance of international peace and security. He therefore saw no reason why the international community could not accept the inclusion in the Code of a new crime and he had decided to support Mr. Rosenstock's proposal. The comments made by Mr. Yamada, the Chairman of the Drafting Committee and Mr. Arangio-Ruiz should be referred to the Drafting Committee so that it could prepare a final version of the proposed article.

31. Mr. de SARAM said that, for once, he was not altogether persuaded by Mr. Pellet's arguments. Mr. Rosenstock had made an extremely important proposal which should be included in the draft Code, albeit with some drafting changes. In that way, it should be possible to avoid a situation in which texts carefully negotiated at United Nations headquarters would be diminished in some way.

32. The whole question was essentially one of perspective, in particular of the United Nations as an organization. Notwithstanding its present difficulties and the criticisms levelled at it, the United Nations was one of the most important, if not the most important, organization in the world. Those who carried on United Nations business in extremely hazardous conditions were the representatives of the Organization: an attack upon them was an attack upon the Organization itself and, indeed, on the international community as a whole. It was therefore difficult to see why some members of the Commission were hesitant about incorporating in the draft Code a provision whereby an attack on United Nations personnel in the field would constitute a crime against the peace and security of mankind. The inclusion of such a provision would, he trusted, have the effect of making sure that there was compulsory universal juris-

diction over the crimes in question and that such crimes could be referred to the international criminal court, if it was established, and arrest warrants issued. Also, the deterrent effect of including such a provision in the Code should not be underestimated. It had been said that the provision was too general, but the answer to that was that many provisions in the draft Code were very general indeed.

33. For all those reasons, he urged adoption of the proposal by Mr. Rosenstock. If such a provision was not included at that point, he did not know when it would be. It should be remembered that the draft Code was limited in scope largely because the Commission had proceeded on the basis of a consensus, a procedure that he fully supported. The Commission should seize the opportunity to affirm the importance it attached to the Organization and to those who served it in the field in very hazardous circumstances.

34. Mr. CRAWFORD said that, once again, the Commission found itself in the difficulty posed by the draft Code, namely, of selecting parts of conventions already in force or about to come into force and applying them partially by force of the Code. The Code was in truth not so much a code as a digest (*Reader's Digest* rather than *Justinian's Digest*), and as devotees of the former would know, reading excerpts was not the same as reading the original work. But there was also the question whether the actual wording of the convention in question could be changed. The original text of the Convention on the Safety of United Nations and Associated Personnel may have been negotiated rapidly, as Mr. Pambou-Tchivounda had said, but it had been negotiated and it did exist. One possible problem with it was whether the accused must have intended to assault a member of a United Nations force as such, as distinct from intending to assault someone who happened to be a member of such a force. He had in mind, for example, an ordinary street crime. The word "intentionally" might perhaps have been intended to support the former interpretation; he wondered whether the *travaux préparatoires* shed any light on the question.

35. If the broader view were correct, such a provision might be sensible in a convention protecting United Nations forces but, in the context of the Code, it seemed to raise a difficulty. An attack, and especially a large-scale attack, on a United Nations peacekeeping force as such could properly be so described as a crime against the peace and security of mankind. The problem, therefore, was whether it was right or prudent at the present stage to amend the wording of Mr. Rosenstock's proposal with a view to limiting it to situations that could be so described. In the past few years, the draft Code had been placed on a strict diet and had shrunk in size. There was always a danger that if it were taken off that diet and extra elements were added to it, it would balloon back to its original size.

36. Mr. FOMBA said that the political and social legitimacy of the issue was unquestionable but there was a real risk of undermining the philosophical basis for the balance of the Code. Also, the preemptory nature of the legal basis of the issue was still in dispute.

37. On the whole, he endorsed the substantive reservations raised by Mr. Pellet in his memorandum and considered that his analysis was correct in law. Further, subparagraph (a) of article 20 (Savings clauses) of the Convention on the Safety of United Nations and Associated Personnel provided that the Convention should not affect the

applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel.

That was no mean achievement in terms of the established law and it left the way open for possible further development in the law. The provisions of the Code should not be set in stone but must always be open to revision should the need arise to take account of a particular concern on the part of the international community. The Chairman of the Drafting Committee had made an interesting proposal which should be weighed up in the light of the other crimes covered in the Code.

38. Mr. VARGAS CARREÑO said that Mr. Rosenstock's proposal had his firm support. The magnitude and gravity of the crimes committed against United Nations personnel and the essential role played by the United Nations in maintaining the peace and security of mankind provided justification for including the proposed article in the draft Code. He would, however, suggest that a reference should be added to the personnel of ICRC, who had recently been the subject of serious attacks and whose vital role in the event of armed conflict should be strengthened. He also agreed that the wording of the article should be improved along the lines suggested by other members.

39. Paragraph 2 wisely stipulated that the proposed article would not apply to United Nations personnel engaged in an operation authorized by the Security Council under Chapter VII of the Charter of the United Nations, in other words, when such personnel were engaged in enforcement action, not in peacekeeping operations. Thus, the article would apply not to situations like that in Iraq but to situations like those in Haiti and Somalia. The Drafting Committee or a working group should, however, examine what the position would be in the event of a mixed operation, with both peacekeeping and enforcement action components.

40. In his view, therefore, Mr. Rosenstock's proposed new article should be approved subject to the incorporation of a sentence to ICRC personnel, and the text of the article should be referred either to the Drafting Committee or to a small working group to prepare a final text for consideration in plenary.

41. Mr. GÜNEY said that, while no one could doubt Mr. Rosenstock's good intentions, the proposed article went very far and would be extremely difficult to incorporate among the "crimes of crimes", since the aim had always been to stipulate in the Code for only the most serious and heinous crimes. Mr. Pellet, who had invited the Commission to act with the utmost caution in order not to jeopardize the whole exercise, had adduced a well thought-out argument. Should a general consensus in favour of savings clauses emerge in the Commission, he would not oppose it. Nevertheless at that juncture, the ar-

ticle should be referred either to the Drafting Committee or to a small working group appointed to examine not only the wording of that article but also the question of its scope and threshold.

42. Mr. KABATSI, supporting Mr. Rosenstock's proposal, said that he had the utmost respect for the views expressed by Mr. Pellet and others who did not support the proposed article. From a purely intellectual and legal stance, there might well be merit in their arguments, but a code of crimes against the peace and security of mankind that remained oblivious to the need to protect the only global organization that existed to promote the international peace and security of mankind would be incomplete, to say the least.

43. It should not be forgotten that, if and when the Code came into effect, it would be the United Nations that would be *primus inter pares* in enforcing its provisions. He was not persuaded by the argument that including the proposed article would upset the balance of the Code. Indeed, the opposite seemed to be the case. The crimes in question were not crimes against property or the person in the ordinary sense. The greatest danger to mankind was the adverse effect on the function of the United Nations itself, whose mandate it was to maintain international peace and security and hence the security of mankind. Spectacles such as those of United Nations personnel tied to stakes near ammunition dumps in the sight of all and sundry and situations such as that in Rwanda where 10 peacekeepers had been murdered at one fell swoop while performing their duties would, if allowed to go unpunished, mean that the United Nations would lose the clout it needed to fulfil its mandate.

44. At the same time, he agreed that the text of the proposed article required fine-tuning and possibly a threshold akin to that laid down in articles 17 and 18 of the draft Code. He did not believe that the death of a United Nations soldier in circumstances other than the active performance of his or her duties should be brought within the ambit of the article's provisions. He too would therefore support the original formulation.

45. Broadening the scope of the article to include regional and other forces might be dangerous, since such forces were often motivated by specific local interests. Anything less than a global effort should not be encompassed. With hindsight, he felt that provision might usefully have been made in article 18 for the protection of personnel of ICRC and its associated bodies, in view of their long-standing international stature. However, the article currently under consideration was not the place for such a provision. Lastly, he saw no need for a working group. The article should be sent straight to the Drafting Committee, which could refine it and possibly establish a threshold before referring it back to the Commission.

46. Mr. THIAM (Special Rapporteur) said he was at a loss. First he was told that what was needed was a code limited to a hard core; he had endeavoured to oblige. Now he was told that what was needed was a more wide-ranging code. As a man of good will he would try to ascertain what elements of Mr. Rosenstock's proposal were acceptable. Its intentions were good—that was not at issue: the problem arose from the exceptional pro-

cedure whereby a text had been submitted directly to the Commission without the agreement of the Drafting Committee.

47. Mr. ROSENSTOCK, speaking on a point of order, said it was inaccurate to say the proposal had not received the agreement of the Drafting Committee. In actual fact, the Drafting Committee had considered that a question had been raised and should not be dealt with by the Drafting Committee without first being discussed in plenary. It had therefore suggested submitting a memorandum to the Commission that would enable it to discuss the matter before any action was taken by the Drafting Committee.

48. Mr. THIAM (Special Rapporteur) said he accepted that point. The fact remained that Mr. Rosenstock ought to have submitted the proposed article when crimes against humanity and war crimes were being debated in plenary. However commendable the intentions, the text required scrutiny in order to ascertain whether it stood in need of amendment. The text was not entirely acceptable in the form submitted. Paragraph 1 (a), for instance, seemed to raise the issue of terrorism, yet when he himself had submitted a draft article on terrorism, it had been rejected. Paragraph 2 seemed to rule out precisely the hypothetical situation that had initially disposed him to favour the proposed article, namely, that such a crime could be considered a crime against peace. Given the large number of questions it raised, the article should be referred to a working group or the Drafting Committee under the usual procedure, for formal and substantive change that would render the text acceptable to the international community.

49. Mr. Sreenivasa RAO said there was no question that the Commission should support any legal regime that would deter attacks on United Nations personnel. The crux of the matter, however, was the timing and methodology for introducing a provision on that matter into the draft Code. As originally envisaged, the draft Code had included the crimes of intervention, terrorism and apartheid. Indeed, as provisionally adopted on first reading, it had contained 12 crimes. Many members, including himself, believed that several of the crimes subsequently deleted should have been reinstated on second reading. In the interests of making the Code acceptable to the largest possible number of States, the Special Rapporteur had reduced the number of crimes to a bare minimum. Time and again, the inclusion of certain crimes had been opposed on the grounds that they were dealt with appropriately in other international instruments and that the Code should cover only the "crimes of crimes".

50. The Commission should therefore seriously consider whether a category of conduct included in the Convention on the Safety of United Nations and Associated Personnel, of recent vintage, that had so far been ratified by only 6 States and signed by only 43, warranted inclusion in a Code of the most serious crimes. In his view attacks on United Nations personnel were covered by other provisions of the Code, and he doubted that referring the matter to a working group or the Drafting Committee at that late stage would result in a greater degree of consensus than had been achieved by the Ad Hoc Committee on the Elaboration of an International Con-

vention Dealing with the Safety and Security of United Nations and Associated Personnel, which, as its Chairman had candidly admitted, had ultimately arrived at a compromise text that left many issues in need of further clarification.

51. Nevertheless, the present discussion went on record and thus served a useful purpose, for States could now take up the points raised.

52. Mr. PELLET said the conclusion he drew from the debate was that the proposal to include the new article posed a number of technical problems, and also objections of principle. Technically, the article was both too broad and too restricted. It was too broad in that it was not limited to personnel in the exercise of their duties, with the result that any murder of or attack upon United Nations or associated personnel would be a crime against the peace and security of mankind. On the other hand, it was too restricted in that it did not extend to personnel of ICRC or regional peacekeeping staff; and especially in that it established an artificial distinction between Chapters VI and VII of the Charter of the United Nations which, as Mr. Bowett and Mr. Barboza had illustrated, would be impossible to observe in practice.

53. He also had objections of principle, because he believed that inclusion of the proposed article would seriously weaken the exercise that the Commission was engaged in. The figures cited by Mr. Sreenivasa Rao were revealing: a convention that in one and a half years had secured only 6 ratifications and 43 signatures could scarcely be said to enjoy the enthusiastic support of the international community. It was not for the Commission to substitute its own opinion for that of the international community.

54. Nor was it true to say that, if excluded, such crimes would go unpunished. The future international criminal court would be empowered to deal with such crimes, and there was no need to include them in the very specific category of crimes against the peace and security of mankind. By disregarding the views of the international community and including those crimes in the Code, the Commission would be acting hastily and disregarding its true vocation, which was not to be a universal legislator, but to promote the codification and progressive development of international law.

55. Mr. ROSENSTOCK said he would first comment briefly on issues other than those raised by paragraph 2 of his proposed article, to which he would return when other statements had been heard. Regarding ICRC, during the careful and extensive efforts that had led to the elaboration of the Convention on the Safety of United Nations and Associated Personnel, ICRC had been consulted and had indicated that it did not wish to be covered by the Convention. Its reasons had been given in private consultations, but had been set forth in an article on the subject by Antoine Bouvier.⁸ Those reasons were, first, that it regarded itself as already covered by the Geneva Conventions of 12 August 1949; and secondly, that

⁸ "Convention on the Safety of United Nations and Associated Personnel: Presentation and analysis", *International Review of the Red Cross*, No. 309 (November-December 1995), pp. 638-666.

it had always acted as an intermediary and never as a party to the conflict.

56. As for the recognition that the Convention on the Safety of United Nations and Associated Personnel was not perfect and contained compromises, there had never been a multilateral convention elaborated in the history of mankind of which that was not true. The term "grave breaches" in the Geneva Conventions of 12 August 1949 had itself been a compromise. Nor did he accept the view that to exclude that Convention would not downgrade the importance of dealing with the problem. As to the question whether the intent included the knowledge that the targets were United Nations personnel, he referred to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the Commission's commentary thereto,⁹ which indicated that the word "intentionally" was used in that context both to make it clear that the offender must be aware of the status of internationally protected person enjoyed by the victim, as well as to eliminate any doubt regarding exclusion from the application of the Convention of certain acts which might otherwise be asserted to fall within its scope, such as serious injury in an automobile accident or as a consequence of negligence. That commentary should resolve the question of intent.

57. Other technical issues raised, including the question of a threshold, could be dealt with by the Drafting Committee or a small working group. In his view, the Commission should first take a decision on the principle of including a provision along the lines of his proposal. The attitude of the Commission towards a crime that struck at the heart of the international community's capacity to conduct peacekeeping operations was a matter of such importance that there might be a need for members to stand up and be counted in a formal vote. If the decision taken on that principle was affirmative, it would then be possible to look at some of the technical questions, either in the Drafting Committee or in a small working group.

58. The formulation in paragraph 1, whose deletion had been regretted by Mr. Yamada, had not been retained because during informal conversations other members had expressed concern that as formulated it might limit the scope of the Code to actions directed against United Nations personnel in their official capacity; whereas the crime would obviously also cover actions such as blowing up a building containing sleeping personnel, even though those personnel had not been on active duty at the time. The deleted wording derived from the Convention on the Safety of United Nations and Associated Personnel and described the coverage of associated personnel, not of United Nations personnel. That latter point could easily be covered in the commentary, without risking the confusion that its inclusion in the text had seemed to engender.

59. Mr. THIAM (Special Rapporteur) said he was opposed to the Commission taking a decision of principle

at the present juncture, since it would then be bound by it. The proposed article must be sent to a working group that would consider the possibility of its inclusion in the draft Code.

60. Mr. ARANGIO-RUIZ said that an adjective such as "serious" should be substituted for the adjective "violent" in paragraph 1 (b) of the proposed article. Actions such as stone-throwing were violent, but were not crimes against the peace and security of mankind.

61. Mr. VILLAGRÁN KRAMER said that he had the utmost sympathy for the efforts of the United Nations and Governments to establish a regime of penalties for criminal acts perpetrated against United Nations forces and personnel. Accordingly, on the adoption of the Convention on the Safety of United Nations and Associated Personnel, he had appealed to his Government, in his capacity as a jurist and adviser, to ratify the Convention as early as possible, since article 9, paragraph 2, and article 10, paragraph 4, made it clear that the obligations set forth therein were obligations of Member States, which, by ratifying it, committed themselves to establishing and implementing appropriate penalties under their national legislation.

62. At the political level, it was perfectly viable to establish a crime of that category. At a legal level, however, he doubted that it was possible for the Commission to elevate the acts covered by that Convention to the status of an international crime in the short time at its disposal. From the legal rather than the political standpoint, Mr. Rosenstock's proposal raised two questions. First, what should the Commission's basic criterion be for incorporating crimes other than those already covered by the text? Secondly, what should its criterion be for deleting crimes from the list of crimes adopted on first reading?

63. For the past three years, the Commission's work on the draft Code had been conducted on the basis of three criteria: first, the crimes included in the Code had to be crimes deemed to be such under general international law, for instance, genocide, aggression and crimes of a similar category; secondly, they had to be of an extremely serious nature; and thirdly, in the case of crimes under existing international instruments, those instruments commanded widespread acceptance and support in the international community. Mr. Rosenstock's proposal unquestionably met the first of those criteria. It also met the second criterion, that of seriousness, but not more so than certain other crimes, such as international terrorism or international drug trafficking, which the Commission had decided to exclude from the draft although articles on them had been adopted on first reading. As for the third criterion, that of universal or at least widespread acceptance, it had to be recognized that the Convention on the Safety of United Nations and Associated Personnel, although adopted unanimously by the General Assembly, had not yet received many ratifications and did not appear to be on the point of coming into force. Accordingly, it could hardly be said that the crime Mr. Rosenstock was proposing for inclusion in the Code was universally recognized as a serious and immediate threat to the peace and security of the whole of mankind.

⁹ For the text of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, and the commentaries thereto, see *Yearbook . . . 1972*, vol. II, pp. 312 et seq.

64. In respect of all the other crimes included in the draft Code, the Commission had sought the views and comments of Governments. There was clearly no time to do likewise with the present proposal, yet it was essential to ascertain the level of acceptance by Governments of the Commission's work *de lege ferenda*, since the absence of such acceptance would undermine the success of the Code as a whole.

65. In view of those considerations, he was regretfully compelled to say that he could not accept the proposal in principle, although he would be prepared to go along with a decision to refer it to the Drafting Committee or a working group. Should Mr. Rosenstock's proposal be accepted, he wished to give notice of his intention to make a formal proposal of his own for the reintroduction into the draft of the crimes of international terrorism and international drug trafficking.

66. Mr. MIKULKA said all members of the Commission were agreed that Mr. Rosenstock's proposal was motivated by a commendable wish to make sure that attacks against United Nations and associated personnel were ranked among the most serious of international crimes. Some doubts arose, however, as to whether that could be done within the framework of the exercise on which the Commission was at present engaged. To begin with, it was difficult to see why crimes against ICRC or regional organizations should not also be covered by the proposed provision. He understood and respected the reasons why ICRC did not want to be mentioned in the provision, but could not see why the personnel of regional organizations, who often stood shoulder to shoulder with United Nations personnel in the course of the same operations, should not be afforded the same protection. That problem, however, was essentially a technical one and could perhaps be resolved by adopting a more general formulation.

67. The objection raised by the Special Rapporteur was of a more fundamental nature. The Commission had decided to reduce the scope of the draft Code to a hard core of "crimes of crimes". The decision had been taken in the interests of achieving consensus, and members should now consider the potential threat to acceptance of the draft Code as a whole if the decision was reversed. The draft as it stood was, in essence, an exercise in the codification of existing international law, with, it was true, some undeniable elements of progressive development of the law. The addition of a completely new category of offences would place the whole exercise squarely in the area of progressive development of international law and would make it extremely difficult to defend the principle of a restrictive list which the Commission had arrived at with so much effort.

68. Lastly, he would be sympathetic to the adoption of a resolution recognizing attacks against United Nations personnel as a serious international crime, but seriously doubted the wisdom of including that crime among those covered by the draft Code.

69. Mr. AL-BAHARNA said that, provisionally, he had no reservations in connection with the proposal to include such an article in the draft Code. He had always favoured the incorporation of a wider range of crimes in the Code, but had decided to join the consensus reached

in the Commission at an advanced stage of the drafting process to the effect that the Code should cover only the most serious and heinous crimes. He thus had no objection of principle to the adoption of Mr. Rosenstock's proposal, taking due account of the observations made by the Chairman of the Drafting Committee, Mr. Crawford, Mr. Yamada and other members. On the question of procedure, he agreed with the Special Rapporteur that the proposed draft stood in need of improvement and should be referred to a working group. It was regrettable that the proposal had not been submitted at an earlier stage, possibly even at the previous session. Lastly, he supported Mr. Arangio-Ruiz's proposal to replace the word "violent", in paragraph 1 (b), by the word "serious"; the attacks referred to in paragraph 1 (b) should not be treated in the same way as those referred to in paragraph 1 (a) for purposes of punishment unless they resulted in death or serious injury.

70. The CHAIRMAN invited members to decide whether, in principle, they wished the proposal to be referred to a small working group.

71. Mr. PAMBOU-TCHIVOUNDA said that a new proposal submitted just as the Commission was about to conclude its work on the draft Code ought not to be discussed.

72. Following a brief exchange of views in which Messrs. CRAWFORD, Sreenivasa RAO, ROSENSTOCK, and VARGAS CARREÑO took part, the CHAIRMAN said he would take it that the Commission agreed to establish a small working group, consisting of Mr. Thiam (Special Rapporteur), Mr. Al-Baharna, Mr. Crawford, Mr. Lukashuk, Mr. Rosenstock, Mr. Vargas Carreño and Mr. Yamada, which would report back on 3 July 1996.

It was so agreed.

The meeting rose at 1.10 p.m.

2450th MEETING

Friday, 28 June 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

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

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/472/Add.1, sect. D, A/CN.4/475 and Add.1,¹ A/CN.4/L.533 and Add.1)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his twelfth report (A/CN.4/475 and Add.1).
2. Mr. BARBOZA (Special Rapporteur) said that the first part of the twelfth report was devoted to an aspect of prevention on which the Commission had not yet taken a decision. He reminded the members that, given the Commission's reluctance to accept the idea of prevention *ex post*—meaning the measures to be adopted after an incident had occurred—he had endeavoured in his tenth report² to explain as clearly as possible why he considered that that kind of prevention existed in international practice.
3. He invited the members of the Commission to refer in particular to chapter I, sections A and B, of the tenth report, and also to section C, which was essential in that regard, and contained comments on the two texts proposed in section D. The first of those texts, which would be inserted as paragraph (e) of article 2 (Use of terms),³ defined what was meant by the expression "response measures", which were nothing other than measures for prevention *ex post*. He had proceeded in that manner to avoid an impasse should the Commission continue to oppose the use of the term "prevention" for *ex post* measures. It should be noted, however, that calling them "response measures" would mean using a term that "differs from the term used in all the relevant conventions", namely, "preventive measures", and that would pose serious problems. At the same time, he had the impression that the Commission was receptive to the arguments put forward and that it currently accepted the idea of prevention *ex post*. If so, he would suggest that the Commission should consider the text at its current session and agree on a formulation that covered measures to prevent incidents and also measures to prevent further harm once an incident had occurred. In that way, the Commission would bring its terminology into line with that used in all existing conventions on the subject, under which the term "prevention" covered all measures taken after the incident had occurred to prevent the harm from developing to its full potential. In the case of the Basel incident, for instance, when the Rhine had been polluted by a large quantity of chemical substances, all the measures taken to prevent the pollution from reaching certain parts of Germany, France and the Netherlands could be described as measures of prevention. With the adoption of that terminology in mind, he was proposing two texts which appeared in paragraph 4 of the twelfth report.
4. Section B of the introduction of the twelfth report dealt with principles or, rather, with one principle which the Drafting Committee had not yet examined, namely, the so-called principle of non-discrimination, which was very useful and had been accepted in other contexts and, in particular, in that of watercourses. The Commission might wish to invite the Drafting Committee to consider that point and take a decision.
5. Chapter I of the twelfth report dealt with liability. As members would remember, they still had to consider two complete reports: the tenth report, which proposed a liability regime for transboundary harm, and the eleventh report,⁴ which dealt with harm to the environment. The Commission had heard the preliminary views of certain members on both reports, but had decided to use the time it would have spent considering them in plenary to enable the Drafting Committee to examine some of the articles on the subject appearing on its agenda. The Drafting Committee had ultimately adopted those articles and so had virtually finished the chapters on prevention and on principles.
6. The time had therefore come for the Commission to get down to the crux of the matter, namely, liability, which was no easy task. The Commission had decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first: only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.⁵
7. Against that background, he suggested that the Commission should determine the main features of the regime it wished to apply to liability for acts not prohibited by international law. He had included in his twelfth report the three basic proposals in that connection, which were, respectively, the schematic outline proposed by the Special Rapporteur, Mr. Robert Q. Quentin-Baxter, in the annex to his fourth report⁶ and the regimes proposed by himself in his sixth⁷ and his tenth reports. He proposed, that at the current session, the Commission should simply look at the main points of those liability regimes. To that end, he had indicated in his twelfth report the articles and paragraphs of the relevant reports which contained essential information. The Commission could therefore focus, in particular, on consideration of the annex to the fourth report of the Special Rapporteur, Mr. Quentin-Baxter; on chapters IV and V of his sixth report and, in particular, on articles 21, 23 and 28 to 31, which defined the proposed regime; and on the whole of chapter II and of sections A, B and C of chapter III of his tenth report.
8. The liability regime set forth in the schematic outline was a rough sketch, but the Commission would find in it the information it needed to take a decision or

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/459.

³ For the text of the draft articles provisionally adopted so far by the Commission, see *Yearbook . . . 1995*, vol. II (Part Two), chap. V, sect. C.1, pp. 89-91.

⁴ *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/468.

⁵ *Yearbook . . . 1992*, vol. II (Part Two), p. 51, para. 345.

⁶ *Yearbook . . . 1983*, vol. II (Part One), p. 201, document A/CN.4/373.

⁷ *Yearbook . . . 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

develop that sketch further, if it so desired. The regime applied to activities carried out in the territory or under the control of one State which gave or might give rise to loss or injury to persons or things within the territory or the control of another State. In other words, the activities covered by article 1 (Scope of the present articles), provisionally adopted on first reading, would be covered by the provisions of the outline.

9. It should be noted that, under the schematic outline, a breach of the obligations of prevention did not give any right of action to the affected State, in other words, there was no responsibility for a wrongful act. That was an important and indeed classical aspect of the matter, since he knew of no convention on liability for risk under which such liability had to coexist with responsibility for wrongful acts.

10. So far as liability for risk was concerned, where transboundary harm occurred and there was no prior agreement between the States concerned regarding their rights and obligations, those rights and obligations were determined in accordance with the schematic outline, which established that there was an obligation to negotiate in good faith. There must be some form of reparation, by virtue, in particular, of the principle set forth in the schematic outline whereby the innocent victim should not be left to bear his loss or injury. Section 4, paragraph 2, of the schematic outline established in that the acting State, namely, the State of origin, should make reparation to the affected State, the amount of such reparation being determined by a number of factors, including, in particular, the "shared expectations" of the States concerned. The principles spelled out in section 5 and the factors outlined in section 6, some of which had been incorporated in article 20 (Factors involved in an equitable balance of interests), provisionally adopted on first reading. The criterion of "shared expectations" had not found much favour with the Commission, which, however, had received the schematic outline fairly well at the time.

11. To sum up, the schematic outline contained the following general ideas: first, recommendations to States on the prevention of incidents resulting from activities which give or may give rise to transboundary harm; and, secondly, no fault (*sine delicto*) State liability for transboundary harm caused by dangerous activities because the acts were not prohibited by international law and in any event the liability could be attenuated. Although in principle the innocent victim should not bear the injury, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors that could justify a reduction in the amount.

12. The regime proposed in his sixth report constituted an almost complete draft on the topic. In the field of prevention, it followed the general ideas contained in the schematic outline and, in particular, there was no responsibility for a wrongful act. Article 18 (Failure to comply with the foregoing obligation), as proposed in the sixth report, stripped the obligations of prevention of their "hard" nature, since it did not give the affected State the right to institute proceedings.

13. With regard to liability, the sixth report followed the schematic outline in part, but also offered a new option. In other words, there was no fault (*sine delicto*) State liability for transboundary harm, but, once again, it translated into a simple obligation to negotiate the determination of the legal consequences of the harm with the affected State. The States concerned must take into account the fact that the harm should in principle be compensated in full, even though, under article 23 (Reduction of compensation payable by the State of origin), the State of origin could, in certain cases, seek a reduction of the compensation payable by it. That applied, for example, if the State of origin took precautionary measures solely for the purpose of preventing transboundary harm. Thus far, the draft articles did not depart from the general lines of the schematic outline. But, at that time, he could not have failed to see that there was an undeniable trend in international practice towards introducing civil liability for transboundary harm in conventions on specific activities and he had therefore felt bound to present that possibility to the Commission. For that reason, in addition to State responsibility which was exercised through diplomatic channels, the draft articles provided for the so-called domestic channel or, in other words, for a remedy for victims through the domestic courts of law either of the State of origin or of the affected State, according to which one was competent. As explained in paragraphs 62 and 63 of the sixth report, the aim was simply to establish a minimum regulation for the domestic channel.

14. To summarize, the general thrust of the regime proposed in the sixth report consisted, first, of recommendations to States on the prevention of incidents and, above all, of drawing up a legal regime between States to govern the activity in question and, secondly, State liability for transboundary harm caused by dangerous activities. That liability was no fault (*sine delicto*) liability, since the activities giving rise to it were not prohibited by international law. There was however provision for attenuation of liability: although in principle an innocent victim should not have to bear the injury caused, the nature and amount of reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which might result in a reduction of the amount. Thirdly, in addition to the diplomatic channel where one State dealt with another, provision was made for a domestic channel available to individuals, private entities and the affected State. Once a channel had been selected for a specific claim, another channel could not be used for the same claim. With respect to the character of the liability, he had provided that it should be established according to the domestic law of the State of the court having jurisdiction.

15. Since the consideration of those two initial attempts had not led to any firm conclusions, he had had to envisage the possibility, in his tenth report, of proposing a substantially different regime to the Commission. It should be recalled that the Commission had categorically rejected the suggestion that obligations of prevention should be "soft" and that, consequently, any violation of such obligations gave rise to State liability for a wrongful act. That made the articles proposed in the tenth report extremely unusual and created many difficulties, since State liability for a violation of its obliga-

tions in respect of prevention must necessarily coexist with liability *sine delicto* for payment of compensation for injury caused. In the tenth report, the liability of a State arising from an act or an omission, as in the case of failure to exercise due diligence in fulfilling its obligations of prevention—in itself, a wrongful act, whether or not it gave rise to any consequences or damage—was distinct from the regime of compensation where actual damage had occurred. A State was thus liable for its own acts or omissions if it had not ensured that all due precautions had been taken in the conduct of the activity, for example, if it had failed to require a risk assessment study or to adopt relevant legislation or had adopted such legislation and had failed to apply it, regardless of whether an incident had or had not occurred. That was a very important aspect. The most likely consequence was the cessation of the wrongful act, or, in other words, the cessation of the breach of due diligence obligations of prevention.

16. However, if an incident did occur and transboundary damage was caused, there should be liability *sine delicto* of the operator of the activity because that was the regime that existed throughout the world, in domestic law and in all the conventions relating to liability for risk, with one single exception, the Convention on International Liability for Damage Caused by Space Objects. In order for a hazardous activity to develop normally, related costs such as payment of compensation should be taken into account “internally”, should be subject to a system of compulsory insurance and should ultimately give rise to the establishment of a fund to ensure payment of fair compensation to the victims. Otherwise, the hazardous activity would have to be financed by the victims.

17. If the Commission were to limit itself in the draft text to awarding compensation only in cases of damage resulting from a wrongful act by a State, the victim of the damage would not only have to prove that the State had not fulfilled its obligations, but would also have to demonstrate the causal relationship between the act of the State and the damage, which was known as indirect causality. It was clear that, if the Commission adopted the solution of State liability for wrongful acts, the damage caused in cases where the State or the operator had fulfilled their obligations of due diligence would go uncompensated. The same would be true of damage caused in the vast majority of cases by activities such as those referred to in article 1 as adopted on first reading, namely, hazardous activities. Moreover, the injurious consequences of an act not prohibited by international law would not even be considered at all in the framework of a topic entitled “international liability for injurious consequences arising out of acts not prohibited by international law”.

18. Thus, the regime proposed in the tenth report was not completely unsatisfactory in view of the difficulty of harmonizing obligations of prevention, which gave rise to the liability of the State for a wrongful act, with the liability of the operator, which was the rule for the hazardous activities dealt with in article 1. The system could be summarized in the following way: obligations to prevent incidents were the responsibility of the State and the State was liable for failure to comply with such obliga-

tions; the liability in such a case was for a wrongful act, with the characteristics and consequences provided for in international law; and payment of compensation for transboundary harm was the responsibility of the operator; in that case, liability was *sine delicto*.

19. In his twelfth report, he was proposing three alternatives to the Commission. It might be a good idea to set up a working group, whose members should be sufficiently representative of the various trends in the Commission with regard to the topic, to examine those alternatives or any others which might arise from their consideration and to propose guidelines to the Commission on that very important aspect of the topic.

20. In his view, such a working group, and the Commission itself, must take account of three important considerations. First, activities falling within the scope of the articles would most likely be identified by their inclusion in a list of activities or by the substances used to carry them out, thus making the scope sufficiently precise. Secondly, in the event that such hazardous activities gave rise to damage in the normal course of their operation, the corresponding liability in the majority of domestic law systems and in all but one international convention was that of the operator. Thirdly, it was necessary to build on what had already been agreed, namely, prevention. The Commission had agreed that the activities referred to in article 1—those with a low probability of causing disastrous harm and those with a high probability of causing significant harm—must be included in a special prevention regime in which certain preventive measures, such as prior authorization by the State, transboundary impact or risk assessment, notification and consultation, were compulsory. Hard obligations of prevention were a legal way to prevent an evil—in the present case, transboundary harm—from occurring. That evil arose not from a wrongful act, but from an act which was not prohibited by international law and which society would like to continue because it was a useful activity for society in general.

21. If damage occurred once those obligations of prevention had been adopted, was it logical to state that no reparation was due? Was there not a contradiction between the logic of prevention and the absence of reparation? In his view, if the Commission accepted the existence of obligations of prevention, it must accept that of an obligation to compensate for damage which should have been prevented, but had occurred. That was exactly the contradiction confronting the Commission when it had considered that article C (Liability and reparation), was a mere working hypothesis. That article, which had become article 8 in the twelfth report, read:

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Was it a wild conception to think that damage caused by a hazardous activity should be compensated, when that principle had been adopted by the vast majority of legal systems in the world? Should not a principle which was considered fair and equitable at the national level be acceptable in international relations? General international law was nevertheless not indifferent to damage. When damage resulted from a wrongful act, it was prohibited

and, in that connection, principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁸ the Trail Smelter case,⁹ the *Corfu Channel* case,¹⁰ and the *Lake Lanoux* case,¹¹ *inter alia*, were relevant. When damage resulted from a hazardous activity, such as those referred to in article 1, it must be compensated. The cost of damage caused in one State by an activity carried out under the jurisdiction or control of another State must be accounted for “internally” and assumed by the one who would benefit the most from that activity. Otherwise, the victims would end up financing the operator in the country of origin and, in that case, the general principle of unjust enrichment would be applicable.

22. In view of certain clear trends in international practice, moreover, a certain amount of progressive development was not ruled out by the Commission’s statute: conservatism had its limits.

23. The purpose of chapter II of the twelfth report was to organize the articles which had been approved thus far and those articles which were still on the Drafting Committee’s agenda. Chapter II was self-explanatory.

24. The CHAIRMAN said that he endorsed the Special Rapporteur’s proposal that a working group should be set up and requested, on the basis of the documents currently available and the Special Rapporteur’s suggestions, to provide the Commission with guidance on how to continue its consideration of the topic.

25. Mr. Sreenivasa RAO said that, since the special problems of the developing countries had been brought up many times during the discussions on the topic at the Commission’s earlier sessions and because the Special Rapporteur had said that he would look into that matter, he was surprised that the question had not been raised during the introduction to the twelfth report. He would like to know how the Special Rapporteur planned to deal with that issue.

26. It might also be asked what obligations of prevention or due diligence could be attributed to the operator over and above the State’s obligation of prevention. As the draft articles currently stood, prevention was basically the responsibility of the State. However, if it was up to the State to determine, by administrative, legislative or other provisions, the rules applicable to the operators under its jurisdiction, the regime established under the draft articles might be applied differently in different countries, and that would result in an absence of uniformity in international rules of prevention at the operational level.

⁸ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

¹⁰ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

¹¹ Award of 16 November 1957, original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

27. If the assumption was made that there must be reparation in the case of damage, a legal problem might arise as to the basis for the liability of the State if it had fulfilled its obligations of prevention, but damage had nevertheless occurred because the operator had not fulfilled his.

28. Mr. BENNOUNA said that, after listening to the Special Rapporteur’s introduction to his twelfth report, he was confused about the point of the exercise. The Special Rapporteur had in fact mentioned several areas which were not part of the topic properly speaking. The violation of obligations of prevention, for example, came under State responsibility. The standardization of the internal law of States on the liability of operators was yet another area.

29. Furthermore, while it might be possible to agree with the Special Rapporteur that there must be reparation where damage had occurred it could be asked on what basis: the violation of obligations of due diligence or prevention, a uniform regime of domestic law on operator liability or liability *sine delicto*? The Special Rapporteur had, of course, referred to some particular regimes of liability established by conventions, but the context was that of general law.

30. If the question was simply one of requesting States to adopt measures of prevention and to negotiate with States which might be affected by hazardous activities carried out in their territory, was a treaty really necessary and might not a recommendation, by the General Assembly, for example, be enough?

31. The idea of prevention *ex post* was not very clear either because there was a contradiction between the prefix “pre” and the term “*ex post*”. It was difficult to see how that idea could be harmonized with another regime, that which governed the cessation of the wrongful act.

32. In his view, consideration had to be given to the overall structure of the topic and, in that regard, the Special Rapporteur should try to define the task of the working group, whose establishment he had proposed, or, at least, give it some guidelines.

33. Mr. LUKASHUK said that, while he endorsed the idea of setting up a working group, he wished to point out that, once the articles had entered into force, any violation of their provisions would be a wrongful act which would come within the scope of State responsibility.

34. Mr. PAMBOU-TCHIVOUNDA said that he was surprised by the difference between the Special Rapporteur’s clear introduction to his twelfth report and the dryness of chapter II. In his view, the working group’s first task should be to amend the content of chapter II in order to bring out more clearly the overall structure of the draft articles and the logical connections between, for example, the general provisions, the principles governing attribution, the principles relating to assessment or, in other words, the parameters to be taken into account in quantifying damage, and the system of reparation itself.

35. Mr. de SARAM said that the Special Rapporteur’s statement on the question of liability was one of the most interesting ever made on that subject in the Commission.

It was simply unfortunate that the statement had been made at a time when the current term of office of the members of the Commission was coming to an end. It would have been better to hear it before the Commission had decided to deal not with the question of liability, but with that of prevention. While the work accomplished on that question was quite remarkable, it was still the question of the obligation to make reparation in the event of transboundary harm that was at the heart of liability. In that regard, he did not share the views of those who, in the Commission and in the Sixth Committee, had maintained that, once the rules of prevention had been stated, the only case in which the State of origin would be bound to compensate the State affected by transboundary harm would be that of a violation of those rules. That question did not involve the progressive development of the law; the point was, rather, to determine the content of what should be regarded as an obligation in public international law which the State of origin owed to the affected State. The Commission had, however, not yet examined the content of that obligation.

36. Was it simply an obligation of due diligence or did it go further? Was it an obligation not to cause damage or an obligation to make reparation for damage caused, somewhat along the lines of the obligation to provide compensation in the event of lawful expropriation by the State of property belonging to foreigners? It therefore had to be asked whether, at a time when lawful activities carried out by a State in its own territory could cause catastrophic damage in the territory of another State, there was an obligation of compensation in general international law. The legal counsel of Australia in the *Nuclear Tests (Australia v. France)* case¹² had answered that question by Mr. Waldock, judge at ICJ, in the affirmative with strongly convincing arguments, but, because the case had been settled, the Court had not had to make a ruling.

37. Another question that deserved consideration was at what stage and by what means the general principles of internal law could be transposed to the international level.

38. The CHAIRMAN said he gathered that the Commission wanted to establish a working group and indicated that the members would be Messrs. Bennouna, Crawford, de Saram, Eiriksson, Fomba, Kabatsi, Lukashuk, Robinson, Rosenstock, Szekely and Villagrán Kramer, as well as the Special Rapporteur, on the understanding that any member of the Commission who wished to do so could also participate.

It was so decided.

The meeting rose at 11.30 a.m.

¹² Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 253.

2451st MEETING

Tuesday, 2 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

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

State succession and its impact on the nationality of natural and legal persons (*continued*)* (A/CN.4/472/Add.1, sect. B, A/CN.4/474¹)

[Agenda item 6]

RECOMMENDATIONS OF THE WORKING GROUP ON STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

1. Mr. MIKULKA (Special Rapporteur), reported that the Working Group on State succession and its impact on the nationality of natural and legal persons² had held four meetings from 4 June to 1 July 1996. At its first meeting, the Working Group had considered in depth the problem of the nationality of legal persons, the form that the work on the topic should take and the calendar of work. It had decided to recommend to the Commission that consideration of the question of the nationality of natural persons should be separated from that of the nationality of legal persons, as they raised issues of a very different order. While the first aspect of the topic involved the basic human right to a nationality, so that obligations of States stemmed from the duty to respect that right, the second aspect involved issues that were largely economic, centering on a right to establishment that could be claimed by a corporation operating in the territory of a State involved in succession. The Working Group had felt, moreover, that the two aspects did not need to be addressed with the same degree of urgency.

2. The Working Group considered that the question of the nationality of natural persons should be addressed as a matter of priority and had concluded that the result of the work on the subject should take the form of a non-

* Resumed from the 2435th meeting.

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² See 2435th meeting, footnote 2.

binding instrument consisting of articles with commentaries. The first reading of such articles could be completed at the Commission's forty-ninth or, at the latest, fiftieth session. On completion of that work, the Commission would then decide, on the basis of comments to be requested from States, on the need to consider the question of the impact of State succession on the nationality of legal persons.

3. At its second to fourth meetings, the Working Group had embarked on an analysis of the impact of State succession on the nationality of natural persons. It had focused on the structure of a possible future instrument and the main principles to be included therein, basing its discussion on a working paper he had prepared for that purpose. That working paper envisaged the future instrument as being in two parts: part one, dealing with the general principles concerning nationality in all situations of State succession, and part two, containing more specific rules directed at specific situations of State succession.

4. The first provision in Part I would highlight the fact that every individual who possessed the nationality of the predecessor's State on the date of the succession had the right to the nationality of at least one of the States concerned. The term "States concerned" was intended to mean the States involved in the State succession, namely the predecessor and successor States, or simply the successor States. The second provision would address the corollary obligation of the States concerned to prevent the possibility that persons who possessed the nationality of the predecessor State on the date of the succession and had their habitual residence on the territory of one of the States concerned or in territories under their jurisdiction would become stateless as a result of the succession.

5. Another provision would deal with legislation on nationality and related issues and was intended to ensure that the States concerned enacted laws on nationality and related issues without undue delay and that they took all necessary measures to ensure that persons concerned would, within a reasonable time period, be apprised of the impact of such legislation on their nationality, their choices thereunder, and the consequences of the exercise of such a choice for their status.

6. A specific provision would be devoted to the principle of respect for an individual's will. It would be based on the premise that, without prejudice to their policy in the matter of multiple nationality, the States concerned should give consideration to the will of the persons concerned whenever those persons were qualified equally, either in whole or in part, to acquire the nationality of two or more of the States concerned.

7. The provision on non-discrimination would be drafted along the lines of the conclusions reached by the Working Group at the forty-seventh session.³ The working paper also contained a provision whereby no one should be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor or predecessor State which he

or she was entitled to retain or acquire in connection with State succession, and no one should be arbitrarily deprived of a right of option to which he or she was entitled. As for the procedures relating to nationality issues, the working paper envisaged that the State concerned should ensure that relevant applications were processed without undue delay and that decisions were issued in writing and were open to administrative or judicial review.

8. Another provision would envisage the obligation for the States concerned to take all necessary measures to make sure that the basic human rights and freedoms of persons who, after the date of the succession, had their habitual residence in their territory or in territories otherwise under their jurisdiction, and whose nationality had not yet been determined, were not adversely affected.

9. Under the provision on the right of residence, whenever the States concerned attached to the voluntary relinquishment of their nationality by a person acquiring or retaining the nationality of another State concerned an obligation for that person to transfer his or her residence out of their territory, those States would be required to grant a reasonable time limit for compliance with the obligation. An additional provision would require States to adopt all reasonable measures to enable a family to remain together or to be reunited whenever the application of internal law or treaty provisions would affect the unity of the family.

10. The penultimate provision of Part I would set out the obligation of States to consult in order to identify the possible negative effects of State succession on the nationality of individuals and other issues concerning their status and to seek a solution to those problems through negotiations. The final provision of Part I would address the difficult problem of the position of States other than the States concerned when they were confronted with cases of statelessness resulting from non-compliance by the States concerned with the provisions of the future instrument.

11. To facilitate negotiations between the States concerned, Part II would contain a set of seven other principles setting forth more specific rules for the granting or withdrawal of nationality or the granting of the right of option in different cases of State succession. They would be based on the conclusions reached by the Working Group at the forty-seventh session of the Commission, in 1995, and set out in its report.

12. He was confident that the Working Group would soon be able to complete its discussion of those issues and to submit its final report to the Commission.

13. Mr. LUKASHUK said that nationality in the event of State succession was a highly important, yet complicated and delicate problem, one that deeply affected the interests of many people. The draft articles prepared by the Special Rapporteur dealt with the problem expertly, reflecting positive international law.

14. Nationality had long been believed by States to be a matter falling within domestic jurisdiction. In 1923, in its advisory opinion with regard to the *Nationality*

³ Ibid., footnote 3.

Decrees issued in Tunis and Morocco,⁴ PCIJ had described questions of nationality as being within the “reserved domain” of domestic jurisdiction, yet it had also indicated that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending on the development of international relations.

15. In 1930, the Hague Codification Conference had recognized that nationality was no longer within a State’s sole jurisdiction. The Universal Declaration of Human Rights⁵ had proclaimed the right to nationality, while the Convention on the Reduction of Statelessness imposed upon States parties the obligation to prevent statelessness upon territorial transfer. In an advisory opinion of 1984, the Inter-American Court of Human Rights had stated that matters bearing on nationality could not be deemed to be within the sole jurisdiction of States and had described the powers of States as being circumscribed by their obligations to ensure the full protection of human rights. Nationality had thus become closely linked with protection of human rights, and that had to be the main idea behind the draft under consideration.

16. On the whole, the draft articles conformed to that criterion, though article 9, paragraph 2, by indirectly legalizing the expulsion of persons acquiring or retaining the nationality of another State, seemed at variance with the need to preserve human rights. The Special Rapporteur himself had rightly pointed out that the provision was contrary to the draft European Convention on Nationality, which indicated that nationals of a predecessor State habitually resident in the territory, over which sovereignty was transferred to a successor State and who had not acquired its nationality had the right to remain in that State. That was a good example of progressive development of international law. The Human Rights Committee, moreover, had stated that an alien, once lawfully admitted, could not be arbitrarily expelled.

17. The Special Rapporteur had rightly proposed the form of a General Assembly declaration for the draft, and he himself hoped it would be adopted on the fiftieth anniversary of the Universal Declaration of Human Rights. With the perspective gained over a half-century, the Commission’s task must not be restricted solely to codification of existing law on human rights. Rather, it should proclaim the right of every person—whether a national of a country, a stateless person, or a foreigner—to live at the place of his or her birth or habitual residence.

18. Mr. MIKULKA (Special Rapporteur) said there appeared to be a misunderstanding. He wished to point out that the only materials before the Commission were his second report (A/CN.4/474) and the progress report he had just given on the deliberations of the Working Group. Mr. Lukashuk’s remarks might be construed as implying that a set of draft articles had been submitted for the Commission’s consideration, but that was definitely not the case. He had indeed proposed some draft

articles, but for the Working Group alone, as a means of eliciting the views of members of the Working Group, and he was intending to use the Working Group’s reactions as a basis for the preparation of his third report. At no time, however, had he projected an in-depth discussion in plenary of the very preliminary drafts he had prepared. He appealed to all members of the Commission to respect the status of an internal document circulated in the Working Group and to focus on his second report or on his verbal progress report.

19. The CHAIRMAN confirmed that the Commission should be discussing the Special Rapporteur’s second report and the progress made by the Working Group.

20. Mr. LUKASHUK said he fully understood the Special Rapporteur’s position, but given the overriding importance of the subject for a great many countries and peoples, the Commission should express its views on that topic, though he took the point that the specifics of the draft articles submitted to the Working Group should not be addressed.

21. Mr. BENNOUNA said he welcomed the fact that the Special Rapporteur had taken account of the opinion, voiced by himself and other members of the Commission that the nationality of natural and of legal persons related to two different fields, namely human rights and the law on economics, and should be treated separately. He likewise endorsed the intention to prepare within, at most, two years a draft declaration, in the form of articles, on the nationality of natural persons in the event of State succession—an assignment that he believed was quite manageable—and only then, after the text on natural persons was adopted, to look into the nationality of legal persons. A proposal had been made to the General Assembly that it should approve consideration by the Commission of the topic of diplomatic protection, one that covered both natural and legal persons. The drafting of an interesting outline, which could form the basis for essential codification work, if the Assembly endorsed the proposal, was now well advanced. Accordingly, he proposed that, at that time, the Commission should discuss the question of the relationship between the nationality of legal persons in the event of State succession and the protection of legal persons, and that some thought should be given to scheduling the work on the first issue so as to coincide with that on the second. There was plainly a close link between those two matters.

22. Mr. THIAM said it was indeed gratifying to see that the Special Rapporteur had taken into account the views of those, who, like himself, had advocated dealing separately with the issues of the nationality of natural and of legal persons in cases of State succession.

The meeting rose at 10.45 a.m.

⁴ *P.C.I.J. 1923, Series B, No. 4*, p. 24.

⁵ General Assembly resolution 217 A (III).

2452nd MEETING

Wednesday, 3 July 1996, at 10.35 a.m.

Chairman: Mr. Ahmed MAHIOU

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

State responsibility (*continued*)* (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE²
PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee on the topic under consideration (A/CN.4/L.524 and Corr.2).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, at its thirty-second session in 1980, the Commission had completed its consideration on first reading of part one of the draft articles on State responsibility. The Drafting Committee had therefore dealt only with parts two and three at the current session. It had had two tasks to accomplish: first, to examine the draft articles dealing with international crimes which had been referred to it; and, secondly, to undertake the fine-tuning, or *toilette finale*, of all the articles in parts two and three. Some had been adopted quite a long time ago and there was a need to establish consistency in the use of terms. For the Commission's convenience, the entire set of articles in parts one, two and three had been reproduced and renumbered consecutively.

3. The Drafting Committee had been very careful to limit any changes in the articles of parts two and three which had been previously adopted by the Commission.

* Resumed from the 2438th meeting.

¹ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 et seq.

The few changes made were intended to bring older articles into line with new ones or to clarify the text.

4. The Drafting Committee had had to work under extremely difficult conditions: it had been deprived of the essential assistance of the Special Rapporteur, whose function had traditionally been to guide the Drafting Committee, make alternative proposals and, of course, prepare the commentary to the articles once they had been adopted in plenary. The members of the Drafting Committee therefore deserved a special tribute for their efforts. Special thanks were owed to Mr. Bowett, who had taken the trouble to formulate revised texts and commentaries for the articles that had been referred to the Drafting Committee, taking into account the views expressed in plenary.

5. The titles and text of parts two and three proposed by the Drafting Committee read as follows (the number within square brackets indicates the number of the corresponding article adopted by the Commission at previous sessions):

Part two

CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY

CHAPTER I

GENERAL PRINCIPLES

Article 36 [1]. Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of part one, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 [2]. Lex specialis

The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

Article 38 [3]. Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this part.

Article 39 [4]. Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 40 [5]. Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part one, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) If the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute are entitled to the benefit of that right;

(c) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) The right has been created or is established in its favour;

(ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(f) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime,* all other States.

CHAPTER II

RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 [6]. Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 42 [6 bis]. Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) The injured State; or

(b) A national of that State on whose behalf the claim is brought;

which contributed to the damage.

* The term "crime" is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia*, avoiding the penal implication of the term.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 43 [7]. Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) Is not materially impossible;

(b) Would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) Would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) Would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 44 [8]. Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 45 [10]. Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) An apology;

(b) Nominal damages;

(c) In cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) In cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 46 [10 bis]. Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III

COUNTERMEASURES

Article 47 [11]. Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 41 to 46, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set out in articles 48 to 50, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful

act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 48 [12]. Conditions relating to resort to countermeasures

1. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

2. Provided that the internationally wrongful act has ceased, the right of the injured State to take countermeasures is suspended when and to the extent that the dispute settlement procedure referred to in paragraph 1 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 49 [13]. Proportionality

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 50 [14]. Prohibited countermeasures

An injured State shall not resort, by way of countermeasures, to:

- (a) The threat or use of force as prohibited by the Charter of the United Nations;
- (b) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;
- (c) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;
- (d) Any conduct which derogates from basic human rights; or
- (e) Any other conduct in contravention of a peremptory norm of general international law.

CHAPTER IV

INTERNATIONAL CRIMES

Article 51. Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52. Specific consequences

Where an internationally wrongful act of a State is an international crime:

- (a) An injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;
- (b) An injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53. Obligations for all States

An international crime committed by a State entails an obligation for every other State:

- (a) Not to recognize as lawful the situation created by the crime;

- (b) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

- (c) To cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

- (d) To cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

Part three

SETTLEMENT OF DISPUTES

Article 54 [1]. Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 [2]. Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 [3]. Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 [4]. Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 [5]. Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken

is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Article 59 [6]. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 60 [7]. Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Annex I

THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

- (i) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Annex II

THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2, shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

6. The Drafting Committee had attempted to bring the style and structure of parts two and three of the draft articles into line with those of part one, which had already been adopted on first reading. Part two had accordingly been divided into chapters, which he proposed that the Commission should take up individually.

PART TWO (Content, forms and degrees of international responsibility)

CHAPTER I (General principles)

ARTICLE 36 (Consequences of an internationally wrongful act),

ARTICLE 37 (*Lex specialis*),

ARTICLE 38 (Customary international law),

ARTICLE 39 (Relationship to the Charter of the United Nations), and

ARTICLE 40 (Meaning of injured State)

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that part two, entitled, as in the original draft, “Content, forms and degrees of international responsibility”, now consisted of four chapters. Chapter I, entitled “General principles”, contained articles 36 [1] to 40 [5], adopted by the Commission at its thirty-fifth session in 1983³ and at its thirty-seventh session in 1985⁴ and had at the current time been given titles. Article 36 [1] (Consequences of an internationally wrongful act), was basically an introductory clause to part two. The Drafting Committee had made only minor drafting changes to the article in order to bring it into line with the terms used in part one, replacing, for example, the words “pursuant to” in paragraph 1 by the words “in accordance with”.

8. The Drafting Committee had likewise made some minor drafting changes in the first part of article 37 [2] (*Lex specialis*) to make it more precise.

9. Article 38 [3] (Customary international law) provided for the application of customary international law to those legal consequences of an internationally wrongful act of a State that were not covered by part two. The Drafting Committee had deleted the “without prejudice” clause at the beginning of the article. That clause referred to the Charter of the United Nations and to a draft article never adopted by the Commission on diplomatic protection and it had been found unnecessary. The article had been entitled “Customary international law”.

10. The Drafting Committee had made no changes to article 39 [4] (Relationship to the Charter of the United Nations), which it had entitled “Relationship to the Charter of the United Nations”.

11. Article 40 [5] (Meaning of injured State) defined the term “injured State”. The Drafting Committee had only made minor drafting changes in paragraphs 1 and 3 of that article. The bracketed words in paragraph 3 had been deemed unnecessary and had therefore been deleted. As the word “crime” was used for the first time, after its use in article 19 of part one, in article 40 of part two, the Drafting Committee had found it useful to indicate in a footnote that the word could be replaced by an alternative expression such as “an internationally wrongful act of a serious nature” or “an exceptionally serious wrongful act”.

12. In concluding his introduction to chapter I of part two, he recalled that, during the Commission’s discussion of the matter at its forty-third and forty-fourth sessions, the question of a plurality of injured States had been raised, particularly in connection with human rights and the protection of the environment. It had been pointed out that not all injured States were injured in the same way or to the same degree and that it must therefore be determined in each case to what extent the State was entitled to claim restitution, compensation, satisfaction or guarantees of non-repetition or to resort to countermeasures.

13. At the forty-fourth session, in 1992, the Special Rapporteur on the topic, Mr. Arangio-Ruiz, had proposed an article 5 *bis*⁵ to address that question. However, after discussing the article extensively and reviewing many different scenarios, the Drafting Committee had taken the view that a plurality of injured States did not really give rise to any difficulty, for the following reasons: different forms of reparation were available to every injured State depending on the type and extent of damage suffered, so that each injured State should be able to find a solution suitable to its particular case. As to countermeasures, article 49 [13] (Proportionality) required that any countermeasures taken by an injured State had to be in proportion to the degree of gravity of the injury suffered. The twofold problem of reparation and countermeasures thus appeared to have been solved. The only difficulty envisaged by some members of the Drafting Committee had been the possibility that a plurality of demands in relation to the forms of reparation or countermeasures might complicate or delay the settlement procedure. That issue had, however, not seemed to be of sufficient gravity to be dealt with in a separate article. It had been thought that the issue could be covered in the commentary to article 36 [1], article 40 [5] or article 42 [6 *bis*]. The Drafting Committee had therefore decided not to adopt the proposed article 5 *bis*.

14. The CHAIRMAN invited the members of the Commission to comment on chapter I of part two of the draft articles.

15. Mr. ARANGIO-RUIZ said that he had two comments to make on chapter I of part two just introduced by the Chairman of the Drafting Committee.

16. With regard to article 5 *bis*, which the Drafting Committee had decided not to adopt, he recalled that, as Special Rapporteur, he had proposed that draft article only at the insistence of some members of the Commission, having tried in vain to demonstrate in his third,⁶ fourth⁷ and fifth⁸ reports, that no such provision was necessary. He therefore did not consider himself to be the “father” of that pointless article and wanted his position to be duly noted.

17. His objections to article 39 [4] went far deeper. As far back as 1992, when he had been thinking about the opening articles of part two of the draft, he had considered that that article should be deleted. In that connection, he referred members of the Commission to the statement he had made at the forty-fourth session of the Commission.⁹ He had again expressed his reservations

⁵ *Yearbook* . . . 1992, vol. II (Part Two), p. 39, footnote 86.

⁶ *Yearbook* . . . 1991, vol. II (Part One), document A/CN.4/440 and Add.1, chap. IX, “The problem of differently injured States”, pp. 26-28.

⁷ *Yearbook* . . . 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3, chap. VIII, “The problem of the plurality of equally or unequally injured States”, pp. 43-49.

⁸ *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3, chap. II, sect. A.4(c), “The wrongdoer ‘not directly’ injured States relationship”, paras. 154-158.

⁹ *Yearbook* . . . 1992, vol. I, 2277th meeting, pp. 150-151, paras. 3 to 5.

³ *Yearbook* . . . 1983, vol. II (Part Two), pp. 42-43.

⁴ *Yearbook* . . . 1985, vol. II (Part Two), pp. 24-25.

about the contents of that article in his seventh report¹⁰ and in his eighth report (A/CN.4/476 and Add.1).

18. Unfortunately, his struggle appeared to have been in vain because the article was still there. The only reaction of the Commission to his criticism of the article in question had apparently been a *fin de non-recevoir* based on the fact that article 4 (now article 39) had already been adopted at the thirty-fourth and thirty-fifth sessions and could therefore not be taken up again. Consequently, he now felt obliged to state again and explain in greater detail the reasons why the maintenance of the article in the draft was dangerous from the point of view not only of the development, but also of the preservation of the law of State responsibility.

19. His objections had to do primarily with the scope of the provision. Not only was the scope not clearly defined, but it also went far beyond the letter of the article itself. Although the article referred to the legal consequences of an internationally wrongful act of a State set out in the provisions of part two of the draft, its effects would inevitably extend to the entire draft, particularly to parts one and three.

20. Part one set forth the general definition of an internationally wrongful act, dealt with the problem of attribution, established a distinction between different internationally wrongful acts and listed the circumstances excluding wrongfulness. But since article 39 [4] spoke of the legal consequences of an internationally wrongful act, it might well be indispensable to deal with the existence or attribution of the wrongful act, its nature and gravity and the possible existence of circumstances excluding wrongfulness. Part three of the draft dealt with dispute settlement, negotiations and third party procedures. Was it not also inevitable that a conciliation commission or arbitral tribunal would also have to take article 39 [4] into account? Part three was clearly conceived in such terms as to include not only part two, but also part one within the mandate of any third party body. In conclusion, it could be said that there was not a single article or paragraph of the draft that would remain unaffected by article 39 [4].

21. But the scope of the article went even beyond the so-called "secondary" rules embodied in the draft. The consequences covered by the draft presupposed the existence and interpretation of the international obligation whose infringement constituted the alleged wrongful act, namely, the existence and meaning of what, in the jargon of the Commission, was called a "primary" rule. It was therefore doubly incorrect to assume that the effects of article 39 [4] would apply only to those rules of part two that related to the substantive or instrumental consequences of the internationally wrongful act. In fact, the scope of article 39 [4] covered the entire draft and more.

22. Considering further that it was in the very nature of a convention on State responsibility to apply to the infringement of any international obligation in any area of international relations that might be of legal relevance,

the provision of article 39 [4] would apply to any primary or secondary international obligations deriving from international treaties and also to those deriving from customary international law.

23. The presumable effects of article 39 [4] also had to be considered. The reference in that article to "the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security" meant mainly the power of the Security Council to make recommendations to Member States or to take binding decisions, especially of the kind referred to in Chapter VII of the Charter. Article 39 [4] would subject any obligations of States and the corresponding rights to the decisions of the Security Council, and that would mean that any such rights and obligations could be restricted, suspended or otherwise modified at the discretion of the Council whenever it decided to take action for the maintenance of international peace and security. That possibility was aggravated by the words "as appropriate" in the second line. Who would be the judge of such "appropriateness" if not, yet again, the political organ of the United Nations principally responsible for the maintenance of peace and international security—in other words, the Council?

24. Another delicate point that had not been explained either at the thirty-fourth and thirty-fifth sessions was the ambiguity of the word "procedures" used in the article. The commentary to former article 4¹¹ was very laconic on that point. Should the term be understood to mean "procedural rules", although that meaning seemed to be implicitly covered by the term "provisions", or should it be understood to mean the action that might be taken by the international body or bodies concerned with the maintenance of international peace and security? Was it part of the de facto application of the Charter of the United Nations or part of Charter interpretation by the political body or bodies concerned? In short, to what exactly were all the rules on State responsibility—primary, secondary or tertiary—supposed to be subject according to article 39 [4]? To legal rules or just to facts?

25. Another issue was the relationship between article 39 [4] and Article 103 of the Charter of the United Nations. Article 103 subjected any international agreement to all the provisions of the Charter (and not only to the all-important purposes and principles of the United Nations). But when article 39 [4] spoke of the "provisions and procedures" of the Charter, it was referring to a specific area, that of the maintenance of international peace and security. By thus singling out some specific provisions and procedures of the Charter, did not the article create a very questionable imbalance among the obligations, rights and functions envisaged in the Charter? On what basis—*de lege lata* or *de lege ferenda*—would the Commission suggest that the law of State responsibility as codified and developed should be subjected, not to all the obligations and rights deriving from the Charter, but only to the "provisions and procedures" relating to the maintenance of international peace and security? It should not be forgotten that Article 103 of the Charter was the general rule governing the relationship between the Charter and other international agreements.

¹⁰ See *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/469 and Add.1-2, chap. I, sect. C.

¹¹ See 2438th meeting, footnote 8.

Was a partial interpretation of the Charter legally admissible? By emphasizing the primacy of the decisions of a political organ of the United Nations—and, what was more, an organ of restricted composition—did not article 39 [4] alter the balance established by the Charter between the General Assembly and the Security Council? Could a commission of experts entrusted with the development and codification of a most crucial area of international law allow itself that liberty?

26. By adopting a provision such as article 39 [4], the Commission would be fully espousing the views of the very few supporters of the legality of the Security Council's actions in the *Lockerbie* case.¹² The Commission would practically admit that, by resolution 748 (1992) of 31 March 1992, the Security Council had been entitled, in the words of some of the members of ICJ, to “bind” that Court to a finding of a political body issued by that body while the matter was *sub judice* before the Court itself. By adopting the article, the Commission would contest the distinction between Chapters VI and VII of the Charter of the United Nations and, at the same time, the fact generally admitted by international legal scholars that the acts of the Council did not represent *res judicata* in a dispute between States over their legal rights and obligations. By adopting article 39 [4], the Commission would be “undoing” the law of State responsibility rather than codifying and developing it.

27. Having taken a new look at the documents of 1982 and 1983, he thought that the relatively confused nature of the initial discussions on part two of the draft could be explained by the fact that, at the time, there had been little or no mention of the fundamental distinction between Chapters VI and VII and, within Chapter VII itself, of any limits on the Security Council's function, although, as he had stated when introducing the eighth report (2436th meeting), such limits within Chapter VII did exist. At the time of those initial debates, the Commission had not yet known very clearly whether it should deal with crimes at the beginning or at the end of part two or even whether part three should not precede part two. Furthermore, those debates had taken place at the time of the cold war and of the paralysis of the Council, so that problems of distinctions between Chapters VI and VII of the Charter or of possible limits on Council action under Chapter VII had hardly begun to be considered. The situation was different today, and no international lawyer could ignore problems that were discussed in almost every issue of the international law quarterlies.

28. At the preceding session, he had proposed, as Special Rapporteur, a different formulation for a saving clause relating to the maintenance of international peace and security, which had formed the subject of proposed draft article 20 for part two.¹³ In that article, he had tried to pay due respect to the law of collective security without subordinating the law of State responsibility to it. To that end, he had inverted the order of the two sets of

rules with a view to achieving two results: ensuring, on the one hand, that the rules on State responsibility did not interfere with the Security Council's legitimate action for the maintenance of international peace and security and, on the other, that the rules of State responsibility would not be subject unconditionally to derogation by virtue of decisions of the Security Council. He had also relied, of course, on the judicial competence vested in ICJ under his proposed draft article 19 to determine the existence/attribution of the most serious internationally wrongful acts.

29. The proposed draft article also marked an improvement with regard to those provisions of the Charter of the United Nations that the draft on State responsibility must not prejudice. The wording of draft article 20 had referred only to measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter, which was much less broad than the formula used in article 39 [4], which referred to provisions and procedures. Draft article 20 had, however, been only a makeshift provision, as it were, for his idea had simply been to try and propose a better text, or a less damaging one, than article 4 as drafted at the time.

30. Lastly, he would prefer it by far if the Commission did not just replace article 39 [4] by another article, but simply deleted it from the draft. Even draft article 20 would be superfluous, not to say ambiguous, having regard to the existence of Article 103 of the Charter of the United Nations. Moreover, there was no reason to introduce a special rule into such a sensitive area and within the framework of such a broad-ranging subject as State responsibility.

31. The CHAIRMAN invited the members of the Commission to comment first on article 39 [4], to which Mr. Arangio-Ruiz' remarks related.

32. Mr. BENNOUNA said that the ambiguity that marked article 39 [4] was not fortuitous and those members who defended the article should therefore make their precise intentions known. If it were simply a matter of giving priority to the Charter of the United Nations, Article 103 would suffice and a provision like article 39 [4] was pointless. On the other hand, if article 39 [4] were meant to supplement Article 103 in any way, at all, he would like to have an explanation before taking a decision.

33. Moreover, it was not normal for article 39 [4] to refer only to the provisions on the maintenance of peace and security, since it was the whole of the Charter of the United Nations that took priority over a convention. In any event, article 34 of part one cited the Charter with regard to self-defence, as did article 50 [14] of part two with regard to the threat or use of force, as prohibited by the Charter. Also, if by “procedures” the Commission meant the resolutions of the Security Council, it should say so clearly and not allow any ambiguity to subsist. He also wondered why the words “subject to” rather than “without prejudice to” were used.

34. He formally requested that any deletion of article 39 [4] should be put to the vote. If the Commission

¹² *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America)*, see, in particular, *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 3 and 114.

¹³ See 2436th meeting, footnote 4.

decided to retain the article, he would have amendments to propose.

35. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, after comparing the article as adopted at the thirty-fifth session with the article proposed by the Special Rapporteur, the Drafting Committee had decided that it would be preferable to retain the first version, which reflected Article 103 of the Charter of the United Nations without anything more. In that connection, he considered that Mr. Arangio-Ruiz' interpretation was somewhat excessive. At all events, the Drafting Committee had not considered the possible deletion of the article and it was up to the Commission to decide the matter.

36. The CHAIRMAN said that, before formally proposing that the Commission should vote on the deletion of article 39 [4], he would like to know whether it was not possible for members to agree on more neutral wording for the article. The words "subject to" could indeed suggest that, so far as the Commission was concerned, there was a hierarchy between the various provisions of international law. The words "without prejudice to" would refer more simply to Article 103 of the Charter of the United Nations.

37. Mr. ROSENSTOCK, speaking on a point of order, said that the discussion would be more orderly if the Commission had before it formal proposals made by individual members of the Commission, in accordance with the order of speakers.

38. The CHAIRMAN suggested that article 39 [4] should be reworded to read:

"The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are without prejudice to the provisions of the Charter of the United Nations."

39. Mr. ROSENSTOCK said that he was not prepared to accept an off-the-cuff suggestion to amend a provision that had been before the Commission for a number of years and that it had considered several times. The expression "without prejudice to" would create more problems than it would solve and would turn the phrase in question into a totally unnecessary statement. Moreover, all the arguments put forward by the former Special Rapporteur had been debated at length and finally rejected by the majority of the members of the Drafting Committee. He suggested that the Commission should revert to the matter when the subject was reconsidered at a later session.

40. The CHAIRMAN said that, when the article had been adopted at the thirty-fifth session, the other draft articles had still not been available; it was normal for the members of the Commission to have questions about the interpretation of a provision in the light of all the articles. At that time, as a member of the Commission, he had accepted the article with reservations, since he believed that it was not the Commission's role to try and establish a hierarchy between the rules of law.

41. Mr. TOMUSCHAT, speaking on a point of order, asked whether there was a commentary to former article 4 of part two. If so, the Commission should take cognizance of it.

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the commentary, which was very short, read:

(1) Part two will indicate the legal consequences of an internationally wrongful act in terms of new obligations and new rights of States.

(2) It cannot a priori be excluded that, under particular circumstances, the performance of such obligations and/or the exercise of such rights might result in a situation relevant to the maintenance of international peace and security. In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part two. In particular, the maintenance of international peace and security may require that countermeasures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to 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.¹⁴

43. Mr. VILLAGRÁN KRAMER said that some of the articles of the draft had been adopted at the thirty-fifth and thirty-seventh sessions and others at the forty-fourth and later sessions. The question was therefore whether the Commission could review what it had done at earlier sessions sometime in the past—and it must not forget, in that case, that, at the thirty-fourth session, it also had had an exchange of views on part one—or should focus on what it had done in recent years and in its present composition. Furthermore, Governments had submitted their observations on the draft articles the Commission had submitted to the Sixth Committee. Article 39 [4] had, however, not given rise to any objections on their part. If the Commission wished to amend the wording of those articles, it must bear in mind the old parameters which had provided the framework when they had been drafted.

44. With regard more specifically to the content of article 39 [4], he noted that wrongful acts were governed by general international law—*lex generalis*—and the Charter of the United Nations—*lex specialis*. In that connection, Mr. Crawford had very clearly demonstrated the role the Commission played in the elaboration of general international law. The treatment of wrongful acts, for instance, had no limits other than those laid down in the Charter.

45. The Chairman's suggestion did not seem convincing and he would be more inclined to support Mr. Rosenstock's position. He had no definite ideas about the words "and procedures" and would like to have a written proposal before he took a decision.

46. Mr. BOWETT said that the question was whether the Security Council could, in the exercise of its powers with regard to the maintenance of international peace and security, suspend or abrogate the legal rights which the international law of responsibility vested in States. However, if article 39 [4] did not address the problem then its deletion would not, nor indeed would any drafting changes made to it. The best solution would perhaps be to deal with the matter in the commentary.

47. Mr. Sreenivasa RAO said that, while Mr. Arangio-Ruiz had raised a substantive problem and his views

¹⁴ See 2438th meeting, footnote 8.

were not without merit, the Commission could not consider that issue because, first of all, it had not been referred to it and, secondly, it did not have enough time to do so. In respect of the substance, if article 39 [4] were to be given the extreme interpretation Mr. Arangio-Ruiz had given it, it would clearly be better if it was left out altogether. Nevertheless, because of its radical nature, such an interpretation was hardly possible. It would therefore be enough to discuss the problem in the commentary without attempting to solve it as to substance.

48. Mr. ARANGIO-RUIZ said that, in the first place, it was not the case that article 39 [4] had been considered several times by the Commission. Secondly, the commentary to article 4, as just read out by the Chairman of the Drafting Committee, showed that not enough thought had been given to the question at the time. Thirdly, the work done by the Commission in the past did not have the force of *res judicata* and the Commission could certainly resume its consideration of texts which had already been adopted on first reading. Lastly, the Charter of the United Nations did not govern State responsibility. He therefore maintained that article 39 [4] should be deleted because it overlapped with Article 103 of the Charter.

49. Mr. HE said that he preferred the current wording "subject (. . .) to the provisions" to that suggested by the Chairman, namely, "without prejudice to the provisions". He also considered the words "as appropriate" to be too vague.

50. Mr. EIRIKSSON said that, while it was true that the texts adopted by the Commission did not have the force of *res judicata*, it was preferable for practical purposes not to amend an article that the Commission in its previous composition had already adopted on first reading. In the case at hand, the Commission could come back to article 39 [4] on second reading and would have the added advantage of doing so in the light of part one. Moreover, there were certainly cases where State responsibility was governed by the provisions of the Charter of the United Nations and, in particular, by Article 103, and it was precisely such cases to which reference was being made in article 39 [4] as it now stood. He agreed with Mr. Bowett that it would be best to explain the issue in the commentary and to make it clear that the application of article 39 [4] could not have the radical consequences referred to by Mr. Arangio-Ruiz.

51. Mr. FOMBA said that Article 103 of the Charter of the United Nations could be regarded as an international policing statute and was therefore, by virtue of its peremptory nature, applicable in all cases, with no need to say so. If article 39 [4] gave rise to controversy, the *renvoi* technique could easily be used. The commentary read out by the Chairman of the Drafting Committee seemed to promote a "particularist" approach that was open to criticism. As to substance, he agreed with Mr. Arangio-Ruiz and Mr. Bennouna that article 39 [4] should be deleted or at least made more neutral. He therefore fully supported Mr. Bennouna's proposal.

52. Mr. KABATSI said he fully shared the views of Mr. Arangio-Ruiz and Mr. Bennouna: article 39 [4] was not necessary and should be deleted. Any explanations

that might be given in the commentary would not dispel the concerns that might arise in that regard because the question was not simply one of interpretation.

53. Mr. ROSENSTOCK said that the outcry over article 39 [4] was unjustified: it seemed to be designed, by means of a deliberately biased interpretation of the text, to lead the Commission into taking action on questions which were usually not referred to it.

54. Even though its wording was not perfect, article 39 [4] was designed to indicate which part of the Charter of the United Nations, through the application of Article 103, might have an impact on the rules of responsibility. The words "as appropriate" were designed to avoid any extreme consequences of the application of the provisions of the Charter in that regard. Article 39 [4] simply stated that the Charter was so designed that, in certain areas, including that of the maintenance of international peace and security, United Nations bodies had the power to take decisions which were binding on States and which, in accordance with Article 25 of the Charter, established legal obligations. The Commission could always come back to article 39 [4] on second reading, but to delete it at present would be a serious mistake. As to the proposed amendments, if extreme interpretations were maintained they would only exacerbate the problem they were supposed to solve. The best solution was probably to note in the commentary that the Commission would come back to article 39 [4] on second reading and to request the views of Governments in that regard.

55. Mr. VARGAS CARREÑO said that, as Mr. Arangio-Ruiz had explained, article 39 [4] did not fill any legal gap and could thus be deleted without harm. The Charter of the United Nations itself in fact dealt with the problem that article 39 [4] was supposed to solve. If the majority of the members of the Commission wanted to retain it, however, the proposals by Mr. Bennouna and the Chairman should be adopted.

56. Mr. THIAM said that the best solution was probably to put Mr. Bennouna's proposal to a vote. If the proposal was not adopted, the commentary could refer to it and indicate that the members of the Commission intended to come back to article 39 [4] on second reading.

57. Mr. TOMUSCHAT said that, although article 39 [4] was not necessary because the provisions of the Charter of the United Nations and of Article 103 in particular were applicable in any case, it was useful because it served as a reminder that questions relating to international peace and security might arise in the implementation of the consequences of an internationally wrongful act. It was also clear that article 39 [4] was not intended to undermine the authority of the Security Council—it could not do so—any more than it was designed to endorse its recent practice. He therefore did not share the serious concerns which had been expressed. Moreover, the Commission should be extremely careful before amending the current text because it certainly did not have time to give detailed consideration to the problem that had been raised. The best solution would probably be, as some other members had already indicated, to explain in the commentary that the Commission was divided as to the need for article 39 [4] and to request the

opinion of Governments so that the Commission could come back to the article on second reading.

58. Mr. GÜNEY said that he shared Mr. Tomuschat's views. If the Commission preferred to adopt more neutral wording, it should choose the amendment suggested by the Chairman and Mr. Bennouna.

59. Mr. ROBINSON said that, in his view, Article 103 of the Charter of the United Nations did not solve the problem raised by some members of the Commission. Article 103 governed the relationship between the treaty obligations of States and their obligations under the Charter. It said nothing about the provisions of general international law. Simply referring to it would therefore not do away with the problem.

60. He also thought that, as it stood, article 39 [4] did not adequately explain the relationship between the law of State responsibility and the Charter of the United Nations. It was thus inappropriate to say that the legal consequences of an internationally wrongful act were "subject" to the provisions of the Charter. He preferred the wording suggested by the Chairman: "are without prejudice to the provisions of the Charter of the United Nations".

61. Mr. ARANGIO-RUIZ said that it would not be appropriate for the Commission to postpone its decision on article 39 [4]. The real question was to decide whether that article was useful.

62. According to Mr. Robinson, Article 103 of the Charter of the United Nations was not enough to solve the problem raised. It was true that Article 103 expressly governed only the relationship between Charter law and treaty law, but, since the Charter could be regarded as *lex specialis*, there was no lack of authors who considered that the Charter also prevailed, from a certain point of view, over customary international law. He did not, however, intend to take a stand on that point. He proposed that article 39 [4] should be put to the vote.

63. Mr. EIRIKSSON said he also thought that the Commission could not brush the problem off lightly. Since it involved a number of complex aspects, the best solution would be to analyse it in the commentary. Mr. Bowett and Mr. Arangio-Ruiz could be asked to help out in that regard.

64. Mr. de SARAM said that the situation referred to in article 39 [4] was that in which an internationally wrongful act gave rise to legal consequences that in fact took the form of rights for the injured State. The purpose of the article was thus to recall that such rights were always subject to that State's obligations under Article 103 of the Charter of the United Nations, which would "prevail", as stated in the Article itself. The proposal by Mr. Bennouna and the Chairman was therefore much too vague. The current wording of article 39 [4] would be better, except for the expressions "as appropriate" and "procedures", which were problematic.

65. As Mr. Sreenivasa Rao had pointed out, however, it was not in the Commission's interests to start a substantive debate at so late a stage. The comments on article 39 [4] should therefore be included in the commentary.

66. Mr. Sreenivasa RAO said that it was not the Charter of the United Nations itself that was being discussed at present. As the Charter itself stated, the Charter prevailed only in the event of a conflict between the obligations of a State under the Charter and its treaty obligations, and that was a special case.

67. The commentary should explain that the expression "as appropriate" did not mean that any limitation was being placed on the action of the Security Council, it being understood that such action came within the context of the maintenance of international peace and security.

68. Mr. BENNOUNA said that, in his view, a *renvoi* to the Charter of the United Nations would be enough. While no member seemed to be in favour of article 39 [4] as it stood, the Commission was ready to adopt it because it had been approved at the thirty-fifth session in 1983. The situation had changed since that time and the Security Council was no longer seen in the same light. In 1996, the problem of abuse of authority was in fact topical.

69. That was why the term "procedures" was so inappropriate: if the Security Council established new procedures, would they prevail, too? He would find it extremely difficult to agree that a mere commentary to the article could solve the problem.

70. Mr. AL-BAHARNA said that he also had reservations about the words "are subject" and "procedures". If article 39 [4] was adopted in its present form, that might give rise to many problems when the articles were applied. In general, the Commission seemed divided in its views on that provision. He therefore proposed that a vote should be taken on article 39 [4], as Mr. Arangio-Ruiz had requested, and then on the amendment proposed by Mr. Bennouna and the Chairman and, lastly, on the proposal by Mr. Tomuschat.

71. The CHAIRMAN invited the members of the Commission to indicate by a show of hands whether they wished to retain article 39 [4].

There were 11 votes in favour, 11 votes against and 4 abstentions.

Article 39 was retained.

72. Mr. BENNOUNA read out the text which would replace the current wording of article 39:

"The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are without prejudice to the provisions of the Charter of the United Nations."

73. The CHAIRMAN invited the members of the Commission to vote on that amendment.

The amendment was rejected by 10 votes to 9, with 7 abstentions.

The meeting rose at 1.15 p.m.

2453rd MEETING

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

Chairman: Mr. Mochtar KUSUMA-ATMADJA

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)*

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

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

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

“Crimes against United Nations and associated personnel

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

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

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

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

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

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

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

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

* Resumed from the 2449th meeting.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

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

⁴ See 2441st meeting, footnote 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 19, as amended, was adopted.

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

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

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

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

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

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

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

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

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

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

It was so agreed.

The meeting rose at 1.40 p.m.

2454th MEETING

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

Chairman: Mr. Robert ROSENSTOCK

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

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING³ (*concluded*)

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

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

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

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

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

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

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

* See 2464th meeting, para. 71.

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

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

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

against the Peace and Security of Mankind as a whole, as amended.

It was so decided.

*The draft Code of Crimes against the Peace and Security of Mankind, as a whole, as amended, was adopted on second reading.***

TRIBUTE TO THE SPECIAL RAPPORTEUR

4. The CHAIRMAN said that, in accordance with the practice of the Commission and in order to give official recognition to the special contribution which the Special Rapporteur, Mr. Doudou Thiam, had made to the work done by the Commission on the draft Code, he proposed that it should adopt a draft resolution, which read:

“The International Law Commission,

“Having adopted the draft Code of Crimes against the Peace and Security of Mankind,

“Expresses to the Special Rapporteur, Mr. Doudou Thiam, its deep gratitude for and its warmest congratulations on the exceptional contribution he has made to the preparation of the draft Code through his devotion and tireless efforts and for the results he has achieved in his work on the articles of the draft Code of Crimes against the Peace and Security of Mankind.”

5. The CHAIRMAN said that he took it that the Commission wished to adopt the draft resolution by consensus.

It was so decided.

6. Mr. THIAM (Special Rapporteur) said that he was very moved by the tribute just paid to him by the Commission. He in turn wished to thank the Chairmen of the successive Drafting Committees and all his collaborators, without whose devotion the work on the draft Code could not have been successfully completed.

7. The CHAIRMAN said that the Commission still had to recommend to the General Assembly the form that the Code should take and the modalities of its adoption. Consultations in that regard would take place among the members of the Commission.

Visit by a member of the International Court of Justice

8. The CHAIRMAN welcomed Mr. Ferrari Bravo, a Judge of the International Court of Justice.

** Subsequently, the wording of article 7 (renumbered as article 8) was amended (see 2465th meeting, paras. 1-4) and a new subparagraph was added to article 17 (renumbered as article 18) (see 2464th meeting, paras. 49 et seq.).

State responsibility (continued)* (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,⁴ A/CN.4/L.524 and Corr.2)**

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE⁵ PROPOSED BY THE DRAFTING COMMITTEE⁶ (continued)

PART TWO (Content, forms and degrees of international responsibility) (continued)***

CHAPTER I (General principles)

ARTICLE 36 (Consequences of an internationally wrongful act),

ARTICLE 37 (*Lex specialis*),

ARTICLE 38 (Customary international law),

ARTICLE 39 (Relationship to the Charter of the United Nations) and

ARTICLE 40 (Meaning of injured State) (concluded)***

9. The CHAIRMAN invited the Commission to conclude its consideration of chapter I of part two.

10. Mr. ARANGIO-RUIZ said that he still had reservations about article 39, whose deletion he had proposed unsuccessfully (2452nd meeting). At that time, he had abstained in the vote on the amendment to that article proposed by Mr. Bennouna because it had seemed dangerous to him to include an express reference to the Charter of the United Nations just in the context of State responsibility. Adding a special rule on responsibility would pave the way for a new interpretation of the Charter, whereas Article 103 of the Charter would suffice. He also stated that he was unable to join the Chairman in his welcome to the visitor.

11. Mr. BARBOZA said that the reasons that had made him express his opposition to article 36 [1], paragraph 2, still existed. That paragraph provided that, despite the legal consequences referred to in paragraph 1, the State which had committed an internationally wrongful act still had to perform the obligation it had breached. That provision was not convincing because, once it had been breached, an obligation could no longer be performed. The breach itself gave rise to new obligations in accordance with what were known as secondary rules. That distinction between primary and secondary rules was a conceptual framework which the Commission had been using profitably for a long time.

12. An obligation was a legal link between two subjects of law. Its content was variable, but its principle was clearly the relationship established between the two

*** Resumed from the 2452nd meeting.

⁴ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

⁵ For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 et seq.

⁶ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

subjects for a certain service. If that primary obligation was breached, the obligation of reparation came into play and it was entirely different, if only because it represented a penalty, not a service voluntarily provided. The content of that obligation was also different from that of the primary obligation. According to the rule arising out of the 1928 decision by PCIJ in the *Chorzów Factory* case,⁷ the breach of a primary obligation had effects which had to be wiped out entirely. To that end, the fulfilment of the primary obligation was not enough because the breach had given rise to new obligations. Thus, if the primary obligation had been to pay a certain amount on a particular date, in the event of failure, interest would also have to be paid by virtue of a new obligation.

13. In conclusion, he maintained that article 36 [1], paragraph 2, made the Commission's conclusions less clear because it stated that, following a breach of the obligation, there was still a legal link which had, however, by definition, already been broken. Primary rules were thus creeping into the realm of secondary rules. The distinction between the two was not a mere artifice, but a fact.

14. Mr. de SARAM, referring to the footnote to article 40 [5], which corresponded to the word "crime" in paragraph 3, and according to which "alternative phrases" could be "substituted" for that term, said that, whatever phrase was chosen, it must correspond exactly to what was stated in article 19, paragraph 2, which referred to the breach of an "international obligation . . . essential for the protection of fundamental interests of the international community".

15. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt chapter I (articles 36 to 40) of part two.

Chapter I (articles 36 to 40) of part two was adopted.

CHAPTER II (Rights of the injured State and obligations of the State which has committed an internationally wrongful act)

ARTICLE 41 (Cessation of wrongful conduct),

ARTICLE 42 (Reparation),

ARTICLE 43 (Restitution in kind),

ARTICLE 44 (Compensation),

ARTICLE 45 (Satisfaction), and

ARTICLE 46 (Assurances and guarantees of non-repetition)

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), in introducing part two, chapter II, said it contained articles 41 to 46, adopted by the Commission at its forty-fifth session.⁸

17. He said that the title of article 41 [6] (Cessation of wrongful conduct) described its content accurately. The Drafting Committee had not made any changes in that article.

18. Article 42 [6 bis] (Reparation) provided that the injured State was entitled to obtain reparation, four forms of which were defined and detailed in the four articles that followed. The Drafting Committee had simply made a minor change in paragraph 1. He was, however, proposing the addition of a new paragraph 3. During the debate on the consequences of crimes, the question had been raised whether a general limit, which would be applicable to both delicts and crimes, should be placed on full reparation. Opinion in the Drafting Committee had been divided on that point.

19. For some members of the Drafting Committee, no form or quantum of reparation should deprive the population of the author State of its means of subsistence. In fact, wrongful acts were often committed by the elite or by the leaders of a State without the population participating or being in a position to prevent those acts. Other members had referred to State practice and cited article 42 [6 bis], paragraph 1, which mentioned "full reparation". They had noted that the articles on restitution in kind (art. 43 [7]) and satisfaction (art. 45 [10]) already set limits on reparation. In addition, they did not see how, in principle, full reparation could deprive a population of its means of subsistence. If the amount of the compensation were extremely high, payment methods could be agreed on which would avoid that harm. Moreover, the point of view on which the new paragraph 3 was based took account only of the harmful effects which full reparation might have on the population of the wrongdoing State and neglected any harm to the population of the injured State that might result from less than full reparation.

20. The majority opinion had prevailed and the Drafting Committee had added a new paragraph to article 42 [6 bis], which he read out. The Commission should bear in mind that some members of the Drafting Committee had expressed reservations about the text.

21. The other articles in chapter II, articles 43 (restitution in kind), 44 (compensation), 45 (satisfaction) and 46 (assurances and guarantees of non-repetition) had not been changed by the Drafting Committee.

22. Mr. ARANGIO-RUIZ said that he had some reservations about article 42 [6 bis] and, consequently, about the articles following it, as a result of the problem of fault on the part of the wrongdoing State.

23. Although fault was not necessarily a *sine qua non* condition of wrongfulness, it played an important role with regard to both the substantive and the instrumental consequences of an internationally wrongful act. It followed that neither the introductory provision before the Commission in article 42 [6 bis], nor those covering the various forms of reparation nor even the articles on countermeasures could properly ignore such a fundamental element, one that characterized most internationally wrongful acts. The notion of fault was surely relevant when moving from the merely preliminary stage of determining wrongfulness to the stage at which the

⁷ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

⁸ See 2436th meeting, footnote 3.

degree of responsibility must be identified. The degree of responsibility could not depend exclusively on the physical, material or objective aspects or elements of the infringement of an international obligation. It depended largely on that element of fault which was called the "subjective" or "psychological" element.

24. From the total absence of fault to such a diversity of variables as those represented by minor fault (*culpa levissima*), negligence and *dolus* (wilful intent), there were as many degrees as in the gravity of the internationally wrongful act. To leave that element out of any consideration of the articles under discussion was not only more serious than to leave a gap for States parties or a conciliation commission, arbitrator or judge to fill but would also mean incorporating a gross ambiguity, particularly as part one did not make any mention at all of fault. To ignore that element in part two could be understood as a negative indication, preventing any consideration of the subjective element either by States or by international bodies involved in dispute settlement.

25. That gap was made even more manifest, if possible, by the fact that article 42 [6 *bis*], paragraph 2, indicated that the negligence or the wilful intent or omission of the injured State was an element that should condition the quality and the quantity of reparation. That provision seemed to take the Commission back to the time when the whole draft had been intended to cover exclusively the responsibility of States for injuries to alien nationals. Moreover, it made article 42 [6 *bis*] appear extremely unbalanced: was it intended to codify the responsibility of the wrongdoing State or that of the injured State? It was not appropriate to refer to the fault, the negligence or the wilful intent of the injured State without referring to those of the wrongdoing State.

26. The problem was aggravated by the fact that there was no mention in article 19 of part one (International crimes and international delicts) of wilful intent, despite the fact that it was difficult to conceive of any one of the crimes referred to in that article as not being characterized by wilful intent. Considering that delicts and crimes were obviously placed along a continuum proceeding from faultless wrongful acts to wrongful acts with a greater or lesser degree of fault, it was strange to move from total non-consideration of fault to the inevitably implied relevance of the gravest degree of fault, namely, *dolus*, in the case of crimes. The law, any more than nature, did not jump over things (*Natura non facit saltus*).

27. It would be even more awkward if the footnote to the term "international crime" in article 40 [5], paragraph 3, was adopted. How could account be taken of an especially serious internationally wrongful act unless account was taken of its subjective aspect, namely, wilful intent, which would no longer be covered without the use of the word "crime", in which it was implicit?

28. He had drawn the Commission's attention more than once to the importance of the role of fault in the determination of the degree of responsibility for, and thus of the consequences of, an internationally wrongful act.

29. By way of evidence, he would confine himself to citing his eighth report (A/CN.4/476 and Add.1), particularly the paragraphs on the role of fault in general

and in connection with satisfaction and on proportionality in chapter II.

30. Sooner or later, when the work had reached the stage of second reading or of a diplomatic conference to adopt a convention on State responsibility, everyone would realize that provisions on so-called "liability" for injurious consequences arising out of acts not prohibited by international law would have to be part of, and flow into, the draft on State responsibility and the convention to be adopted on that subject. He had made that point on only one occasion⁹ in order not to give the impression that he wanted to steal the topic for which Mr. Barboza, Special Rapporteur on the topic of international liability for the injurious consequences of acts not prohibited by international law, was responsible. At that future stage, in any event, it would have to be acknowledged that fault was an essential element in determining the various degrees of responsibility. It was therefore essential to refer to fault in the draft, at least within the framework of parts two and three.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he was aware that Mr. Arangio-Ruiz had always attached great importance to the concept of fault. He had no doubt that many jurists would agree with him that that aspect should have been developed more fully in the draft articles. He recalled, however, that article 42 [6 *bis*] had been adopted, not at the current session, but at the forty-fifth session in 1993. At that time, Mr. Arangio-Ruiz, as Special Rapporteur on the subject, had been involved in the work of the Drafting Committee that had prepared the article. He had thus had ample time to set out his arguments and formulate reservations. At the current stage of work, comments made in plenary for inclusion in the summary record should be as concise as possible. Proposals aimed at amending a text that had already been adopted should be formulated in extremely clear language and not in general terms.

32. Mr. BARBOZA said that, without wishing to enter into polemics with Mr. Arangio-Ruiz, he was extremely surprised to hear him drawing a link with the topic of international liability for the injurious consequences of acts not prohibited by international law. On the occasion of the United Nations Decade of International Law,¹⁰ he had written an article¹¹ intended specifically to demonstrate the many differences between State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. He invited the members of the Commission to consult that article.

33. Mr. PELLET said that, having been personally involved in the preparations for the United Nations Decade of International Law, he had had the privilege of reading the excellent article by Mr. Barboza and would suggest

⁹ *Yearbook* . . . 1991, vol. I, 2227th meeting, pp. 128 to 130, paras. 12 to 31.

¹⁰ See 2433rd meeting, footnote 2.

¹¹ "Sine delicto (causal) liability and responsibility for wrongful acts in international law", *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations publication, Sales No. E/F.97.V.4).

that copies should be distributed to the members of the Commission.

34. He had two comments to make on the articles of chapter II now under consideration. Unlike Mr. Arangio-Ruiz, he thought that the concept of fault must in fact be excluded from everything relating to delicts, for it had nothing to do with the international responsibility of a State. It could come into play only in respect of crimes. In more general terms, articles 42 [6 *bis*] and 45 [10] suffered from being too concise and did not correspond to what had been expected of the Commission. A genuine code on reparation should have been developed and more specific indications given to States on the consequences of responsibility.

35. Mr. VILLAGRÁN KRAMER said he shared the reservations which the Chairman of the Drafting Committee had expressed about article 42 [6 *bis*], paragraph 3. Although he had no formal objection to that paragraph, he questioned the Commission's decision to place general limitations on the concept of full and complete reparation as applied both to delicts and to crimes.

36. Jurists were, of course, all influenced by the legal regime of the country in which they had been born. However, the Latin American countries were trying to free themselves from the system of Roman law and he did not think that it was necessarily appropriate for the Commission to let itself be guided by that system in its work on the codification of the rules of international law.

37. Mr. ARANGIO-RUIZ said that, at the risk of contradicting the Chairman of the Drafting Committee, the issue of fault had never actually been dealt with as it should have been in part two of the draft. Each time he had raised the issue, the Commission had tried to find ways of evading or ignoring it by using arguments already put forward in connection with part one, which was totally different.

38. He had therefore had to explain his position again and to recall that, in chapter II of his eighth report, he had given serious consideration to the problem in two separate contexts. He regarded the fact that that dimension had not been taken into consideration in part two as a regrettable failing and a source of ambiguity and he was fully entitled to express that view so that it would be reflected in the summary record.

39. The current discussion of the articles on State responsibility was, moreover, the last opportunity he would have to express himself on the subject in the Commission. As everyone knew, he would be deprived of the possibility of participating in the future work on the topic owing to a so-called age limit, which existed neither in Italian law nor in the United Nations and was being arbitrarily applied to him. Without going into personal considerations, he wished to say that that measure, which was unprecedented in the history of the Special Rapporteurs of the Commission, appeared to be based on tactical reasons which he preferred not to go into at length. It had prompted a protest resolution from the faculty of law of the University of Rome, La Sapienza, to which he had the honour to belong. In any event, the situation forced him to seize his last opportunity as a member of the Commission to express the viewpoints

that he considered important for the future of the codification and progressive development of the international law of State responsibility.

40. Mr. BENNOUNA said that he agreed with Mr. Pellet's analysis of the articles under consideration. While it was useful to speak of negligence or of a deliberate act or omission, the idea of fault had no place in the chapter under consideration.

41. The CHAIRMAN, speaking as a member of the Commission, said he had serious reservations about article 42 [6 *bis*], paragraph 3.

42. Mr. Sreenivasa RAO said that he shared Mr. Pellet's view and, in a way, that of Mr. Arangio-Ruiz as well: the articles under consideration were inadequate. The various consequences referred to in chapter II were presented in a manner that was both too logical and too semantic and did not reflect the true situation. As they stood, the articles would be difficult to implement in practice.

43. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt chapter II (articles 41 to 46) of part two.

Chapter II (articles 41 to 46) of part two was adopted.

CHAPTER III (Countermeasures)

44. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced chapter III of part two, comprising articles 47 [11] to 50 [14].

45. He said that article 47 (Countermeasures by an injured State) corresponded to the former article 11 adopted by the Commission without a commentary at its forty-sixth session.¹² The Drafting Committee had made no changes in the article, which provided for the right of an injured State to take countermeasures subject to certain conditions specified in the three following articles.

46. Article 48 (Conditions relating to resort to countermeasures) corresponded to the famous article 12, which had shuttled between the Commission and the Drafting Committee since the forty-fifth session in 1993, when it had first been referred to the Commission by the Drafting Committee.¹³ At the forty-sixth session, the article had been referred back to the Drafting Committee, on the understanding that, if reformulation of the article proved impossible, the text adopted by the Drafting Committee at the forty-fifth session would form the basis for action by the Commission. The Commission had taken no action on the article at the forty-sixth or forty-seventh sessions.

47. At the present session, however, the Drafting Committee had been directed to consider all articles in parts two and three for the purposes of their adoption on first

¹² For the text of articles 11, 13 and 14 of part two provisionally adopted by the Commission at its forty-sixth session, see *Yearbook . . . 1994*, vol. II (Part Two), pp. 151-152, footnote 454.

¹³ For the text of article 12 of part two, as adopted by the Drafting Committee, see *Yearbook . . . 1993*, vol. I, 2318th meeting, para. 3.

reading. It had therefore reviewed article 48 [12]. In the light of the decision taken by the Commission at its forty-sixth session,¹⁴ it had taken the view that it should not attempt a substantive revision of the article, but should confine itself to bringing the text up to date because of the adoption, at the forty-seventh session, of part three on the settlement of disputes.¹⁵ Consequently, paragraphs 1 and 2 of the article had been revised.

48. As already indicated by the two previous Chairmen of the Drafting Committee, the text of article 48 [12] was the result of a compromise. It represented an attempt to strike a fair balance between the interests of the injured State and the wrongdoing State. Thus, paragraph 1 said that the injured State which had taken countermeasures continued to be bound by its obligations in relation to dispute settlement procedures.

49. Paragraph 2 stipulated that, provided that the wrongful act had ceased, the right of the injured State to take countermeasures was suspended when and to the extent that the dispute was submitted to a tribunal which had the authority to issue orders binding on the parties.

50. Lastly, paragraph 3 provided that the suspension of the right to take countermeasures would terminate if the wrongdoing State failed to honour a request or order from the tribunal to which the dispute had been submitted.

51. Before going on to introduce articles 49 [13] and 50 [14], he asked whether there were any comments on articles 47 [11] and 48 [12].

ARTICLE 47 (Countermeasures by an injured State) and

ARTICLE 48 (Conditions relating to resort to countermeasures)

52. Mr. PELLET said that chapter III as a whole was very questionable and that he would vote against it if it was put to the vote, as he hoped it would be. Article 47 [11] in particular was disastrous because it was based on the principle that the injured State had a right to take countermeasures. In practice, it was obviously the most powerful States that would have that option and the provision thus amounted to proclaiming a real "law of the jungle". Article 48 [12] was supposed to mitigate that right, but a close look showed that the conditions it set were not basic conditions. The only limit on the right to resort to countermeasures lay in article 49 [13] on proportionality.

53. Mr. BENNOUNA said that he basically agreed with Mr. Pellet's reservations and would willingly dispense with all of chapter III, the effect of which was, in a sense, to "legalize" countermeasures. In reply to those who said that account must be taken of realities, he would say that he preferred to reject the reality of the balance of power. He, too, would like the adoption of chapter III to be put to the vote.

54. If the Commission finally decided to maintain the chapter, he would like to make two proposals. The first related to article 47 [11], in which the words "As long as the State which has committed an internationally wrongful act" were far too affirmative. It would be better to use the words: "As long as the State which is presumed to have committed" or "accused of having committed".

55. His second proposal related to article 48 [12], paragraph 1, in which it would be necessary to introduce the idea, that, prior to taking countermeasures, the injured State should first try to negotiate. The beginning of the paragraph might read: "Prior to taking countermeasures, an injured State shall fulfil the obligation to negotiate provided for in article 54 . . .".

56. Mr. KABATSI said that he shared the reservations expressed by Mr. Pellet and Mr. Bennouna. He was totally opposed to legalizing unilateral self-help at the international level by one State against another, as that would only serve the interests of the strong against the weak and the rich against the poor, whereas, the so-called safeguards contained in articles 48 [12], 49 [13] and 50 [14] did not really deserve to be described as such. The only genuine safeguards would be prior ones, for example, of the kind proposed by Mr. Bennouna.

57. Having said that, he knew that chapter III existed and all members who were opposed to it had had several occasions to state their point of view. He would personally address himself particularly to the last part of paragraph 2 of article 48 [12], which read: "and the dispute is submitted to a tribunal which has the authority to issue orders on the parties". That part of the sentence was unnecessary and would further aggravate the situation of the State against which the countermeasures were directed. Paragraph 2 already made the suspension of the right of the injured State to take countermeasures subject to two preconditions: that the internationally wrongful act had ceased and that the dispute settlement procedure referred to in paragraph 1 was being implemented in good faith by the State which had committed the internationally wrongful act. Accordingly, he doubted the appropriateness of setting a third condition the effect of which would be to give more time to the State taking countermeasures, since establishing a tribunal, particularly a special one was bound to take time. He therefore proposed that the last part of paragraph 2 of article 48 [12] should simply be dropped.

58. Mr. ARANGIO-RUIZ said that he was flabbergasted by the statements of Mr. Pellet and Mr. Bennouna. Recalling the history of the provisions relating to countermeasures, he said that, when the time had come for him, as Special Rapporteur, to deal with the instrumental consequences of an internationally wrongful act, he had been confronted with rules of customary international law which admitted the right to resort to countermeasures, subject, of course, to certain rules and conditions. At that time, there had been opposition from two sides to having countermeasures dealt with in the draft. One had come from Mr. Shi, now a judge at ICJ, who had said that, since countermeasures were to the advantage of strong States, they should simply not be mentioned in the draft. The other objection, seemingly with

¹⁴ See *Yearbook . . . 1994*, vol. II (Part Two), p. 151, para. 352.

¹⁵ See 2436th meeting, footnote 13.

different motivations, had been put forward in the Sixth Committee by the representative of France, who had suggested that countermeasures should not be dealt with by the Commission, but should be left to the unwritten rules of international customary law.

59. In any event, a very large majority of the members of the Commission had unquestionably wanted him to submit articles on countermeasures. Contrary to what Mr. Bennouna had said, it was not the Special Rapporteur alone who had had the idea of putting countermeasures in the draft.

60. Referring to Mr. Pellet's comments, he said that, on finding himself, as Special Rapporteur, in the position of having to prepare articles on countermeasures, he had decided to surround countermeasures with as many guarantees as possible against abuse. In that, he had been instructed directly by the Sixth Committee, where a veritable hue and cry had been raised during the forty-seventh session of the General Assembly on the subject of possible abuses of countermeasures by States. That was why, in addition to an article 11 which was a good deal shorter and better than what had eventually become article 47 [11], he had proposed an article 12 entitled "Conditions relating to resort to countermeasures", paragraph 1 of which had read:

"1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

"(a) The exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it is a party;"¹⁶

61. Mr. Pellet's reaction to that proposal had been to call it revolutionary. At the current time, things had changed and Mr. Pellet had appointed himself the champion of the weak against the strong, whereas he himself was supposed to be the champion of the strong against the weak. Incredible as it might seem, the member of the Commission who had accused the former Special Rapporteur of being a revolutionary was now calling him a reactionary.

62. Mr. Bennouna seemed to be inventing an obligation to negotiate, having discovered at the last moment that negotiation was a means of settlement to which the parties to a dispute had to resort. Yet that obligation was set forth in Article 33 of the Charter of the United Nations and was quite clearly referred to in paragraph 1 of draft article 12 as proposed by the Special Rapporteur.

63. Mr. LUKASHUK said that he understood the doubts expressed by Mr. Pellet, Mr. Bennouna and others on the subject of countermeasures. However, it was obviously too late to change what had already been accomplished. The existence of countermeasures was a reality and Governments were manifestly not about to renounce it. The Commission had been accused of lack of realism, but it had to show both realism and idealism

in the decisions it was called on to take. That being so, it could not overlook the fact that countermeasures were an essential element of a realistic mechanism of international law. The Commission could not, even if it wanted to, change the existing situation at the drop of a hat. Moreover, and he agreed with Mr. Arangio-Ruiz on that score, the draft did place a certain limit on countermeasures and that limit would disappear if all provisions on the subject of countermeasures were removed from it. As the proverb had it, the road to hell was paved with good intentions. The best course would, in his opinion, be to await the reaction of States to the draft.

64. The discussion in the Commission and the differences of opinion expressed testified to the fact that the Commission had for many years found itself unable to find a solution to a problem of great importance. That was the only conclusion that could be drawn in practice.

65. Mr. FOMBA said that, whatever they were called, countermeasures were a reality. Nonetheless, the purpose of article 47 [11], in particular, was to recognize the right of States to take countermeasures, and that was tantamount to excluding the weak countries from the possible and highly desirable benefit they could or should derive from the regime of responsibility being proposed by the Commission and so in a sense to recognize the law of the strongest. If the Commission really had to recognize the right to take countermeasures, it would have to ring that right round with draconian substantive conditions in order to mitigate very significantly, if not avoid, the prejudice that such a right would cause to the weak countries. That did not apply, in general, to the proposed provisions. Bearing in mind that all of the Commission's work ranged between what was possible and what was desirable, the Commission had in the present case perhaps arrived at the threshold of what was possible.

66. He supported in large measure the reservations expressed by Mr. Pellet and Mr. Bennouna and was inclined to favour the idea of a vote on some articles. Mr. Bennouna's proposal seemed to be on the right lines, even allowing for Mr. Arangio-Ruiz's explanation in that connection. He was grateful to Mr. Arangio-Ruiz for having refrained from supporting the strong against the weak and for having emphasized the impartial, neutral and intermediary nature of his position, which he himself had never doubted.

67. Mr. Sreenivasa RAO said that part two, which dealt with the consequences of a wrongful act and incorporated chapter III on countermeasures, was one of the most difficult with which the Commission had had to grapple, not only because it had been necessary to reconcile the divergent positions, of the Special Rapporteur and other members on the one hand, and of a group of members including Mr. Rosenstock, on the other, but also because it was virtually impossible to reflect the basic realities of international society in a text of that kind.

68. In his excellent eighth report, the Special Rapporteur had identified the various abuses to which countermeasures could give rise, had warned against such abuses and had endeavoured to fashion a regime to control those abuses. On the other hand, Mr. Rosenstock and other members had argued that, given the state of international society and the lack of institutions to respond

¹⁶ *Yearbook* . . . 1992, vol. II (Part Two), p. 27, footnote 61.

without delay, in the event of a wrongful act, it had been necessary, in the regime of State responsibility, to preserve a measure of freedom and to build in a certain element of deterrence through countermeasures. Both perspectives were reasonable and respectable and were based on the logic and preferences of those who espoused them and on their understanding of what was just for international society in a given situation.

69. Other members of the Commission, including Mr. Shi and himself, had made a number of observations over the years which were not reflected in the draft articles under consideration and which had not in fact really been heard because the two opinions he had referred to had clashed sometimes violently and it had not been possible for other opinions to be expressed and for certain members of the Commission to make their contribution to the debate. For that reason, he felt duty-bound at the current stage to express his complete disagreement with chapter III for the various reasons he had mentioned whenever he had had an opportunity to do so during the consideration of the topic.

70. Like Mr. Shi, he had initially simply wondered whether it was possible to try to elaborate, in the case of a concept as controversial in practice as countermeasures, a regime that was acceptable to the majority of States. Secondly, on several aspects, the general principles, namely, the so-called primary rules, had not been developed or, if they had been, they remained controversial both as to their scope and as to their elements and the specific nature of their application in international law. That was particularly true in the case of the non-use of force and the maintenance of international peace and security in general, international trade law, human rights and environmental law. There was a tendency to project the choices of a State or a group of States as community decisions without basing those choices on the common interest which could be developed only through the democratic participation of all States in the debate and after genuine attempts to arrive at a consensus. Some sometimes had a tendency to try to crystallize their position as norms before others understood all the implications and had had the possibility to propose alternative solutions. That was why they had ended up with an unsupportable, contradictory and unjustified regime for countermeasures. No State should be encouraged to decide unilaterally to take the law into its own hands, no matter how real the provocation to which it reacted.

71. Turning to the draft articles under consideration, he expressed his full support for the comments made by Mr. Bennouna and Mr. Pellet. Like them, he would ask for chapter III to be put to the vote if the specific proposals he was about to make were not deemed acceptable.

72. He proposed that paragraph 1 of article 47 [11] should be replaced by the following:

“1. The State which has a reason to believe that an internationally wrongful act has been committed involving significant injury to its rights is entitled to take countermeasures subject to the conditions and restrictions set out in this chapter.”

73. Paragraph 2 of article 47 [11] would remain unchanged. Paragraph 1 of article 48 [12] should be replaced by the following:

“1. Before taking countermeasures, the State which has suffered, in its opinion, significant injury to its rights shall fulfil the obligations in relation to peaceful settlement of disputes inscribed in the Charter of the United Nations, and in particular Article 2, paragraph 4, and Article 33, and obligations of dispute settlement arising under part three in respect of any other binding dispute settlement procedure in force between itself and the State which is alleged to have committed the internationally wrongful act.”

74. In his view, it seemed advisable to refer expressly to the provisions of the Charter which dealt with the non-use of force and the different methods for the peaceful settlement of disputes.

75. Paragraph 2 of article 48 [12] should be deleted and paragraph 3 replaced by the following:

“3. A failure by the State which is alleged to have committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall entitle the State alleging injury to its rights to take recourse to such remedies as are approved or ordered by the particular procedure of settlement of dispute involved.”

76. The trouble with the existing wording was that, if the State accused of the internationally wrongful act defaulted, the injured State would be free to act as it saw fit, and that was tantamount to making the law of the strongest prevail. It would be preferable if the dispute settlement procedure that had been initiated continued to apply.

77. Mr. PELLET said that Mr. Arangio-Ruiz should not take criticisms of the draft articles as personal attacks. Nonetheless, it was true that, insofar as article 47 [11] endorsed countermeasures, which were available only to powerful States, he was conservative and that part three seemed excessively innovative having regard to the state of international law. The sole limitation on countermeasures was the dispute settlement procedures set forth in part three, in other words, provisions that were totally unacceptable in the existing state of international society.

78. With regard to Mr. Lukashuk's comment, the fact that the Commission was well advanced in the consideration of the topic should not prevent its members from trying to improve the provisions when they considered them unacceptable—and Mr. Sreenivasa Rao's proposals in that connection were judicious albeit insufficient—or from rejecting them. In fact, chapter III could be dropped without difficulty since countermeasures were not indispensable for a regime of responsibility, which could be applied without prejudice to such measures.

79. Mr. TOMUSCHAT said that he supported the text of chapter III, which was an excellent and balanced compromise. It would be a complete mistake to assume that the small States were the “good guys” and the big States the “bad guys”: any State could commit an inter-

nationally wrongful act, as attested to, for instance, by the case of the diplomatic and consular staff held in a certain capital, which showed that it was sometimes necessary to take countermeasures quickly. The small State/big State configuration was therefore absolutely irrelevant and a dispute which gave rise to countermeasures could very well arise between States of equal power.

80. He would also draw attention to paragraph 2 of article 58 [5] of part three, the existence of which those members who had spoken seemed to have forgotten and which, in his view, constituted a big step forward in that it protected weak States from arbitrary action by strong States. That was why the Commission would be ill-advised to drop chapter III, thereby leaving strong States free to take such countermeasures as they deemed appropriate, under general international law. Paragraph 2 did give rise to a problem, however: if the injured State instituted proceedings for the settlement of disputes pursuant to article 48 [12], paragraph 1, and if, at the same time, the State which was the victim of countermeasures had instituted proceedings pursuant to article 58 [5], paragraph 2, two parallel procedures for settlement would have been instituted. That risk could perhaps be mentioned in the commentary.

81. With regard to Mr. Sreenivasa Rao's proposal concerning article 47 [11], paragraph 1, any State could claim that it had "reason to believe" that an internationally wrongful act had been committed by which it was affected. The existing wording therefore seemed preferable.

82. Mr. AL-KHASAWNEH said he had always felt that acceptance of the provisions on countermeasures should be conditional on the existence of effective dispute settlement procedures. The provisions in part three were, however, a little disappointing from that standpoint, bearing in mind that countermeasures were a fact of political life, and an extremely dangerous one, and that, although they could be taken by a small State, the possibilities of abuse were more frequent in the case of disputes between a powerful State and a weaker State or between a rich country and a poor country. The substantive rules, including the rule of proportionality, were very elastic and could give rise to so many different interpretations and the dispute settlement provisions were not as clear and as binding as they should be.

83. With regard to Mr. Sreenivasa Rao's proposal concerning article 48 [12], it was the Special Rapporteur who had been the first to adopt protection of poor or weak States as one of his uppermost considerations in preparing the draft articles. He was to be commended on the work he had accomplished in that regard and a tribute should be paid to him for his commitment to an ideal of justice in what was a politically sensitive area.

84. Mr. ARANGIO-RUIZ said that Mr. Tomuschat was not perhaps altogether wrong in thinking that, basically, the Commission had arrived at a balanced text. Despite the persistent faults he had repeatedly indicated, that text struck him as less unbalanced than it had been earlier. So far as Mr. Sreenivasa Rao's proposal concerning paragraph 1 of article 47 [11] was concerned, both

the Drafting Committee and he himself had assumed that, because an allegedly injured State acted at its own risk, it would make very sure that there had indeed been an internationally wrongful act, that that act was attributable to a given State and that certain consequences derived from it. The words "has reason to believe" were therefore pointless, if not dangerous, for the reasons Mr. Tomuschat had explained.

85. Article 48 [12] departed a little less from his initial proposal for article 12.

86. The deletion of chapter III, as advocated by the representative of France in the Sixth Committee, would be tantamount to allowing powerful States complete freedom in the matter of countermeasures.

87. In addition to settlement procedures, the State wishing to take countermeasures should be required to notify, in one form or another, the State against which it intended to take such measures. A provision to that effect had appeared in his initial proposal and perhaps it was an oversight that could easily be corrected by providing, for example, that the State which intended to take countermeasures was required to inform the State concerned, in an appropriate and timely manner, of its intention.

88. The CHAIRMAN said that the Commission would resume its consideration of articles 47 [11] and 48 [12] at its next meeting to allow it to hold the ceremony for the award of certificates to the participants in the thirty-second session of the International Law Seminar.

The meeting rose at 1.05 p.m.

2455th MEETING

Tuesday, 9 July 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

State responsibility (*continued*) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE²
PROPOSED BY THE DRAFTING COMMITTEE³ (*continued*)

PART TWO (Content, forms and degrees of international responsibility) (*continued*)

CHAPTER III (Countermeasures) (*continued*)

ARTICLE 47 (Countermeasures by an injured State) and

ARTICLE 48 (Conditions relating to resort to countermeasures) (*continued*)

1. Mr. Sreenivasa RAO reminded members that he had submitted a number of proposals (2454th meeting) concerning articles 47 [11] and 48 [12] to encourage further dialogue on the important subject of the enforcement of international law. A number of valuable comments had been made on those proposals, in particular by Mr. Tomuschat, who had rightly pointed out that the wording of article 47 [11], paragraph 1, created the wrong impression in that it lowered the threshold at which countermeasures could be taken. In point of fact, his intention had been to ensure that countermeasures were taken only as a last resort and to compel observance of, rather than run counter to, the law. In view of Mr. Tomuschat's comments, therefore, his original proposal should be amended to read:

“1. The State which considers that it has suffered a significant injury on account of an internationally wrongful act allegedly committed by another State is entitled to take countermeasures, that is, not to comply with one or more of its obligations towards that State, subject to the conditions and restrictions set out in this chapter.”

2. While he also agreed with Mr. Tomuschat that the wrongdoer must not be favoured, it was important to think in terms of a law that not only distinguished between a right and a wrong but also met the needs of justice and equity and commanded universal approval, in other words, a law that was wholly in keeping with the Charter of the United Nations and was based on the interests of all nations rather than those of a select few. Such interests should form the basis of a genuine give-and-take policy on the part of all concerned and should not be imposed under duress or on the basis of unequal strength.

¹ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 et seq.

³ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

3. But there was a further point: could international law—or indeed any law—ever be enforced by the use of force and punishment? Surely it was not sanctions but genuine reciprocity that lay at the root of peaceful interaction. In today's international society, dogged by poverty and overpopulation, the articulation of the universal principles and processes of law-making that would ensure participation on an equal footing for all citizens throughout the world merited the Commission's consideration as a matter of some priority. Ultimately, only those principles that were voluntarily accepted as being in the common interest had a guarantee of enforcement. It was in that context that doubt was cast on the role of countermeasures. In its further work on the draft articles, on second reading, the Commission would, however, no doubt take due account of the comments received from States and of those made in the Commission.

4. Mr. EIRIKSSON said that he joined Mr. Tomuschat in supporting the Drafting Committee's original proposal.

5. Mr. BARBOZA said that he too was in favour of the provisions in chapter III submitted by the Drafting Committee, since they were well-balanced and reflected a good compromise between opposing trends. It would be a pity if the opportunity to agree on an acceptable text was lost in the search for a utopian one. Compulsory arbitration afforded an allegedly delinquent State the best guarantee that the countermeasure adopted was legal.

6. Much had rightly been said about the past abuses strong States had inflicted on weaker States. One of the main reasons for those abuses was the lack of any check on the legality of abusive countermeasures, in other words, to establish that the breach of the obligation giving rise to the countermeasure was a real, not an invented, one. If the breach was real and the other conditions of legality, for instance, those laid down in articles 49 [13] and 50 [14], were complied with, there would be no further abuses in the field of countermeasures.

7. It had also been said that the acceptance by weaker States of article 47 [11] was a trap, since stronger States would never accept article 58 [5] (Arbitration). That was tantamount to insulting the intelligence of States, weak and strong alike. Articles 47 [11] and 58 [5] were inter-linked: if the latter was rejected, the former would no longer exist.

8. Many members had stressed the iniquity of countermeasures and there was no denying that stronger States had in the past used reprisals in an abusive way, particularly when armed reprisals had not been forbidden under international law as they now were. But decentralized sanctions were the very stuff of a legal order: in the absence of a central body to take such sanctions in the place of individual States, there would be countermeasures, as there was no other mechanism for enforcing international law.

9. It was better to have a regulation that provided all States with adequate guarantees rather than pretending that, by ignoring countermeasures, they could somehow be made to disappear. Regulation of countermeasures was essential if international law was to be a real legal

order. While he would not oppose the idea of requiring prior negotiation, the arbitration clause would, in his view, suffice.

10. Mr. VILLAGRÁN KRAMER said that he wished, in order to clarify matters, to raise a question that was prompted by a statement by Mr. Koroma, a judge at ICJ, made in 1992 when he had still been a member of the Commission, that, before the Commission gave its imprimatur to the chapter on reprisals, it should clarify the *lex lata* rules it wished to codify and also the rules *de lege ferenda* it was endeavouring to draft—a view he had expressed because the chapter on reprisals was extremely sensitive. Also, as Kelsen had once said, international law was characterized by the act of reprisals.⁴

11. His own question, therefore, was whether the Commission, before proceeding any further, should establish that it was codifying existing rules—part *lex lata*—or whether it would move on to rules *de lege ferenda*.

12. Mr. AL-BAHARNA said it was pointless to argue that the principle of countermeasures, as a final remedy for the injured State, should be deleted from the draft articles because it was unnecessary. That principle lay at the very heart of the doctrine of State responsibility and was unreservedly accepted in customary international law. Indeed, the fact that it had undergone a number of restrictions, as reflected in draft articles 47 [11] and 48 [12], was itself an expression of the progressive development of international law.

13. The mitigations for which the draft articles provided were self-explanatory. Under article 47 [11], for instance, an injured State could resort to countermeasures, but that right was not absolute inasmuch as it was subject to the conditions laid down in articles 48 [12], 49 [13] and 50 [14], the effect of which was to mitigate drastically the effect of countermeasures. A further mitigating element was to be found in the reference in article 47 [11], paragraph 1, to articles 41 to 46, which provided for a series of remedies that the State which had committed the allegedly wrongful act must seek in good faith.

14. There had been an earlier suggestion that, before the injured State took any countermeasures, negotiations should be held between that State and the State which committed the wrongful act. The answer to that suggestion was that negotiations were always implied in the process. It was not possible to conceive of an injured State resorting to countermeasures immediately after the commission of the wrongful act, save perhaps in the case of aggression as a result of which a state of war ensued, and the injured State would naturally resort to self-defence.

15. In normal cases, some time for diplomatic negotiations would be allowed before the mechanism under articles 47 [11] and 48 [12] came into operation. He was certain that those members who had commented on the

draft articles did not object to the actual principle of countermeasures, as set forth in draft article 47 [11]. Rather, they were inclined, with the best of intentions, to make the right to take countermeasures subject to further mitigation and restrictions. In his view, however, draft article 47 [11] provided the best compromise available and should command consensus in the Commission. To make the drafting more acceptable, he would nonetheless propose that it should be reworded to read:

“As long as the State alleged to have committed an internationally wrongful act has not complied with its obligations under articles 41 to 46, the injured State is entitled to take, subject to the conditions and restrictions set out in articles 48 to 50, countermeasures that allow it not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response by the State which has committed the internationally wrongful act to the requirements of complying with its obligations under articles 41 to 46.”

In addition the word “alleged” or “allegedly” should be incorporated at the appropriate point throughout the draft articles and, in particular, in article 42 [6 *bis*], paragraphs 1 and 4, and article 48 [12], paragraph 2.

16. Article 48 [12] was satisfactory. As the Chairman of the Drafting Committee had rightly noted, it was an attempt to strike a fair balance between the interests of the injured State and the wrongdoing State.

17. Mr. ARANGIO-RUIZ said that, with the use of the phrase “as long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 41 to 46”, article 47 [11] ignored a number of possibilities of positive response on the part of the wrongdoing State to an allegation by an injured or allegedly injured State that an internationally wrongful act had been committed. He was referring to such positive responses as admission of wrongdoing, admission of responsibility, apology, and assurances or even commencement of implementation of one or more forms of reparation. In any such cases there should be either renunciation by the allegedly injured State of resort to countermeasures or an attenuation or suspension of countermeasures. He had raised that point in the Drafting Committee without success. In his view, article 47 [11] could not be accepted unless that serious defect was eliminated. Before countermeasures were taken or continued, the wrongdoing State must be given the opportunity to recognize its responsibility and act accordingly. The present formulation would simply grant an excessive degree of severity for the action by the injured State.

18. Mr. YAMADA said that he agreed with Messrs. Tomuschat, Eiriksson and Barboza that the draft articles on countermeasures were well balanced. Whether the Commission liked it or not, countermeasures were used in actual practice and, as such, they were not prohibited under positive international law.

19. The Commission had to find a proper balance between the legal constraints it placed on countermeasures on the one hand, and on the other, the protection of the

⁴ H. Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 571 et seq.

rights of the injured State in the event of intentional delay or refusal by the wrongdoing State to redress its illegal act. The draft articles did provide a reasonable balance in that regard. Furthermore, the legal constraints on countermeasures in the draft articles went beyond existing customary law by providing, under article 58 [5] of part three, for compulsory arbitration, to be initiated by the State against which the countermeasures had been taken. Deletion of the articles on countermeasures, as suggested by some members would lead to hardship for the State against which countermeasures had been taken. He endorsed the adoption of the countermeasures articles as a whole, in their present formulation. An amendment to any element of those articles could well bring about the collapse of a well-balanced system.

20. Mr. CRAWFORD said that the question of countermeasures was difficult and controversial. In the course of lengthy debate and an arduously negotiated package of proposals on the subject, a number of compromises had obviously had to be made, but that was in the nature of the way the Commission worked. Members had preferences which could and, indeed, ought to be reflected in the commentaries to the articles, especially on a first reading.

21. The function of draft articles adopted on first reading was not to present the Commission's final view, but to present the issues in a defensible form, for discussion and response by States. The draft articles as currently formulated did, by and large, meet that criterion. Actually, the provision on prohibited countermeasures and the provision associating arbitration with the taking of countermeasures in certain circumstances were important steps forward. The Commission would have a chance to continue its debate once States had been given the opportunity to comment on the articles.

22. Some members of the Commission were in favour of eliminating the chapter on countermeasures, which would be a regressive move, for failure to provide adequate regulation of countermeasures would only lead to greater use of such measures. The amendments to article 47 [11] proposed by Mr. Sreenivasa Rao were certainly of merit, but did not resolve the certain basic problem which arose from the fact that the determination of whether a State had committed a wrongful act could not always be made categorically at the point at which the injured State was entitled to act. For example, in cases where it had not actually been determined whether a State was in breach of its obligations, insisting on cessation as a condition for arbitration might not be justified. Again, Mr. Sreenivasa Rao's amendments to paragraph 1 of article 47 [11] reintroduced elements of subjectivity which contradicted the Commission's basic position that countermeasures could only lawfully be taken in response to an act which was unlawful. It was the use of the word "considers" or "allegedly" that was incompatible with that position. A State taking countermeasures did so at its own risk and if it was confronted with lawful conduct then its own conduct would, by definition, be unlawful.

23. The draft articles as they stood were reasonably balanced and, in conjunction with appropriate commen-

taries, could usefully serve as the basis for further debate.

24. Mr. ROSENSTOCK said that he shared the views of Mr. Crawford and Mr. Yamada. With regard to Mr. Sreenivasa Rao's proposed reformulation of article 47 [11], the addition of the word "significant" in paragraph 1 was not helpful. If "significant" meant not *de minimis*, it did not add anything. If it meant more than that, the word simply led to confusion and indicated a failure to appreciate the importance of article 49 [13]. The use of the word "alleged" in paragraph 1 was also a matter of concern: it could well diminish or eliminate the responsibility of a State which took countermeasures in the erroneous belief that a wrongful act had been committed against it. As to paragraph 3, he was again opposed to the use of "alleged" and to the last phrase, namely "remedies as are approved or ordered by the particular procedure of settlement of dispute involved", which seemed to be a misperception of the role of a third party dispute settlement procedure in regard to the issue at hand. It would be an odd arbitration procedure which spelt out what could be done to punish a wrongdoing State if it failed to comply with an order for cessation. The reimposition of countermeasures, subject to proportionality, prohibited countermeasures and failure to honour orders, was enough to regulate the situation in the context in which it was likely to arise.

25. Mr. PELLET said that he had formally requested (2454th meeting) the deletion of chapter III of part two and hoped that the chapter could be put to a vote. It was not only unbalanced but was actually based on a false equilibrium: it began by setting forth a State's entitlement to take countermeasures, which could, in his view, only be applied in practice by the most powerful States, and counterbalanced that with an unrealistic dispute settlement mechanism, provided for under part three. A State might decide to accept chapter III of part two without accepting the constraints of part three, something which would automatically destroy that false equilibrium. The Commission would be better off eliminating chapter III and stating expressly that the draft was adopted notwithstanding the possibility of adopting countermeasures. A proposal could be made to the General Assembly to include in the Commission's agenda an item on the codification of the law on countermeasures, though he was not sure the Commission would receive such a mandate. That was his basic position.

26. A number of changes to the articles on countermeasures had been proposed by Messrs. Kabatsi, Bennouna and Sreenivasa Rao and they were all in the right direction. All the amendments were preferable to the texts as they currently stood. However, a decision still had to be taken on the Commission's procedure: a vote, referral to the drafting Committee, rediscussion of the amendments one by one.

27. It might just be possible for him to join in a consensus and agree to chapter III, but only if paragraph 1 of article 47 [11] was couched in negative terms rather than in terms of a positive entitlement to take countermeasures. It should be reformulated to the effect that the injured State did not have the right to take countermeasures except under the conditions and subject to the

restrictions set out in articles 48 [12] to 50 [14]. Thus revised, the draft would be in conformity with the rules of law, for countermeasures must not be a priori, legitimized. They were an unfortunate fact of international life and the Commission would do a great disservice to international law if it started out by saying that they were permitted.

28. Mr. Sreenivasa RAO said that he wished to endorse the statement made by Mr. Pellet, in the light of comments made by Mr. Crawford. The revision proposed by Mr. Pellet would definitely improve the draft text and help achieve the goal of regulating the use of countermeasures and restricting their abuse.

29. Several members had pointed out that a progressive element had been introduced into the draft article by giving to the State against which countermeasures had been taken the right to seek compulsory arbitration. For his part, he failed to see the logic in that procedure. In a civilized system, it was the aggrieved party which took its complaint to court, not the party against which reprisals had been taken. It had been suggested that both parties should be entitled to submit the dispute to arbitration, a solution he found more equitable.

30. If the Commission attempted to restrict the use of countermeasures solely through compulsory settlement of disputes, the draft articles would not gain broad acceptance: no State was prepared to accept compulsory settlement of disputes under circumstances in which the law itself was not clearly articulated in the best interest of all States.

31. Mr. ARANGIO-RUIZ said that Mr. Crawford seemed to wish to reduce the first reading text to a very preliminary draft intended merely to open the debate, as if the Commission was only starting the exercise on parts two and three. Of course, the text had to be submitted, in view of the second reading stage, for the comments of Governments, but it was odd to leave gaps or to include very unsatisfactory formulations. The Commission had been working on parts two and three of the topic since before 1980 and should endeavour to present the best possible articles. As to Mr. Pellet's suggestion to remove chapter III, he would point out that the Special Rapporteur's allegedly "revolutionary" draft article 12 of part two proposed in 1992⁵ was indeed couched in negative terms, that is to say an injured State could not take countermeasures unless means of amicable settlement had first been used. With regard to the question of whether the articles on countermeasures should be maintained, he believed that the Commission must be consistent. It would be absurd to present a draft with the immense gap that would result from omitting the provisions on countermeasures. The Commission should try to include articles 47 [11] and 48 [12] to the best of its ability. If a working group or the Drafting Committee considered them, there was a good chance of improving the text.

32. Mr. VILLAGRÁN KRAMER said that there were many countries powerful enough to take countermeas-

ures against weaker countries, which found them much more difficult to apply. Yet the smaller, weaker countries were obliged to find special ways to apply their own form of "countermeasures"—not necessarily armed reprisals—between themselves. For example, one Central American country had successfully carried out reprisals during a commercial transaction by a most ingenious interpretation of the convention which applied in the particular case. The sole purpose had been to obstruct the transaction to secure settlement of an entirely different matter.

33. The Commission had been given a mandate to codify the rules of international law. That implied, of course, that members would at times have to codify certain rules which they themselves did not endorse. The chapter on countermeasures was a case in point. Nevertheless, it was important to include in the draft measures which, within what was currently considered permissible, would safeguard the rights of the smaller countries. His own region had suffered repeated tragedies as the result of the use of countermeasures. He therefore endorsed the articles on countermeasures because they provided means whereby such harmful effects could be mitigated.

34. Those who wished to see chapter III deleted should be aware that countermeasures would continue to exist, but would not be balanced by any restrictions. The Commission would appear to be promoting the law of the jungle rather than international law. Instead, it was necessary to find a formula to frame the use of countermeasures. Were countermeasures to be considered as penalties, or as a means of inducing the wrongdoing State to compensate the damage caused? He favoured the latter view, though he would have been willing to discuss the former, which had seemed to prevail in the Drafting Committee. Yet the Commission had pre-empted such discussion by deciding that the measures must be aimed at inducing a wrongdoing State to cease the act and compensate the damage.

35. There was a counterpart responsibility to the taking of countermeasures: if a State could not demonstrate before ICJ that it was the injured State, it immediately became a wrongdoing State. It was therefore essential to link the underlying purpose of the countermeasures, namely to induce the wrongdoing State to rectify illegal conduct, with the need to demonstrate that the countermeasures themselves were not illegal—on pain of incurring penalties.

36. The discussion had been useful to some degree for it had enabled the Commission not only to define countermeasures but also to see clearly their limitations. As Mr. Crawford had pointed out, there were certain conditions that applied to the application of countermeasures: they could not be carried out through the use of force or in such a way as to affect the political independence of States. There were also certain circumstances in which States must suspend countermeasures. In short, chapter III provided for minimum safeguards for States that might be affected by countermeasures. It must be viewed as a whole and decided on as such, leaving minor amendments to a later stage. If the Commission failed to adopt chapter III, it would be leaving the

⁵ See 2454th meeting, footnote 16.

door open to all manner of abuse. If it adopted that text, on the other hand, it would place the countermeasures regime within a legally manageable context.

37. Mr. BENNOUNA said he could not agree with members who considered the text well balanced, despite Mr. Crawford's eloquent argument. The draft should deal with the consequences of countermeasures, rather than the countermeasures themselves, and there lay the conceptual problem. A countermeasure was a unilateral act, a priori of an illegal nature, carried out by a State; it was a breach of the law that was condoned because it took place in response to another illegal act. But such acts should neither be condoned nor criminalized; the State should be exonerated from responsibility for them, as for actions taken in self-defence. And such exoneration should be gained through a dispute settlement procedure rather than arrogated to themselves by States, as would be the effect under the draft articles. It was argued that to require the exhaustion of all dispute settlement procedures before countermeasures could be started would be unrealistic. Perhaps that was true; but the Drafting Committee had turned the whole sequence back to front, making all dispute settlement efforts subsequent to the adoption of countermeasures. The most judicious approach would have been to require some attempts at dispute settlement—for example, negotiation—to precede the launching of countermeasures.

38. Mr. Pellet's proposal seemed to be a compromise formula that was wholly acceptable. It had the advantage of being fully in line with existing international law and actually adapted the self-defence regime to countermeasures. If that proposal was adopted, he could go along with a consensus on the draft articles. Otherwise, he would call for a vote on chapter III as a whole, and would vote for it to be deleted.

39. The CHAIRMAN read out the following proposal, submitted by a small group of members of the Commission:

“Article 47. Countermeasures by an injured State

“1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations to the State which has committed the internationally wrongful act.

“2. The injured State is not entitled to take countermeasures, except under the conditions and subject to the restrictions set out in articles 48 to 50, as necessary in the light of the response of the State which has committed the internationally wrongful act to its demands in order to induce it to comply with its obligations under articles 41 to 46.

“3. (Previous paragraph 2).”

40. Mr. ROSENSTOCK said that tinkering with the articles now might only undo the whole package. He believed the Commission should proceed directly to a vote, recording differing views in the commentary, as appropriate, and in the summary records. If it was accepted that the only issue to be considered with regard to chapter III was whether or not article 47 [11] could be reformulated in slightly stronger terms—a public relations exercise—then it might be worth a brief effort, perhaps through a small working group, to see whether that change alone, and no other, could be accepted. Otherwise, the result would be to destroy chapter III.

41. Mr. EIRIKSSON said that he endorsed the proposal, which was entirely in line with the considerations outlined by Mr. Rosenstock: to effect a slight change in the tone of article 47 [11] without affecting the substance. He would likewise support, and contribute to, an attempt to revise the proposal with a view to reaching consensus.

42. Mr. CRAWFORD said that the exact wording of the proposal was not the crucial matter at stake: if it was determined that such a proposal had broad support, and that that was the only significant change to be made to chapter III, then a small working group could take charge of the final formulation. The Commission should also establish a small working group to ensure that the views of all of its members were adequately reflected in the commentaries. For the moment, a time-limited exercise, as suggested by Mr. Rosenstock, was the right course to follow, to achieve consensus on chapter III as a whole.

43. Mr. BENNOUNA said he had no objection to the idea of refining the proposal further, even by establishing a small working group. But he could not accept Mr. Rosenstock's contention that the proposal must be the sole change to be made to chapter III. He himself had already made a suggestion, one that seemed to have been accepted, that a reference to prior negotiation should be incorporated in article 48 [12]. That, too, should be debated thoroughly. The overriding objective was to achieve consistency in chapter III, which covered a delicate subject that had already raised controversy in the General Assembly. If necessary, a vote should be taken on both proposed changes—to article 47 [11] and to article 48 [12].

44. Mr. SZEKELY said he agreed with Mr. Rosenstock that the only type of change that should be contemplated at the present stage was one of very limited scope. If the approach advocated by Mr. Bennouna was adopted, however, the entire package represented by chapter III would be reopened for discussion and that would be extremely unfortunate. It might indeed be better to proceed to a vote.

45. Mr. ROSENSTOCK said he was in complete agreement with Mr. Szekely. The issue of whether efforts should first be made at dispute settlement had been twice debated in the Commission and twice in the Drafting Committee. Bringing up the issue yet again would serve no purpose and might only undermine what had been achieved so far. Redrafting article 47 [11], moreover, as part of a public relations exercise, would not necessarily ensure that consensus would be reached: the exercise did not therefore seem to be a very promising or constructive one.

46. Mr. PELLET said Mr. Rosenstock's comment that the proposed rewording of article 47 [11] was a public relations exercise could not be allowed to go unchallenged. The proposed reformulation of article 47 [11]

was intended to make it absolutely clear that countermeasures could be envisaged only under the conditions outlined in articles 48 [12] to 50 [14]. A statement that States had a right to do something was diametrically opposed to a statement that they did not have such a right. In its previous endeavours in elaborating international instruments, the Commission had very carefully considered whether the wording should be couched in positive or negative terms. For example, the commentary to article 46 of the Vienna Convention on the Law of Treaties explained why the wording had been deliberately cast in the negative.⁶ The same was true of article 33 (State of necessity), in part one of the draft. The proposed negative formulation of article 47 [11] was intended to place the maximum limitation on resort to countermeasures.

47. Mr. ROSENSTOCK's position was that article 47 [11] could be slightly amended as long as no change was made to article 48 [12]. Article 47 [11] had been adopted subject to the adoption of article 48 [12], which had never been adopted. Personally, though he endorsed Mr. BENNOUNA's proposed amendment to article 48 [12], he would not insist on that amendment, as long as article 47 [11] was reformulated in such a way as to make it clear that countermeasures could not be taken, except in certain cases. He would insist, however, on the Commission's right to contemplate any changes to article 48 [12] that it deemed appropriate: that text was not sacrosanct, contrary to the viewpoint advanced by Mr. ROSENSTOCK.

48. Mr. THIAM said that he was prepared to vote in favour of the text proposed by a small group of members, but would have no objection to referring the text to a small working group provided a decision could be reached soon. The Commission had already spent a great deal of time on the subject of countermeasures.

49. The CHAIRMAN said that, if necessary, the Commission could hold an extra meeting the next day.

50. Mr. LUKASHUK said that, by turning the plenary meeting into a meeting of the Drafting Committee, the Commission was seriously jeopardizing the chances of completing its work on the draft. The only way to achieve success at the present stage was to stop discussing amendments and, instead, to decide whether chapter III should be maintained or deleted. His own position on that issue was a dual one. As a responsible jurist, he thought that the chapter was useful and should be maintained, but from the point of view of his country's national interests he thought that it could be dispensed with.

51. Mr. ARANGIO-RUIZ said that he welcomed the proposal submitted by a small group of members, which went some way towards meeting the criticisms he had formulated earlier in the meeting. Perhaps the order of the first two paragraphs should be reversed. The fact that the right of the injured State to take countermeasures was expressed in a negative rather than a positive form was perhaps an improvement, although the difference was not very great as the provisions of articles 49 [13] and 50 [14] were also expressed in negative terms. As

for article 48 [12], which had also been couched in the negative originally, there was no need to prejudge the issue until a decision had been reached on article 47 [11]. Mr. BENNOUNA's proposal was useful but would not really suffice. For his own part, he would want much more than negotiation prior to countermeasures.

52. Mr. KABATSI said that the text proposed by a small group of members represented a useful compromise and he was prepared to accept it. It should be understood that those who had spoken out against countermeasures had not done so out of any misplaced sympathy for the wrongdoing State but only because they felt the underlying approach to be too heavily weighted in favour of the injured State, real or imagined. The new formulation went some way towards redressing the situation. He was not against countermeasures. They should simply be the exception rather than the rule and subject to certain conditions.

53. Mr. ROSENSTOCK suggested that, under the circumstances, the simplest way to proceed would be to treat the proposal by a small group of members as an amendment to article 47 [11] as it stood. A decision could then be taken without further delay. Otherwise, the Commission would be going round in circles.

54. Mr. BENNOUNA said that he had no objection to the procedure just proposed by Mr. ROSENSTOCK. The Commission could adopt the proposed new text of article 47 [11] and then go on to consider article 48 [12]. Perhaps the small group should be allowed to meet for a few minutes in order to put some finishing touches to the text.

The meeting was suspended at 12.45 p.m. and was resumed at 12.55 p.m.

55. Mr. BENNOUNA said that the proposed new version of article 47 [11] would read:

“1. The injured State is not entitled to take countermeasures, except under the conditions and subject to the restrictions set out in articles 48 to 50, as necessary in the light of the response of the State which has committed the internationally wrongful act to its demands in order to induce it to comply with its obligations under articles 41 to 46.

“2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

“3. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations to the State which has committed the internationally wrongful act, in response to that act.”

He hoped that the text, thus amended, would be accepted by consensus.

56. Mr. EIRIKSSON and Mr. LUKASHUK said that they were unable to accept or vote on a text which had not been circulated in writing.

57. Mr. ROSENSTOCK said that he continued to regard the proposed text as seriously deficient. The omis-

⁶ The article was originally adopted as article 43; for the commentary, see *Yearbook . . . 1966*, vol. II, pp. 240 et seq., in particular, para. (12) at p. 242.

sion of the phrase "As long as the State . . . has not complied" represented a substantive change which he, for one, was not prepared to accept. The possibility of reaching a decision by consensus was therefore very slight.

58. The CHAIRMAN said that the proposed new text of article 47 [11] would be circulated in writing for the next meeting.

The meeting rose at 1.10 p.m

2456th MEETING

Wednesday, 10 July 1996, at 10.15 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Roldrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (continued) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE²
PROPOSED BY THE DRAFTING COMMITTEE³
(continued)

PART TWO (Content, forms and degrees of international responsibility) (continued)

CHAPTER III (Countermeasures) (continued)

ARTICLE 47 (Countermeasures by an injured State) (concluded)

1. The CHAIRMAN invited the Commission to resume its consideration of chapter III of part two starting with article 47 [11].

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

³ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

2. Mr. CRAWFORD said that the compromise text which had been prepared by a group of members read:

"1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

"2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

"3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State."

3. Paragraph 1 of that text no longer stated that countermeasures were lawful, but simply defined them, which was more consistent with article 30 (Countermeasures in respect of an internationally wrongful act) of part one of the draft. The wording was therefore more neutral. The words "as long as it has not complied" imposed a temporal limitation on countermeasures, while the end of the article, from the words "as necessary" indicated that, if countermeasures were not "necessary", they could not be taken, and that met the concern expressed by the former Special Rapporteur (2455th meeting).

4. Paragraph 2 made countermeasures subject to the conditions and restrictions set out in articles 48 [12] to 50 [14] and should be uncontroversial, while paragraph 3 was the same as former paragraph 2, except that the words "of paragraph 1" had been replaced by the words "under this chapter" to take account of the amendment to paragraph 1.

5. Mr. de SARAM said that it was difficult for him to comment on a text he had only just seen. Nonetheless, he would like to know how paragraph 1 of the text as just read out by Mr. Crawford differed from the original paragraph 1 and, in particular, whether it weakened the safeguards the latter paragraph provided against possible abuses with respect to countermeasures. If there was no substantial difference, he could go along with the new text, which was in fact clearer and did not take a position on the legitimacy or otherwise of countermeasures.

6. The CHAIRMAN said that the new text was not substantially different from the text it replaced; it was merely more neutral.

7. Mr. ARANGIO-RUIZ said that he was on the whole in favour of the new text proposed for article 47 [11], although he had the strongest reservations about the phrase "as long as it has not complied with those obligations and", which suggested that a State could take countermeasures without waiting for any response on the part of the State which had allegedly committed the wrongful act or before assessing such response. If the accused

State admitted the existence of a breach and assured the injured State that it was ready to meet its responsibilities, there should be no reason for countermeasures. He would therefore like the phrase in question to be deleted.

8. Mr. BOWETT said that he did not read paragraph 1 of the new text proposed for article 47 [11] in the same way as Mr. Arangio-Ruiz, since, in his view, the two criteria to which countermeasures were subject under the last part of paragraph 1 were cumulative, as was indicated by the conjunction “and” before the words “as necessary”. If there was “no reason” for countermeasures, as in the situation to which Mr. Arangio-Ruiz had referred, they would not be “necessary” and hence would fall foul of the second criterion. In actual fact, it was the provision on compulsory arbitration that would provide the most effective safeguard against abuses of countermeasures. Any State which took measures that were unreasonable or unnecessary would be penalized in the arbitration process. Any sensible interpretation of article 47 [11], paragraph 1, made in good faith must take that provision into consideration.

9. Furthermore, he trusted that no attempt would be made, during the consideration of article 47 [11] or of other articles, to introduce new conditions about prior attempts at negotiation or settlement, which had already been rejected by the Drafting Committee and were, in addition, unnecessary because of the provision on compulsory arbitration.

10. Mr. JACOVIDES said that, owing to lack of time, he had been unable, at the preceding meeting, to make the comments he was hoping to on countermeasures in the context of State responsibility, in the light of chapter III as adopted by the Drafting Committee. If countermeasures were to be included in the draft—and, in the circumstances, their omission would leave a serious gap in the present state of international law—they must (a) be circumscribed as clearly and narrowly as possible; (b) be accompanied by the strictest possible system of effective and binding third party dispute settlement procedures; (c) be proportional to the wrongful act responded to; and (d) be prohibited in certain categories of case and, certainly, when they were in contravention of peremptory norms of international law, a concept which, incidentally, should be clarified and defined. Draft articles 47 [11] to 50 [14] as adopted by the Drafting Committee were acceptable in that they achieved a certain balance among the various elements involved. Like several members of the Commission, including Mr. Sreenivasa Rao, Mr. Al-Baharna and the small group of members who had submitted a proposal (2455th meeting), he considered that countermeasures should be the exception rather than the rule. At the same time, he was prepared to go along with the text read out by Mr. Crawford.

11. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he could accept the new text proposed for article 47 [11], but felt bound to express strong reservations about its drafting. New paragraph 1 of article 47 [11] defined countermeasures and then laid down two conditions to which they were subject. Those conditions should have been set out in the articles which dealt with the conditions for and restrictions on the use of countermeasures.

12. Mr. SZEKELY said that, like Mr. Bowett, he considered that the two conditions to which countermeasures were subject under new paragraph 1 of article 47 [11] were cumulative. He too still preferred the text originally proposed by the Drafting Committee and he had some concern about the reasons for recasting article 47 [11]. He also found it difficult to accept the new text proposed for article 47 [11] before knowing the final content of article 48 [12] on the conditions relating to resort to countermeasures. Accordingly, he could join in the consensus on article 47 [11] provided that the outcome of the discussion on article 48 [12] did not jeopardize the balance achieved in article 47 [11].

13. Mr. VILLAGRÁN KRAMER said that the Drafting Committee had made considerable efforts to arrive at the compromise wording Mr. Bowett had just read out. He himself was prepared to vote on the text as initially proposed so that the General Assembly could be aware of who among the members of the Commission took the view that there was a rule of *lex lata* with regard to reprisals or countermeasures and that the rule must be codified and who believed that the draft should not deal with that question and preferred to let the law of the jungle prevail in that regard. Because it was necessarily linked to article 48 [12], he could accept article 47 [11] and join in the consensus only if article 48 [12] remained as it stood.

14. Mr. BARBOZA said that the Commission should avoid reopening the debate on chapter III. It was extremely difficult to carry out drafting work in plenary meetings. With regard to paragraph 1 of the new article 47 [11], the phrase “as long as it has not complied” was redundant, since countermeasures were defined precisely as those measures which were taken when the wrongdoing State had not complied with its obligations. He joined in the consensus on article 47 [11], but reserved his position on article 48 [12] for the time being.

15. Mr. PELLET said he agreed with the Chairman of the Drafting Committee that the last part of paragraph 1 of the new article (“as long as it . . .”) should be placed in paragraph 3. With regard to substance, Mr. Arangio-Ruiz was right to express reservations about the condition laid down by that phrase, which, referred not to the obligation of arbitration, but to the obligations which the wrongdoing State had to fulfil under articles 41 to 46. If article 47 [11] was taken literally, as proposed, it could be said that the injured State was justified in taking countermeasures even during the period of arbitration. Such a procedure could last three or four years. That being said, he was prepared to accept the new text, which seemed better than the previous version, since it no longer asserted that recourse to countermeasures was a right. In that regard, he agreed with Mr. Villagrán Kramer that, in order to limit the use of countermeasures to a minimum, such measures must not, for a start, be considered as a right. He also took exception to what he regarded as blackmail in article 48 [12]. In his opinion, whatever version of article 47 [11] was retained, the basis for that decision must be taken into account during the consideration of the following article.

16. Mr. ROSENSTOCK said that the text of article 47 [11] as provisionally adopted by the Commission at its

forty-sixth session,⁴ had been drafted in a satisfactory manner and had been discussed thoroughly enough. In his opinion, it was a mistake to engage in drafting work in the plenary meeting. He was nevertheless prepared to join in the consensus, but he agreed with other speakers that article 48 [12] must not be changed.

17. The words “as long as it . . .” would have to be applied in real circumstances. If they referred to the amount of time the wrongdoing State would have for making reparation, it was hardly likely that the injured State would agree not to use countermeasures in return for a simple promise. If those words referred to the time prior to arbitration, that was hardly more realistic because they would keep the injured State from acting during the entire time it would take to establish a conciliation commission or arbitral tribunal, and that, as everyone knew, might be very long.

18. The new text under consideration seemed to be the least common denominator on which the members of the Commission could agree. He would therefore accept it in that sense, subject to the smoothing of its stylistic rough edges later.

19. Mr. HE said that he would have preferred article 47 [11] to be retained as already adopted. The wording had been the result of lengthy debate, made even more difficult by the many aspects that had had to be covered. If a consensus was reached on the new text, however, he would agree to join in it.

20. Mr. FOMBA said that the new text of article 47 [11] was an improvement over the previous one because it no longer said that the injured State was entitled to take countermeasures. The system of State responsibility was based on respect for primary obligations. However, the functioning of the system was based on four considerations: the period during which the primary rules were not respected; the evaluation of the gravity of the breach of the primary rules; the evaluation of the good faith, goodwill and ability to make reparation of the wrongdoing State; and, lastly, the assessment of the need for countermeasures. In the proposed text, there was a balance between two criteria of the continued existence of the internationally wrongful act and the need to counter it with a reaction. He therefore endorsed the new text of article 47 [11].

21. Mr. LUKASHUK said that he, too, was prepared to join in the consensus on the new text of article 47 [11], which seemed to be more precise and to give more consideration to the entire range of views expressed by the members of the Commission. Nevertheless, he associated himself with the reservations expressed by the Chairman of the Drafting Committee about the end of paragraph 1. The words “as long as it has not complied” should be part of the conditions under which countermeasures could be taken and which were dealt with in the following articles.

22. Mr. VARGAS CARREÑO said he welcomed the consensus that seemed to be taking shape on the new text of article 47 [11]. In his opinion, the fate of that pro-

vision had to be linked to that of article 48 [12] and also that of articles 49 [13] and 50 [14]. He proposed that the new text of article 47 [11] should be adopted provisionally; the Commission could return to it for final adoption once action had been taken on the other articles on countermeasures.

23. Mr. YANKOV said that neither the earlier version nor the new text of article 47 [11] was fully satisfactory, although the latter did dispel certain doubts about the nature of countermeasures. He was fully prepared, in principle, to put aside his reservations and join in the consensus which seemed to be taking shape. It should nevertheless be understood that article 48 [12] would define precisely the conditions under which countermeasures could be taken.

24. Mr. MIKULKA said that, while he was willing to accept the new text of article 47 [11], he endorsed the comments by Mr. Pellet and the Chairman of the Drafting Committee on the end of paragraph 1, which in his view, belonged in paragraph 2. In fact, the words “as long as it has not complied” could just as well be deleted, since its meaning was already implicit in the text, which clearly stated that the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations. It should also be understood that the interpretation of that phrase would always be made in the light of article 49 [13] on proportionality.

25. Mr. AL-BAHARNA said that, although it had been drafted hastily, the new text of article 47 [11] was somewhat better than the previous version. He was therefore willing to join in the consensus, it being understood that article 48 [12] would also be adopted. The commentary should also be revised to take the new wording into account. If the new text of article 47 [11] and article 48 [12] could not be adopted by consensus, he would like the Commission to go back to the earlier version of article 47 [11] and put it to a vote.

26. Mr. ROBINSON said he welcomed the fact that the entitlement to take countermeasures had been left out of the new text, which, in his view, differed from the previous text only in the way in which the issues were presented. He was willing to join in the consensus which seemed to be taking shape on articles 47 [11] and 48 [12].

27. The CHAIRMAN, speaking as a member of the Commission, said that he, too, welcomed the deletion of the reference to an “entitlement to countermeasures”, which would appear to authorize the types of conduct that article 30 condemned. It was now much clearer that countermeasures should come into play only in exceptional cases.

28. He recalled that the Commission was merely at the stage of the first reading of the draft and that it could, if necessary, go back over any wording that needed to be reworked.

29. Mr. ARANGIO-RUIZ said that he would like his very serious reservations on the words “as long as it has not complied” to be reflected in the summary record.

⁴ See 2454th meeting, footnote 12.

30. Mr. EIRIKSSON said that he joined in the consensus because he considered that article 30 of part one had already dealt with the problem at hand.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the new text of article 47 [11] by consensus.

Article 47, as amended, was adopted.

ARTICLE 48 (Conditions relating to resort to countermeasures) (*continued*)

32. Mr. PELLET said that it would be logical to bring article 48 [12] into line with the new article 47 that had just been adopted. He therefore suggested the following amendment to the last two paragraphs of that article:

“2. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 1 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

“3. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.”

Even with that amendment, he believed that the conditions set out in article 48 [12] were somewhat utopian, for they presupposed that part three of the draft articles, dealing with the settlement of disputes, would be adopted—something that was by no means certain.

33. Mr. BENNOUNA said he supported the proposal made by Mr. Pellet and recalled that he himself had likewise proposed (2454th meeting) an amendment to article 48 [12] designed to introduce, in a new paragraph 1, the idea that, before resorting to countermeasures, the injured State was under the obligation to negotiate. The amendment read:

“1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54”

Such a provision might be useful for a number of reasons: first, it was directly in line with Article 33 of the Charter of the United Nations; secondly, it enabled the parties, regardless of the outcome of the negotiations, to exchange views and clearly state their respective positions; thirdly, it would discourage powerful countries from being tempted to take advantage of their dominant position; and, fourthly, it offered the parties a practical and realistic solution, for, as Mr. Pellet had pointed out, arbitration could go on for years.

34. Mr. ARANGIO-RUIZ said he continued to be of the opinion that article 48 [12] should have been much stricter in requiring prior compliance with dispute settlement obligations before a State resorted to countermeasures. The obligation to negotiate as proposed by Mr.

Bennouna was welcome, but it was not sufficient. Reference should also have been made in paragraph 1 to all the other dispute settlement procedures available, above and beyond those provided for in part three. In that connection, he referred the members of the Commission to the draft article he himself had proposed, in his fourth report.⁵ In general terms, the conditions for countermeasures laid down in the article were too dependent on the ultimate fate of part three and particularly article 58 [5], paragraph 2, to which strong objections had been expressed by several members of the Commission.

35. Another defect of article 48 [12] was that it contained no provision imposing prior communication among the parties. Except, of course, for urgent protective measures, for which no prior communication should be required, a wrongdoing State should be granted the possibility of avoiding countermeasures by admitting to the breach it had been accused of committing and by offering reparation. That was possible only in the context of prior communication with the injured State.

36. Article 48 [12] also entirely failed to take account of the distinction that must be made between countermeasures and urgent protective measures. He had drawn attention to that matter yet again in his eighth report (A/CN.4/476 and Add.1).

37. For everything he had said about dispute settlement, he referred the members of the Commission to his fourth and fifth⁶ reports, chapter II of his eighth report and the article that he had published in 1994.⁷

38. Mr. MIKULKA said that the drafting amendment proposed by Mr. Pellet seemed logical, but he wondered whether it would solve the problem completely. By indicating, in paragraph 2, that “the injured State shall suspend countermeasures”, the Commission was assuming that countermeasures had already been adopted. Yet article 47 had been amended precisely to do away with the idea that the injured State had the right to adopt countermeasures. Accordingly, must not article 48 [12] likewise cover the case where the injured State had not adopted countermeasures? He said he would like Mr. Pellet to redraft paragraphs 2 and 3 along those lines.

39. Mr. ROSENSTOCK said that he endorsed the comments made by Mr. Mikulka. By wishing at all costs to make article 47 “politically correct” without really changing anything as to substance, the Commission had complicated matters in article 48 [12]. As to whether paragraph 1 should include a reference to the obligation to resort to dispute settlement machinery other than that provided for in part three, he recalled that all proposals made along those lines by the Special Rapporteur had been rejected.

⁵ *Yearbook . . . 1992*, vol. II (Part One), p. 22, document A/CN.4/444 and Add.1-3, para. 52.

⁶ *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3.

⁷ G. Arangio-Ruiz, “Counter-measures and amicable dispute settlement means in the implementation of State responsibility: A crucial issue before the ILC”, in *Journal européen de droit international*, vol. 5 (1994), No. 1, pp. 20-53.

40. Mr. LUKASHUK said that he had no objection in principle to draft article 48 [12] or the drafting amendments proposed by Mr. Pellet and Mr. Bennouna. He wondered, however, whether the Commission was not making things unnecessarily complicated. After all, the right to resort to countermeasures was generally recognized and countermeasures themselves were an important part of the mechanism by which international law operated. That fact could be repudiated on paper, but what would happen in practice? If the Commission wanted to be honest, it had to stop contesting the right to countermeasures and merely limit it. Obstinate doing otherwise would only lead to contradictions.

41. Mr. PELLET acknowledged that article 48 [12] represented an attempt to find a middle term. The version he had proposed had the advantage of being in line with article 30 of part one of the draft, which was careful not to say anything about a right to resort to countermeasures. In order to meet the concerns expressed by Mr. Mikulka, he could either replace the words "the injured State shall suspend countermeasures" in paragraph 2, by the words "the injured State shall not adopt countermeasures and shall suspend the countermeasures it has adopted" or incorporate wording to that effect in the commentary.

42. Mr. de SARAM drew Mr. Pellet's attention to the fact that, in article 30 of part one, to which he had referred, countermeasures were described as constituting a legitimate measure. He did not particularly want the word "right" to be retained in article 48 [12], but he wondered whether, in proposing that it should be deleted, Mr. Pellet was motivated only by drafting considerations.

43. Mr. VILLAGRÁN KRAMER said that the right of reprisals was fully recognized by the doctrine and that, if the obligations of the injured State were listed, the least that could be done was to recognize its rights as well. The difference between *faculté* and "right" was not of such fundamental importance in that connection. If his memory served him correctly, Mr. Pellet himself had dealt masterfully with the problem of countermeasures in a work in which he included them among the circumstances precluding unlawfulness. The Spanish version of that work stated that the wrongfulness of such measures in question was precluded if they were legitimate measures taken in response to an internationally wrongful act.

44. As to the obligation of prior exhaustion of all possibilities of peaceful settlement which Mr. Arangio-Ruiz wanted to introduce, he had not found one single example among the cases cited by the former Special Rapporteur showing that such an obligation existed. No precedent to that effect was to be found either in the *Portuguese Colonies* case (Naulilaa incident)⁸ or in the case concerning *the Air Service Agreement of 27 March 1946 between the United States of America and France*.⁹ What did exist, however, was the obligation of the State which intended to take countermeasures to give prior

notice. The following wording, which he had recently found in a treaty on international law, seemed highly pertinent: "Before taking countermeasures, notice is given not out of courtesy, but because it is an obligation".

45. The injured State would therefore request the wrongdoing State, first, to cease the wrongful act and, secondly, to provide satisfaction or reparation. If the response to that request was negative, there would be a controversy between the two States, but, if it was positive, the dispute settlement mechanism could enter into play. That did not, however, imply the existence of an obligation to resort to such a mechanism unless the obligation to submit a given question to arbitration or to a compulsory dispute settlement system was provided for by a treaty. In that case, that obligation would cancel out the right of the injured State to resort to countermeasures. As it happened, part three of the draft did contain such an obligation.

46. Referring specifically to the wording of article 48 [12], he recalled that some members had agreed to amend the text of article 47 only on condition that no change was made in article 48 [12]. He was, however, prepared to consider the proposal by Mr. Pellet, but would ask for a vote on any proposal that went beyond that of Mr. Pellet and, in particular, on any proposal for the addition of a new paragraph 1 to article 48 [12].

47. Mr. PELLET explained that the wording of article 48 [12] which he was proposing did not entirely correspond to what he would have wished, namely, that the Commission should start from the idea that, save in exceptional circumstances, States had no right to resort to countermeasures.

48. In reply to the question raised by Mr. de Saram, he said that, by adopting the proposed wording, the Commission would avoid stating the principle of the existence of a subjective right to take countermeasures. Furthermore, article 48 [12], like article 30 of part one, would make the right and the obligations indissociable, since the legitimacy of the countermeasure would be made contingent on compliance with a number of conditions.

49. Referring to Mr. Villagrán Kramer's rejection of the proposal that a new paragraph 1 should be added to article 48 [12], he said that he could not understand such a position on the part of a member who was apparently one of those who wanted to limit resort to countermeasures to the maximum possible extent. The proposal to make resort to countermeasures subject to prior negotiations amounted to adding an a priori obligation to the a posteriori obligations contained in part three, thereby limiting still further the possibility of resorting to countermeasures that was available to the great Powers or the super-Powers. The proposal was a happy medium between the thesis of a subjective right to resort to countermeasures and the somewhat unrealistic idea defended by Mr. Arangio Ruiz that the injured State should be able to resort to countermeasures only after the exhaustion of all dispute settlement procedures.

50. Lastly, like Mr. Arangio Ruiz, he regretted the fact that the Commission had set aside the possibility of

⁸ United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1011.

⁹ *Ibid.*, vol. XVIII (Sales No. E/F.80.V.7), pp. 415 et seq.

recourse to urgent protective measures in exceptional cases. That was a question to which the Commission should come back on second reading.

51. Mr. CRAWFORD said that he was prepared to join in the consensus that seemed likely to emerge in favour of the amendments to article 48 [12] which had been proposed in order to bring it into line with article 47. On the other hand, he thought that the problem raised by Mr. Mikulka was already resolved by the existing text of paragraph 1 of article 48 [12], referred to in paragraph 2 of the same article, which was concerned only with an injured State that had actually taken countermeasures. That left open the possibility, which he supposed was not merely hypothetical, that a State entitled to take countermeasures might exercise that right only after it had already referred the matter to a dispute settlement mechanism which it had accepted previously, for example, by a treaty. In such a case, the coexistence of two parallel dispute settlement procedures, one relating to the underlying dispute and the other relating to the subsequent taking of countermeasures, would undoubtedly give rise to problems. However, that possibility did not fall textually within the scope of article 48 [12].

52. Mr. VILLAGRÁN KRAMER, replying to Mr. Pellet's remarks, said that his reasoning was not in the least contradictory. Like the other members of the Commission, he had received a very clear mandate from the General Assembly to codify in good faith the existing rules of general international law, *lex lata*, and, if no rules existed, to undertake the progressive development of international law. But the Assembly had not given him the right to negotiate a solution politically. He could, of course, reach a compromise on defining a rule or on precluding the application of a rule, but, unlike some of his colleagues, he considered himself bound by the statute of the Commission. Besides, the question of the right of reprisals was relatively clear-cut.

53. It was also worth pointing out that, when the Security Council authorized a State to take reprisals by reason of a violation of the Charter of the United Nations or a wrongful act committed by a State, prior negotiations were not required.

54. Mr. EIRIKSSON said that he supported Mr. Pellet's proposal. For the same reasons as Mr. Crawford, he did not think that it needed to be amended in order to meet the concerns of Mr. Mikulka and Mr. Rosenstock.

55. Mr. MIKULKA, unreservedly supported by Mr. ROSENSTOCK, said that he could accept Mr. Pellet's proposal that the problem he had raised should be solved in the commentary. That did not, however, mean that he was convinced by the arguments put forward by Mr. Crawford and supported by Mr. Eiriksson. It was not entirely true to say that paragraph 1 was concerned a priori with cases in which countermeasures had already been taken; according to article 47, countermeasures as such were authorized only subject to the conditions set out in articles 48 [12] to 50 [14]; in other words, those conditions had to be interpreted as being applicable to the actual taking of countermeasures. Moreover, while paragraph 1 defined the limits placed on a State already engaged in taking countermeasures, paragraph 2 had a far wider scope in that it applied to a situation where a

State which had the intention of taking countermeasures, but which hesitated to apply them, submitted in advance to procedures set out in part three. Meanwhile, a development took place in that the wrongful act ceased and the perpetrator of the act himself submitted to a procedure provided for in part three. He therefore objected to it being stated in the commentary that the problem was solved because paragraph 2 of article 48 [12] derived purely and simply from paragraph 1.

56. The CHAIRMAN invited the members of the Commission to decide on Mr. Pellet's proposal. If he heard no objection, he would take it that the Commission wished to adopt the proposal.

It was so decided.

57. The CHAIRMAN invited the members of the Commission to vote on Mr. Bennouna's proposal that a new paragraph 1 should be added to article 48 [12].

The proposal was adopted by 13 votes to 9, with 1 abstention.

58. Mr. CRAWFORD, speaking in explanation of vote, said that the addition of the paragraph in the absence of any provision relating to urgent measures of protection contributed towards seriously unbalancing article 48 [12].

59. Mr. ROSENSTOCK said that he associated himself with the explanation of vote given by Mr. Crawford. Article 48 [12] as it had just been amended was totally unacceptable. He therefore requested the Chairman to put the whole of article 48 [12] as amended to the vote.

60. The CHAIRMAN, replying to comments by Messrs. Arangio-Ruiz, Bennouna, Eiriksson, Mikulka, Thiam, Güney and Szekely, said that the beginning of the following meeting would be set aside for the vote on article 48 [12], as a whole, and for possible explanations of vote by members of the Commission.

The meeting rose at 1.15 p.m.

2457th MEETING

Thursday, 11 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. Jaconides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (continued) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE²
PROPOSED BY THE DRAFTING COMMITTEE³
(continued)

PART TWO (Content, forms and degrees of international responsibility) (continued)

CHAPTER III (Countermeasures) (continued)

ARTICLE 48 (Conditions relating to resort to countermeasures) (continued)

1. Mr. CRAWFORD said that, at the previous meeting, the Commission had voted to adopt a proposal by Mr. Bennouna for a new paragraph 1 of article 48 [12] containing a provision to the effect that, before resorting to countermeasures, an injured State was required to negotiate in accordance with article 54 [1] of part three. A number of members had voted against the proposal on the grounds that, by depriving the injured State of the possibility of protecting itself for what might well prove in some circumstances to be a considerable length of time, the proposed provision threw the whole chapter out of balance. In an endeavour to retrieve that balance yet preserve the principle of prior negotiation before countermeasures were definitively applied, he now wished to propose the addition of the following paragraph 1 *bis* to follow the new paragraph 1:

“1 *bis*. Paragraph 1 is without prejudice to the taking by the injured State of interim measures of protection which otherwise comply with the requirements of this chapter and which are necessary to preserve its legal position pending the outcome of the negotiations provided for in article 54.”

The proposal reintroduced the concept of interim measures of protection initially proposed by the Special Rapporteur, and drew on the form of language used by the Special Rapporteur in his fourth report.⁴ The French version of the proposed new paragraph 1 *bis* had been improved by Mr. Bennouna.

2. Mr. BOWETT said that, while acknowledging the reasons for Mr. Bennouna's proposal and the support expressed by a number of members for the best of motives, he continued to think that the result of the previous day's vote represented a very serious error. It meant the Commission was back where it had been three years before,

with all the intervening effort dismissed as so much waste of time. Chapter III as it now stood would be unacceptable to Governments because it was largely unworkable in practice. For example, an injured State might decide on a temporary freeze of assets. If prior negotiations were to be a condition for taking countermeasures, the wrongdoing State would be able to make sure that by the time the negotiations ended there were no assets left to freeze. Although the proposal for a new paragraph 1 *bis* provided some remedy in the form of “interim measures of protection”, it merely made the best of a bad job. The ideal solution was to adopt the right principle, not to adopt a bad principle and then minimize its harmful effects. However, he was prepared, albeit with misgivings, to support the proposal and join a consensus on article 48 [12]—which he continued to regard as a very bad article—on condition that new paragraph 1 *bis* was included. If it was not included, he would vote against the article as a whole.

3. Mr. BENNOUNA said it appeared that either the Commission worked so as to please certain Governments—those that were in a position to freeze other States' assets—or it was made up of bad jurists who made mistakes. That was a totally unacceptable assertion, the Commission was now simply engaged in correcting something that had been badly done. At the previous meeting, the majority of members had wisely decided to restore a minimum measure of balance to an unsatisfactory provision by making countermeasures contingent upon prior negotiation. The amendment he had proposed was in keeping with customary international law and its adoption had therefore been a straightforward act of codification.

4. As to the proposal by Mr. Crawford, the fact that he had refined the French version should not be taken to mean that he was in agreement with the substance of the proposed new paragraph 1 *bis*, which, he feared, might have the effect of neutralizing paragraph 1 as adopted by the Commission (2456th meeting). In any case, he was not sure that article 48 [12], which was on the conditions relating to resort to countermeasures was the right place for the proposed new provision. It might be more appropriately inserted as a separate new article on interim measures between articles 47 and 48 [12].

5. Mr. ARANGIO-RUIZ said that he could only abstain in a vote on article 48 [12] as well as on article 47. After years in which improvements would have been made on the highly unfortunate article 12 of part two, which had been adopted by the Drafting Committee at the forty-fifth session, in 1993⁵ without any real reflection of the true position in the Commission, paragraphs and bits and pieces of articles were being proposed that simply did not square with each other. He did not consider Mr. Bennouna's solution adequate, for he had originally had much more than negotiation in mind, and Mr. Crawford wished to suggest a remedy by reverting to interim measures that had been rejected after very superficial discussion in the Drafting Committee in 1993 and 1994, with a promise that they would be scrutinized later. The matter never had been looked into. The current

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

³ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

⁴ See 2456th meeting, footnote 5.

⁵ See 2454th meeting, footnote 13.

situation was a mess and article 47 was in an unacceptable state. The whole issue of the relationship between the Commission and the Drafting Committee should be given special consideration when the Commission came to review its methods of work in connection with the report of the Planning Group.

6. Mr. ROSENSTOCK said that he entirely agreed with Mr. Bowett on the substance of the matter. It was intolerable to hear comments that the work was being done hastily and that the Drafting Committee's view had been unbalanced. It was utterly deplorable that, without prior notice or consultation, an amendment should be tossed in at the last minute and undo years of painstaking work by the Drafting Committee. The Commission was engaged in an *ex post* mitigation exercise. Chapter III would not be perfect and, if the Commission tried to make it so, it would decide in effect not to submit to the Sixth Committee a text which most members could accept. Mr. Crawford's proposal was not one he liked and he had rejected the idea in the Drafting Committee on several occasions. Interim measures were a concept borrowed from elsewhere. At no time when suggested in the past had it been explained in any detail. It had been regarded as a cumbersome and dubious idea and rejected at Drafting Committee meetings open to all concerned. However, it made the chapter less bad. Mr. Crawford's proposal represented the lesser of two evils and was a basis on which it was conceivable the Commission could adopt a text without a vote.

7. Mr. LUKASHUK said that he was not happy with the procedure of adopting an important amendment by only a small majority after a snap vote. Article 48 [12] in its current form was no longer on the side of the injured party but, rather, on the side of the wrongdoing State. As such, it ran counter to many existing standards of international law and to the Charter of the United Nations itself, which did not insist on prior negotiations as a preliminary condition for self-defence. That being so, the article was unacceptable. He had no objection to the compromise solution proposed by Mr. Crawford, but seriously doubted whether his country would be able to agree to chapter III even with that amendment. The decision taken by the Commission (2456th meeting) jeopardized the chances of acceptance of the draft articles on State responsibility as a whole.

8. Mr. VILLAGRÁN KRAMER said that the Commission's decision regarding article 48 [12] placed the international community in a very curious situation from the legal point of view. There existed at the current time no rule whatsoever in international law which obliged the wrongdoing State and the injured State to hold negotiations. Until such time as a sufficient number of States ratified an international instrument incorporating the provision which Mr. Bennouna had proposed and the Commission had accepted, the situation remained and would remain where it was, namely, the situation in which the Drafting Committee had adopted draft article 12 of part two at the forty-fifth session of the Commission. When Governments came to analyse the draft adopted by the Commission on first reading at the current session, they would realize that it had, in effect, sought to codify a non-existent rule. They would not accept article 48 [12] and matters would be worse than

before. It would be seen that the Commission could not formulate a text that might be acceptable to the majority of States that resorted to reprisals with some frequency, and the record would show that political considerations had prevailed over legal ones in the Commission's deliberations. Mr. Crawford's contribution was worthy of praise and he would support it, although it provided only a partial solution to the problem arising from the fact that negotiations could be drawn out indefinitely. While aware of the highly unusual nature of such a procedure, he intended to request a roll-call vote on article 48 [12] unless a satisfactory formula were found that would redress the current lamentable situation.

9. Mr. EIRIKSSON said that the mood which had prevailed at the previous meeting had left him with a bad taste in his mouth. He feared that a similar situation might be arising at the current meeting and appealed to all members to make an effort to overcome their personal differences. So far as Mr. Crawford's proposal was concerned, he suggested that, after taking a decision on it, the Commission should set up a small working group to look at the text with a view to making possible improvements before adopting article 48 [12] as a whole.

10. Mr. YAMADA said that he had voted against Mr. Bennouna's proposal for reasons which coincided with those put forward by Mr. Bowett and Mr. Lukashuk. The provision adopted as new paragraph 1 diminished the value of article 54 [1] and other articles of part three. While appreciating Mr. Crawford's efforts to reduce the harm done, he did not think that adoption of the proposed new paragraph 1 *bis* would restore the balance of article 48 [12] as proposed by the Drafting Committee. Therefore, he could not endorse that article in its new form.

11. Mr. SZEKELY said that he, too, had been totally opposed to Mr. Bennouna's proposal and had voted against it. The adoption of the proposal had to be viewed as something that was most regrettable and would do the Commission little good from the point of view of the repute or the quality of its products. He wished to associate himself with the comments made by Mr. Rosenstock and also the statement by Mr. Bowett in regard to substance. Mr. Crawford's proposal was an attempt to mitigate the effects of the lamentable accident of the adoption of Mr. Bennouna's amendment. It was inconceivable that the Commission should not be equal to the task of doing the work properly.

12. Mr. YANKOV said that he did not share some of the extreme views voiced in support of the idea of negotiations prior to taking countermeasures, nor the view that negotiations could go on forever: should one of the parties to a dispute so decide, it could cease negotiations at any time. The negotiations requirement, far from improving the text, would simply create more problems. In the circumstances, serious thought should be given to Mr. Crawford's proposal, which could also be referred to a small working group with a view to making the wording consistent with the other paragraphs in the article.

13. Members of the Commission did not speak on behalf of any particular Government but sat as experts and in their personal capacity. While they should take account of the possible reactions of States, such reactions

were in no way binding either as to the interpretation of principles of international law or as to any other issues relating to dispute settlement and State responsibility.

14. Mr. THIAM, noting that the Commission had broken with its long tradition of not voting on first reading, said that Mr. Crawford's proposal could perhaps be accepted pending any comments received from Governments or made by delegations in the Sixth Committee. For his own part, he could provisionally accept the proposal.

15. Mr. de SARAM said that he supported Mr. Crawford's proposal, which sought to remove a flaw in Mr. Bennouna's proposal, and agreed that it should be considered further in a working group.

16. So far as the decision taken at the previous meeting was concerned, his own difficulties had arisen because he had always regarded article 47, paragraph 1, and article 48 [12], paragraph 1, in the original formulations, as interlinked. In particular, it seemed to him that the right to exercise the privilege accorded under article 30 of part one, whereby an injured State could in certain circumstances resort to a countermeasure, was clearly subject to certain conditions laid down in article 47, paragraph 1. Those conditions were included in the new condensed version of article 47, paragraph 1, but there was a difference when it came to clarity. Mr. Bennouna's proposal, for which he had voted, went some way to remedying the situation. Under article 47, paragraph 1, as originally drafted, it was clear that the injured State would make demands on the wrongdoing State, for instance, would call upon it for cessation or reparation. As that was less clear in the condensed version, he had been concerned at the effect on article 48 [12], paragraph 1, but had decided that the conciliation requirement proposed by Mr. Bennouna would meet the point. The problem was that in an extreme situation where an injured State needed to take a countermeasure in order to preserve its position, it would be self-defeating for it to inform the other State that it proposed to do so. That difficulty would now be resolved by Mr. Crawford's very worthwhile proposal. Consequently, notwithstanding certain practical and other difficulties, he supported that proposal as a way out of the difficult situation facing the Commission.

17. Mr. BARBOZA said that he had voted against Mr. Bennouna's proposal at the previous meeting, as it introduced a very definite imbalance into the draft. Mr. Crawford's proposal, however, restored that balance to some extent and he could therefore support it. It might also be useful for a small working group to attend to any drafting details and to consider how the proposed form of wording might affect the rest of the article.

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that one of the main points to be solved, of course, concerned the interplay between countermeasures and dispute settlement procedures. From the very outset, he, like the former Special Rapporteur, Mr. Arangio-Ruiz, had always believed that dispute settlement procedures should come before countermeasures. He continued to feel that countermeasures, though unfair, were unavoidable and must be accepted as a reality in the disorganized international society of the modern-

day world. At the same time, an attempt must be made to limit them in so far as was possible.

19. Article 12 (currently art. 48), as adopted by the Drafting Committee at the forty-fifth session, when Mr. Mikulka had been Chairman of the Drafting Committee, had not been to his liking at all. At the time, the Commission had decided that, unless a better text could be approved, it would have to stand. He had finally concluded that it should be accepted as a compromise, particularly in view of the approval of article 58 [5] of part three, paragraph 2, under which a State against which countermeasures had been taken would be immediately entitled to seek arbitration, when the countermeasures would be suspended and a solution found.

20. Even though he was in favour of having dispute settlement procedures before the application of countermeasures, he had had to vote against Mr. Bennouna's proposal at the previous meeting, first, because that proposal had not been studied in the Commission at all and, secondly, because it was very one-sided. For instance, although it was designed to protect a State wrongly accused of having committed a wrongful act, it would also protect a State that had actually committed a wrongful act and would therefore be detrimental to the interests of the injured State.

21. Mr. Crawford's proposal restored to some extent the balance the former Special Rapporteur had earlier sought to achieve in that it would allow the injured State a certain leeway to react immediately with measures of protection, if not with full countermeasures. He therefore supported that proposal. Unless it were adopted, and if the provision for which the Commission had voted at the previous meeting were maintained, he would be unable to vote in favour of the article.

22. Mr. FOMBA said that the idea of requiring negotiations to be held before countermeasures were taken, with which he agreed, had been accepted by a majority in the Commission at the previous meeting. Yet it was now being said that it could lead to problems and in particular to the use of delaying tactics by States. The answer lay in the principle of the presumption of good faith, which should apply unless it was felt that that principle no longer carried weight, something he personally would deplore. The proposed solution was to introduce a system of interim measures of protection, but the question was to what extent such measures should be taken *ex ante* or *ex post*. His own feeling was that it was necessary to talk before interim measures were taken. Only when a measure of ill-will was discernible should it be necessary to think in terms of applying such measures. He had nothing against such measures in principle, although they could cause certain difficulties as to form and substance as far as the chapter on countermeasures was concerned. For the rest, he shared to a large extent the position of Mr. Bennouna and Mr. Arangio-Ruiz. Should a general consensus emerge in favour of Mr. Crawford's proposal, however, he was prepared to join in it, subject to any necessary improvements.

23. Mr. ROBINSON said that, while he had some sympathy with Mr. Crawford's proposal, it gave rise to certain concerns, one of which was that the regime of interim measures was nowhere defined in the Commis-

sion's work. The acceptability of the proposal would therefore be considerably enhanced by a carefully elaborated commentary explaining that interim measures operated in a very narrow and circumscribed ambit.

24. Another point concerned the wording of the proposal. He was not altogether sure that it was correct to refer to the preservation of the legal position of the injured State—as distinct from its essential interests—pending the outcome of the negotiations. He would none the less consider Mr. Crawford's proposal in the context of those considerations.

25. Mr. ARANGIO-RUIZ said that, in 1993 and 1994, when he had been the Special Rapporteur and had taken part in the work of the Drafting Committee, if article 12 had been made worse than it was—and he was not implying that it had been perfect originally—it had certainly not been through the fault of the Chairmen of the Committee at the time. It had been the fault of the Drafting Committee and the fact that the Committee's composition had not reflected—as it had not reflected at the current session—the views, and the support for those views, in the Commission. That was why article 12 had been messed about. He was sorry that the Drafting Committee, under the chairmanship of Mr. Calero Rodrigues, had not managed at the current session to do anything, simply because of something he could only define as a kind of obstinate veto on reviewing article 12 and on moving away from the bad drafting of the article in 1993. That obstinacy on the part of some members of the Drafting Committee had prevailed and indeed had been reflected in the report on the work of the Drafting Committee at the forty-fifth session of the Commission in 1993⁶. At that time, as repeatedly stressed by the Special Rapporteur, and as reported by the then Chairman of the Drafting Committee in plenary, there had been a majority in the Drafting Committee in favour of prior recourse to means of settlement. The reason why it had not worked was because at one point its supporters had started to disappear; why, he did not know. At one point, the Drafting Committee had been reduced to just a few members opposed to the idea of prior recourse. That explained what was to be found in the summary records of the Commission.

26. Mr. BENNOUNA said that he was not opposed to the idea of interim measures of protection, which had in fact existed in the Commission since the time of draft article 12 as proposed by the former Special Rapporteur, Mr. Arangio-Ruiz. As Mr. Thiam had said, the proposed paragraph 1 *bis* could be adopted pending the second reading of the draft articles, but it seemed to him that a second paragraph introducing an exception to the first in an article on conditions relating to resort to countermeasures would be a little bizarre from the legal standpoint. The Commission could, of course, proceed to adopt paragraph 1 *bis* with the legal inconsistencies to which reference had been made and he would not oppose its adoption. The best thing, however, would be to have a separate article at the end of the chapter on countermeasures and to ask Mr. Crawford to draft it.

27. Mr. CRAWFORD said that the notion of interim measures of protection had appeared in the fourth report of the former Special Rapporteur, Mr. Arangio-Ruiz, within the framework of countermeasures but without any definition. The proposal before the Commission attempted to spell out the same basic idea in a little more detail. True, it did not occur anywhere else but it was needed only at that particular point because of the problem raised by the insertion of the new paragraph 1 and notwithstanding the fact that, in the view of the majority, paragraph 1 had other merits. Nor was it the case that paragraph 1 *bis* neutralized paragraph 1; it merely qualified it in a particular respect, namely, in respect of interim measures. He agreed entirely that that should be explained in the commentary.

28. With regard to Mr. Fomba's point about bad faith, unfortunately, in some circumstances States incontestably committed an unlawful act—for instance, where the hostage-taking of diplomatic personnel was involved—and in such cases the principle of presumption of good faith could wear a little thin.

29. In his view, adoption of the principle set forth in his proposed paragraph 1 *bis* was essential if the article was to be satisfactory and he would vote against the article unless something along the lines of that proposal was adopted. It seemed that the Commission was in a position to adopt it if not by consensus at least without a vote. He would be opposed to a separate article as he did not think it was necessary, but questions of placement and further drafting refinements in the narrow sense could be examined once the principle had been accepted.

30. Mr. ROSENSTOCK said that virtually everything he had wanted to say had been said by Mr. Crawford. The fact that the Commission had adopted an amendment (2456th meeting) in connection with certain points requiring fine-tuning did not mean that the amendment would be exempt from further refinement. If the best way of arriving at a text without a vote—a text about which most members were less than overjoyed—was by a change in wording in order to overcome the concerns expressed regarding the interaction between Mr. Crawford's proposal and the rest of the article, there should be no reason why that was not possible. Personally, he agreed with Mr. Crawford's proposal, but it should be examined further in the light of the text as a whole. In particular, artificial barriers should not be erected. Should such barriers persist, however, the Commission might wish to reconsider the decision it had taken at its previous meeting. He trusted that matters would not come to that.

31. Mr. KABATSI said that he found it extremely difficult to accept any argument which questioned the need for and usefulness of negotiations in disputes between States. In fact, the ideal solution in such cases was to enter into negotiations before any drastic steps or actions were taken. He could appreciate, however, that circumstances might arise in which an injured State might have to use interim measures of protection, which were in fact countermeasures, in order to preserve its legal rights or position pending the outcome of negotiations. There was, of course, the risk that once such interim measures were authorized, they might be abused, especially if they

⁶ Ibid.

were not implemented in good faith. Under such circumstances, interim measures could be quite drastic.

32. He was prepared to accept paragraph 1 *bis* proposed by Mr. Crawford, provided that the interim measures to which it referred were implemented in good faith. The commentary to article 47 should emphasize the need to avoid situations where such measures might be taken in bad faith and where countermeasures might be resorted to in the guise of interim measures.

33. Mr. AL-BAHARNA said that he considered the principle of interim measures of protection to be legitimate, but it might not be prudent to grant the injured State the right to take interim measures because the definition and scope of such measures had still not been clarified. Some members had suggested placing such clarifications in the commentary. That would not be sufficient: once the injured State was given the unilateral right to take interim measures, it might act in bad faith or exceed the limits of interim measures, thus causing injury.

34. The right to authorize the use of interim measures should be restricted to the courts. In that connection, the contents of paragraph 1 *bis*, as proposed by Mr. Crawford, would be more appropriately incorporated in paragraph 2 of article 48 [12]. In particular, the right to order interim measures of protection should lie with the tribunal referred to in paragraph 2. That would lessen the danger of exceeding the limits of interim measures.

35. Mr. ARANGIO-RUIZ said it was true that "interim measures of protection" had been used without definition in the original proposal. The expression had been used as a term of art whose meaning was understandable to lawyers, especially in relation to the concrete situation in which the concept was being used by an injured State, which had in any case to interpret and apply it at its own risk.

36. A definition had been needed, perhaps in the commentary, and it was what the Drafting Committee should have done, but had failed to do. Some members had contended that the very idea was too vague. Actually, the inclusion of a special provision in the old article 12 exempting urgent protective measures from prior dispute settlement requirements would have meant a very considerable reduction in the weight of the prior recourse to amicable settlement requirement, by admitting that interim measures would be subject neither to prior communication nor to prior resort to amicable means of settlement. Members who had supported that view had again disappeared, so no definition had been elaborated. That was the story of what had happened.

37. Mr. VILLAGRÁN KRAMER said that the obligation to negotiate was independent of the good faith of States. A State which had committed an unlawful act would clearly not propose negotiations prior to committing the act. Yet the injured State was bound under article 48 [12] to enter into negotiations.

38. Was the obligation to negotiate appropriate in the case of an international crime such as aggression or genocide? Under such circumstances reprisals were taken in order to obtain the immediate cessation of the

crime or, as the case might be, immediate reparation. Negotiations which continued for an unlimited period would only prolong the agony of the victim State.

39. After a brief exchange of views in which the CHAIRMAN, Mr. BENNOUNA and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the Commission should adopt paragraph 1 *bis* in principle and establish a working group, to be headed by Mr. Crawford, and comprising a limited membership representing the five regional groups: Messrs. Bennouna, de Saram, Robinson, Rosenstock, and Yankov. It would revise draft article 48 [12] and submit the new draft to the Commission.

It was so agreed.

ARTICLE 49 (Proportionality)

40. Mr. ARANGIO-RUIZ said that, with regard to article 49 [13], he was strongly opposed to the phrase "the effect thereof on the injured State", which must be deleted from that article, for two reasons. First, it was misleading to emphasize the effects of an internationally wrongful act on an injured State in any case of infringement of an *erga omnes* obligation. He was referring to both *erga omnes* delicts and, of course, to crimes, which were always *erga omnes*. In either case, there might well be no damage at all to any one of the injured States concerned. That would be true, for example in the case of infringement by a State of its obligations with regard to the treatment of its own people, including human rights, self-determination and non-discrimination. Again, in the case of differently injured States, as in the case of aggression or damage to the environment, there might be some States, or a great majority of the States involved, which did not suffer any damage at all. In both instances, the reference to "effects . . . on the injured State" would be clearly inappropriate as a criterion or factor for the assessment of proportionality.

41. The second and equally important reason was that in any case—even apart from the hypothesis of the infringement of an *erga omnes* obligation, the emphasis on the effects upon the injured State stressed only one of the factors that went to make up the gravity of the wrongful act. The gravity of such an act depended, in addition to the importance of the infringed rule and even prior to the "effects" on anybody, on the absence or presence of fault and, where fault was present, on the degree of that fault, which might, as in the case of crimes, reach the degree of wilful intent. It followed that, by emphasizing the effects on the injured State, article 49 [13] quite seriously altered the balance between the various factors which had to be considered in order to assess the gravity of the breach.

42. He would suggest deletion of the phrase in question. As he had been unsuccessful in drawing the Commission's attention to that matter in his seventh report⁷ he had taken up the issue again in his eighth report (A/CN.4/476). In its current form, article 49 [13] was unacceptable.

⁷ See 2434th meeting, footnote 5.

43. Mr. ROSENSTOCK said that members who were dissatisfied with the language of article 49 [13] failed to take due account of what had been fully in the minds of all concerned when the article had been provisionally adopted, namely, it was not the fact that a fundamental violation of human rights was involved that meant that the act had no effect on the injured State. The notion of “effect on the injured State” in article 49 [13] had the same sense as the notion had been discussed in the case *concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*.⁸ The subject of examination had been not only whether the breach of the treaty was of itself serious but also the fact that the treaty provision in question was one found in very many agreements. Accordingly, the breach would affect not only that agreement but other agreements as well, so that the effect of the wrongful act went in fact beyond the gravity of the act. The Commission had accepted article 49 [13] expressly on the understanding that there were no implications whatsoever in the case of breaches of *erga omnes* obligations involving fundamental human rights. The criticisms raised with respect to article 49 [13] were directed at a problem that did not really exist; that problem had been resolved by the commentary.

44. Mr. de SARAM said that he endorsed draft article 49 [13] as it stood, including the last clause reading “the effects thereof of the injured State” which provided a perfectly valid criterion for evaluating proportionality. A countermeasure was in fact a unilateral act of coercion which was taken by a State which believed itself to be injured. While that belief might prove to be well founded, there was always the possibility of a genuine misunderstanding between States with regard to whether a breach had actually occurred and as to what adequate reparations should be.

45. Mr. VILLAGRÁN KRAMER said that he agreed with Mr. de Saram that article 49 [13] should be maintained as it stood. In the literature on the subject of international crimes much attention had been paid to the question of whether the concept of proportionality should apply both in the case of reprisals and in the case of international crimes. It was his understanding that, as it appeared in article 49 [13], proportionality had a general application and would apply to all wrongful acts.

46. Mr. ARANGIO-RUIZ said that he objected to Mr. Rosenstock’s point with reference to the commentaries, the value of which should not be overestimated. They were useful, but what mattered was the text of the article itself.

47. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 49 [13].

Article 49 was adopted.

ARTICLE 50 (Prohibited countermeasures)

48. Mr. ROSENSTOCK said that subparagraph (b) of article 50 [14] was extremely vague and unhelpful and,

in the light of the existence of article 49, unnecessary as well as unwise.

49. Mr. VILLAGRÁN KRAMER said that subparagraph (b) was very important because it reflected an aspiration and a reality and was grounded in the Charter of the United Nations. He could agree with Mr. Rosenstock that the subparagraph had lost some of its force, in view of the restrictions on countermeasures which had been incorporated into article 48 [12]. However, the matter could be brought up again during the Commission’s subsequent review of article 48 [12]. For the time being, he was in favour of maintaining subparagraph (b).

50. Mr. SZEKELY said that he endorsed the comments of Mr. Villagrán Kramer. Subparagraph (b) was of the greatest importance for article 50 [14].

51. Mr. LUKASHUK said that article 50 [14] was quite satisfactory. It set forth sound criteria and contained important limitations on the conditions under which a State could resort to countermeasures.

52. Mr. ROSENSTOCK said that whereas the prohibition on countermeasures set forth in subparagraph (d) would necessarily hold in all cases, it was a matter of concern that, by virtue of subparagraph (b), a situation might arise in which an injured State that was suffering from extreme economic or political coercion as a result of a wrongful act could not respond proportionately to the situation if it needed to take the measures described in that subparagraph. It was an unwise idea, and further complicated by the lack of precision in the wording.

53. He did not object in general to article 50 [14] but wished simply to record his hesitation and doubts about subparagraph (b).

54. Mr. FOMBA said that he was in favour of subparagraph (b), a provision that was founded on a philosophy which was beneficial to the smaller countries. It would help prevent the situation in which a small country which had committed an internationally wrongful act was brought to its knees through economic or political coercion.

55. Mr. ARANGIO-RUIZ said it should be made very clear in the commentary that the Commission was fully aware of the fact that the prohibitions contained in subparagraphs (a) and (b), threat or use of force, and extreme economic or political coercion, were circumvented by qualifying the countermeasures concerned as self-defence. He would refrain from citing examples, some of them, unfortunately, all too recent.

56. Mr. SZEKELY said that he was glad that Mr. Rosenstock had simply wished to place on record his reservations with regard to subparagraph (b) because the argument according to which the injured State might be suffering from extreme political or economic coercion and should thus be entitled to proportional action could be applied equally to some of the other prohibited countermeasures. He himself wished to place on record his endorsement of subparagraph (b).

57. Mr. AL-BAHARNA said that he endorsed article 50 [14] as it stood. The five subparagraphs of the article formed a whole and helped link article 50 [14] to arti-

⁸ See 2456th meeting, footnote 9.

cle 47. Article 50 [14] minimized the effect of countermeasures and described which countermeasures were prohibited. By using the words "designed to endanger", subparagraph (b) was making express reference to the idea of intent. Any intent on the part of the injured State to resort to countermeasures of the type described in the subparagraph should, of course, be prohibited.

58. Mr. ERIKSSON said he took the view that if the conditions and restrictions set out in articles 48 [12] to 50 [14] were not complied with, the particular measure could not be deemed to fall within the realm of countermeasures. The title of article 50 [14], "Prohibited countermeasures", was therefore a contradiction in terms. The actions enumerated under subparagraphs (a) to (e) were simply prohibited measures.

59. Mr. ELARABY said he supported article 50 [14] as a whole and was particularly in favour of subparagraph (e), which ensured that any countermeasure that ran counter to a peremptory norm of general international law would be prohibited. Since the norms of *jus cogens* were in constant development, the system was thus open-ended, ensuring that countermeasures would always be subject to certain restrictions.

60. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 50 [14].

Article 50 was adopted.

CHAPTER IV (International crimes)

61. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that no article within the draft on State responsibility had attracted so much attention as had article 19 of part one: heated discussion had taken place in the Commission and in the Sixth Committee on the merits, wisdom and practicality of that article. In view of the Commission's decision not to reopen article 19 for examination until the second reading of parts one, two and three, it should now be dealing solely with the consequences of article 19. In other words, it should determine what the consequences were of a category of wrongful acts—whether they were called crimes or exceptionally serious wrongful acts—that might differ from those of delicts. It was necessary to examine the extent of the differences from those already described in part two and whether the procedures for the settlement of disputes arising in relation to crimes should be different from those already proposed in part three.

62. The Drafting Committee had examined the articles in part two on cessation, reparation and countermeasures to see whether they were applicable to crimes, with or without modifications. It had concluded that article 41 (Cessation of wrongful conduct), applied without qualification to international crimes. All four forms of reparation had likewise been found to be applicable to crimes. A State that committed a wrongful act of exceptional gravity was certainly obligated to make full reparation. Some of the limitations on restitution in kind and satisfaction should be lifted for an act of such gravity, a point he would explain in connection with article 52. The limitation on reparation set forth in article 42, paragraph 3, remained applicable.

63. Regarding countermeasures, the Drafting Committee had concluded that articles 47 to 50 applied without exception or modification to international crimes. The grounds for the Committee's conclusions were, first, the relationship between countermeasures and the dispute settlement procedure referred to in article 48 [12]; secondly, the requirement under article 49 that there should be proportionality between countermeasures and the wrongful act; and thirdly, the fact that the list in article 50 of prohibited countermeasures should also apply to crimes.

64. In relation to the procedures for dispute settlement, the Commission had heatedly debated the issue of who would make the initial determination that an international crime had been committed. The Drafting Committee had taken the view that that determination was made in the first instance by the injured State or States, in the form of their reaction. That reaction would either involve protest or a demand for reparation; in the case of crimes, there would be no limitations on restitution in kind or on satisfaction. If the State alleged to have committed the crime did not agree with the characterization of its conduct as a wrongful act or did not accept responsibility for the commission of the act, the resulting dispute between the parties would be subject to the dispute settlement procedure in part three. In addition, the Drafting Committee believed that a State accused of committing a crime had the option, if it wished to challenge that accusation, of invoking Article 35 of Chapter VI of the Charter of the United Nations, thereby bringing the dispute to the attention of the General Assembly or the Security Council, which would exercise their functions in accordance with the Charter. A dispute about an alleged crime would presumably also meet the criterion of Article 33 of the Charter, its continuance being likely to endanger international peace and security.

65. The Drafting Committee thus believed that the procedures under part three and those provided for by the Charter of the United Nations were sufficient to deal adequately with the characterization of a wrongful act as a crime in the sense of article 19 of part one, and that it was unnecessary to design any new procedures for that purpose. Some members of the Drafting Committee, while agreeing with that general approach, had felt that the draft should provide the State accused of committing a crime with the immediate right to binding dispute settlement under part three, but that view had not been accepted by the majority. Some of the members had indicated at that point that they intended to raise the matter in the Commission.

66. As to article 51 (Consequences of an international crime), it was in fact an introductory clause to the whole of chapter IV. It made the point that an international crime entailed all the consequences of any other internationally wrongful act, but that it also entailed further specific consequences that were set out in articles 52 and 53. The words "any other internationally wrongful act" were intended to refer to acts called "delicts" in article 19, paragraph 4, of part one.

67. Mr. ARANGIO-RUIZ said he opposed chapter IV in its entirety much more on account of what was omitted than what was included. He was referring to both the

substantive and the instrumental consequences of the international crimes of States. As to the substantive consequences, he had in mind draft articles 16,⁹ 17,¹⁰ and 18¹¹ of part two as proposed in his seventh report. For the instrumental consequences, he would refer members to draft article 19,¹² proposed in the same report. In regard to the latter consequences he voiced in particular strong opposition to the deliberate omission of any involvement of ICJ in the determination of the existence/attribution of a crime. That omission created an unacceptable gap in a draft devoted to the progressive development and codification of the law on State responsibility. As he had explained in his eighth report, that gap would inevitably be seen as acceptance by the Commission of an untenable theory advanced, especially by one member, at the forty-sixth and forty-seventh sessions, namely the theory that, since all or most international crimes of States represented threats to the peace, the determination of the existence/attribution and consequences of such a crime naturally fell within the powers of the Security Council in the exercise of its functions in the maintenance of international peace and security. By deliberately setting aside the proposed involvement of ICJ in the determination of the existence/attribution of a crime the Commission would place the authority of all its members behind such a theory. It would thus approve not only unlimited extension of the notion of threat to the peace on the part of the Security Council, something viewed with great concern by some Governments and numerous scholars, but also implicit extension of the Commission's support for the even more dangerous theory—also evoked by at least one member of the Commission—that the Security Council would be endowed under the Charter of the United Nations or its interpretation, with judicial and even legislative powers. He was unable to endorse such a theory and wished to record his firm belief that it had no foundation *de lege lata* and was dangerous *de lege ferenda*.

68. By implicitly espousing such a theory, the Commission would be failing doubly in its duty as a body of legal experts. First, it would fail to stress the manifest legal incorrectness of the theory, and secondly, it would encourage the otherwise meritorious political body in question to pursue a policy of expanding its functions and powers, something that was incompatible with the Charter of the United Nations. In so doing, the Commission would also ignore the important, long-standing debate among international legal scholars about the legality of action of United Nations political bodies, and particularly of the Security Council. He had in mind the debate, to which he had contributed in his capacity as Special Rapporteur, between the “legalists”—a very bad term to describe real lawyers—and the “realists”—a term for those who dealt not with international legal problems as lawyers but with international facts, especially the facts of the strong. Ultimately, to minimize the involvement of ICJ in favour of a broadened role for the Council entailed the subjection of the law of State responsibility to

the law of collective security or, more precisely, to interpretations of the law of collective security made by a political body of restricted composition and even more restricted voting power. Moreover, the Commission's total rejection of draft article 19 proposed by the Special Rapporteur at the forty-seventh session inevitably implied serious neglect of the role that the General Assembly should play, together with ICJ and the Council, in the reaction to a crime.

69. In conclusion, he felt compelled to quote the Phaedrus: *peperit mons ridiculum murem*—the mountain gave birth to a ridiculous mouse—regarding the entire part of the exercise on State responsibility which related to international crimes of States. It had been precisely in the sad expectation that such would be the outcome—clearly heralded by the response to the seventh and eighth reports—that he had decided, with regret, not to be present at the birth in the Drafting Committee. The idea of referring to crimes in the terms suggested in the footnote to article 40, paragraph 3, was simply a most infelicitous fig leaf to cover acts which anyone with common sense, and the media and States themselves characterized as crimes, namely as very serious, wilful breaches of fundamental international obligations.

70. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he wished to explain the reasons why the Drafting Committee had not retained the four articles dealing with crimes as proposed by the former Special Rapporteur, Mr. Arangio-Ruiz: draft articles 17, 19, 20¹³ of part two and draft article 7 of part three.¹⁴

71. Draft article 17 would make the application of countermeasures dependent on a decision by ICJ that a crime had been committed—a decision to be taken after the General Assembly or the Security Council had determined that the conduct alleged to constitute an international crime was of concern to the international community. Such a procedure had earlier been proposed in draft article 19 but had received little support in plenary, being generally considered too complicated to apply. The Drafting Committee had decided not to retain draft article 19 and, consequently, not to retain draft article 17, paragraphs 1 and 2, which were dependent on draft article 19. Draft article 17, paragraph 3, provided that the requirement established in article 49 (former art. 13) of proportionality for countermeasures should apply in relation to crimes. The Committee had felt that the regime of countermeasures as set forth in chapter III of part two necessarily applied to all wrongful acts, except as otherwise indicated, and that therefore the paragraph was unnecessary.

72. Draft article 20, had stipulated that the provisions of the articles on State responsibility were without prejudice to measures decided upon by the Security Council and to the right of self-defence under the Charter of the United Nations. The Drafting Committee had taken the view that article 39 (former art. 4) dealt adequately with the relationship between the articles and the provisions

⁹ For the text, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 105.

¹⁰ *Ibid.*, footnote 109.

¹¹ *Ibid.*, footnote 114.

¹² See 2436th meeting, footnote 9.

¹³ *Ibid.*, footnote 4.

¹⁴ For the text, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 149.

of the Charter, and that a new article on the matter was unnecessary.

73. Finally, draft article 7 of part three had provided for a particular system for the settlement of disputes related to international crimes, a system the Drafting Committee found unnecessary, since the provisions of part three could aptly cover disputes concerning both delicts and crimes.

74. Mr. BOWETT said the Chairman of the Drafting Committee had just described four of the draft articles as too complicated, but he would say, rather, that they were misconceived. The entire scheme had hinged on the acceptance of the compulsory jurisdiction of ICJ over crimes. The view generally taken had been that there was no way States would accept such compulsory jurisdiction, and that in that case, they would either reject chapter IV as a whole, thereby excluding crimes *in toto*, or refuse to sign the convention itself. The consequences of the scheme were very serious, and it was right and proper to avoid them.

PART THREE (Settlement of disputes)

75. Mr. EIRIKSSON introduced the memorandum in support of the proposals by Mr. Pellet and himself which related to part three of the draft (ILC(XLVIII)/CRD.4/Add.1).¹⁵ In addition to the supporters listed in that memorandum (Messrs. Bennouna, de Saram, Idris, Kabatsi, Robinson, Szekely, Villagrán Kramer, Yamada and Yankov), other members had decided to endorse it, namely, Messrs. Barboza, Crawford, Fomba, Jacovides, Lukashuk, Thiam and Vargas Carreño. He referred the Commission to the memorandum, which contained detailed explanations for the reasons behind the proposal, and drew attention to some editorial corrections.

76. In essence, the proposal envisaged two stages. In the first, either party could require the Conciliation Commission to state in its final report whether there was *prima facie* evidence that a crime had been committed. An affirmative view by the Conciliation Commission would trigger the second stage, allowing either party unilaterally to initiate arbitration. The first stage acted like a filter, preventing abuse, and the second stage, involving compulsory arbitration, had been thought to be analogous to the requirement of compulsory jurisdiction for ICJ over disputes arising from pleas of *jus cogens* under

¹⁵ It was proposed that a paragraph 6 should be added to article 57 [4] (Task of the Conciliation Commission) to read as follows:

“6. At the request of either party, the Commission shall indicate in its final report whether there is *prima facie* evidence that an international crime may have been committed.”

It was also suggested that the text of article 58 [5] (Arbitration), paragraph 2, should be amended as follows:

“2. A dispute may, however, at any time be submitted unilaterally to an arbitral tribunal to be constituted in conformity with the Annex to the present articles in the following cases:

“(a) Where one of the parties to the dispute has taken countermeasures, by the State against which they are taken;

“(b) By either party to the dispute, in cases where the Conciliation Commission has indicated in accordance with paragraph 6 of article 4 that there is *prima facie* evidence that an international crime may have been committed.”

articles 53 or 64 of the Vienna Convention on the Law of Treaties. The basis of the analogy had been seen in the relative uncertainty surrounding both the concept of crime and the concept of *jus cogens*.

The meeting rose at 1 p.m.

2458th MEETING

Thursday, 11 July 1996, at 3.15 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE² PROPOSED BY THE DRAFTING COMMITTEE³ (*continued*)

PART TWO (Content, forms and degrees of international responsibility) (*continued*)

CHAPTER III (Countermeasures) (*concluded*)

ARTICLE 48 (Conditions relating to resort to countermeasures) (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of part two, chapter III, of the draft articles and recalled that a working group on article 48 [12] had been set up (2457th meeting). He requested

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

³ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

Mr. Crawford, coordinator of the working group, to introduce the working group's proposal.

2. Mr. CRAWFORD said that the working group had been able to agree on a strategy for a solution to the problems that had arisen because, at the stage reached in the Commission's discussions, that could be done by means of a drafting exercise. The Commission would nevertheless have to reconsider all of those problems on second reading.

3. The basic idea had been to combine the amendments proposed by Mr. Bennouna (2456th meeting) and by himself (2457th meeting) in a single paragraph, which was thus balanced. At the same time, his own amendment had been shortened, some terms having been regarded as unnecessary and even, in one case, undesirable. That exercise had led to paragraph 1 of the text of article 48 [12] dated 11 July 1996, which had been distributed.⁴

4. The first sentence was identical to the amendment which the Commission had adopted on Mr. Bennouna's proposal. However, the second sentence differed in two ways from the amendment the Commission had adopted on his own proposal. First of all, the word "rights" had been regarded as less ambiguous and more objective than the term "legal position". Secondly, the words "and which otherwise comply with the requirements of this chapter", which might not have been strictly essential, had nevertheless been regarded as useful for bringing out the idea that measures of protection were themselves countermeasures, even if they were provisional. They should be in conformity with the regime instituted by chapter III.

5. The working group recommended that the Commission should adopt article 48 [12], since the principle underlying the two sentences of the new paragraph 1 had already been approved and the working group had merely done a *toilettage* which had been made necessary when the two amendments had been combined.

⁴ The text proposed by the working group read as follows:

"Article 48 [12]. Conditions relating to resort to countermeasures"

"1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter.

"2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

"3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

"4. The obligation to suspend countermeasures end in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure."

6. The CHAIRMAN thanked Mr. Crawford and the working group for having tidied up what the Commission had already adopted and for arriving at a clearer, simpler and more coherent wording. He submitted article 48 [12] to the members of the Commission for their approval. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 48 [12] as proposed by the working group.

7. Mr. LUKASHUK said that, for the sake of consensus, he was prepared to support the new proposal, even though it was not really satisfactory because it was unilateral and based only on the interest of the State which had committed the internationally wrongful act.

8. Mr. ARANGIO-RUIZ said that he maintained his reservation with regard to article 48 [12].

Article 48, as amended, was adopted.

9. Mr. EIRIKSSON said that he had doubts about the scope of the consensus the Commission had reached on the wording of article 48. Since he would no longer be a member of the Commission when it came to consider that text on second reading, he wished to stress that article 48 as it now stood did not clearly show the link between the general provision contained in paragraph 2, the specific provision embodied in paragraph 1 and the conditions laid down in paragraph 3, particularly with regard to the possibility that a tribunal might suspend interim measures of protection. In his opinion, it would have been better to combine paragraphs 1 and 2, starting with the sentence that constituted the wording of paragraph 2 and following it with the wording of paragraph 1 compressed into the following single sentence:

"Prior to taking countermeasures, an injured State shall in any event fulfil its obligation to negotiate as provided for in article 54, without prejudice to the taking by that State of the interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter."

The restructured article would thus be clearer and bring out more clearly the links between the various provisions.

10. Mr. ROSENSTOCK said that, if article 48 had been put to the vote, he would have voted against the wording resulting from the various amendments, as opposed to that agreed on by the Drafting Committee. He had, however, not wanted to stand in the way of a consensus, considering as he did that the Commission should be able to transmit a text to the General Assembly and to Governments on which they could comment for the purpose of the second reading.

11. Mr. VILLAGRÁN KRAMER said that he had also not wanted to stand in the way of the consensus. However, he pointed out that, before deciding to resort to countermeasures, the injured State must, of course, make some attempt at negotiation, which the French called *la sommation*, and then, if the wrongdoing State did not comply with its request for cessation and reparation, it could exercise its right. He believed that article 48 as it

stood could never apply to international crimes because that would be illogical and counterproductive.

12. Mr. YAMADA said that, if article 48 had been put to the vote, he would have voted against the proposed text.

13. Mr. BENNOUNA said that he would have voted in favour of article 48.

14. The CHAIRMAN proposed that the members of the Commission should take a decision on chapter III as a whole. If he heard no objection, he would take it that the Commission wished to adopt chapter III as a whole.

Chapter III, as a whole, as amended, was adopted.

CHAPTER IV (International crimes) (*continued*)

ARTICLE 51 (Consequences of an international crime)

15. The CHAIRMAN invited the Commission to continue its consideration of chapter IV, of which the introduction and article 51 had been submitted by the Chairman of the Drafting Committee at the preceding meeting.

16. Mr. VILLAGRÁN KRAMER, explaining why he partially supported chapter IV, said that, when the Commission had adopted article 19 of part one of the draft, the dichotomy it had established had made it possible to state the characteristics of delicts and crimes and to distinguish between them. It had also made it possible to understand the basic difference between the organized international community as a whole and the institutional community in the context of the United Nations. Two regimes thus existed side by side, the first being that of general international law, which was applied to crimes, and the second, the one which existed under the Charter of the United Nations. The provisions which the Commission had adopted so far clearly showed that the chapter relating to crimes had no application within the United Nations, and vice versa, since the scope of the United Nations system was limited by Article 1 of the Charter.

17. In view of the lack of precision of the legal writings on the question, it should also be stressed that crimes were an extremely serious violation of rules essential for the international community as a whole. The legal and international consequences of such crimes should not therefore be mitigated, but, rather, aggravated. In the Drafting Committee, he had not managed to convince the other members of the validity of his point of view, so that the Drafting Committee had adopted a very "soft" and "tolerant" regime, which had no effect on the Charter of the United Nations. No member State of the Security Council or the Council itself would be bound to apply the rules formulated by the Commission in the event of an international crime and the Council would not find a satisfactory legal regime. If account was taken, for example, of the resolutions which had been adopted at the time of the conflict between Iraq and Kuwait, it would be seen that they were much harsher than what was provided for in chapter IV of the draft.

18. In conclusion, he hoped that, on second reading, the Commission would be able to bring out more clearly what he regarded as the fundamental difference between international crimes and international delicts.

19. Mr. ROSENSTOCK said that, even if he subsequently refrained from requesting a vote, he now dissociated himself from any action the Commission might take on chapter IV because he was of the opinion that the concept of international crimes did not exist and did not need to be created and that no State practice justified the creation of such a concept, which could not give rise to far-reaching consequences.

20. With regard to the comments on action by the Security Council, he pointed out that the Council had not found that a crime had been committed and had done no more than to determine that a State had engaged its international responsibility by committing a wrongful act. In his opinion, the idea of an international crime committed by a State was more the result of media influence on certain lawyers than of a cogent analysis.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 51.

Article 51 was adopted.

ARTICLE 52 (Specific consequences)

22. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 52 dealt with reparation in the event of an international crime. After the Drafting Committee had reviewed the four forms of reparation set out in articles 42 to 46, namely, restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, it had taken the view that all those remedies should be available to the injured State as a result of an international crime without three of the limitations established in the case of a delict. With regard to the condition laid down in article 43, subparagraph (c), namely, that restitution in kind did not impose a burden out of all proportion to the benefit that the injured State would receive in obtaining restitution in kind rather than compensation, the Drafting Committee believed that, since the basic purpose of restitution was to restore the situation as it had existed prior to the wrongful act, the wrongdoing State should not be able to keep the proceeds of conduct that was so serious as to be characterized as a crime. The Drafting Committee also considered that the condition laid down in article 43, subparagraph (d), namely, that restitution did not seriously jeopardize the political independence or economic stability of the wrongdoing State, was not justified in the case of a crime. It had taken the view that, since the wrongdoing State had forfeited its dignity, the limitation set in article 45, paragraph 3, with regard to impairment of dignity was also not applicable.

23. The Drafting Committee had not considered it necessary to make other changes in the consequences provided for in the case of an internationally wrongful act. The obligation of cessation of the wrongful conduct and the obligation to make full reparation obviously applied both to crimes and to delicts.

24. Some members of the Drafting Committee had wanted article 52 to provide for the possibility of punitive damages, but the majority had taken the view that that was unnecessary, particularly as article 45, paragraph 2 (c), already provided that, in cases of gross infringement of the rights of the injured State, the wrongdoing State should pay damages reflecting the gravity of the infringement. The Drafting Committee recommended that the Commission should adopt article 52.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 52.

Article 52 was adopted.

ARTICLE 53 (Obligations for all States)

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that an international crime, which, as stated in article 19, paragraph 2, of part one involved the breach of an international obligation "essential for the protection of fundamental interests of the international community", called for a collective response by that community. When confronted with the commission by a State of an international crime, the members of the international community, which, as stated in article 40, paragraph 3, were all "injured States", had a duty to take certain actions in order to safeguard those fundamental interests. The purpose of article 53 was to set out the obligations that the commission by a State of an international crime entailed for all other States. In preparing the text being submitted to the Commission, the Drafting Committee had considered the proposals which had been made by the two former Special Rapporteurs, namely, draft article 14 proposed by Mr. Riphagen⁵ and draft article 18 proposed by Mr. Arangio-Ruiz.⁶

27. The obligations under the first two subparagraphs were negative. Subparagraph (a) embodied the obligation of States not to recognize as lawful the situation created by the crime. Subparagraph (b) stated the rule that assistance to a State which had committed an act affecting the fundamental interests of the international community in order to maintain a situation which all States had the duty to consider unlawful under subparagraph (a) was in itself an unlawful act.

28. Subparagraphs (c) and (d) dealt with two positive obligations. The duty to cooperate embodied in subparagraph (c) was an expression of the solidarity of the international community in the face of a crime and it strengthened the effectiveness of the individual obligations of States. Some members had considered that subparagraph (c) was unnecessary as the obligation it contained was already covered by subparagraph (d), which related to the obligation of States to cooperate in the application of measures designed to eliminate the consequences of the crime. The Drafting Committee had considered that, even if a State had not participated in the decision to adopt such measures, it must, as a member of the international community whose fundamental interests had been affected, join in efforts to eliminate the un-

lawful situation created by the crime. Some members nevertheless expressed reservations on the grounds that the provision in subparagraph (d) did not reflect *lex lata*.

29. Article 53 did not deal with the question of sending fact-finding operations or observer missions to the territory of a State which had committed a crime, as referred to in article 18, paragraph 2, as proposed by the former Special Rapporteur, Mr. Arangio-Ruiz, because that type of fact-finding mechanism was provided for in part three of the draft and, specifically, in article 57 [4], paragraph 2, and article 59, paragraph 2. The Drafting Committee recommended that the Commission should adopt article 53.

30. Mr. LUKASHUK said that, in his opinion, article 53 and chapter IV as a whole were the result of the excellent work done by the Drafting Committee and an example of what the Commission could do best. It had in fact reached a new stage in the development of international law in the sense that an international crime stopped being simply the problem of a State and became a matter of concern to the entire international community, and that was an important step towards the formulation of rules of *jus cogens* and the obligation *erga omnes*.

31. He also stressed that article 53 left no doubt about the non-applicability in that case of article 48, paragraph 1, and that, without any condition, it required every State party immediately to adopt the rules which it stated. In particular, that article showed that the right to resort to countermeasures belonged directly to the injured States.

32. In conclusion, he considered that article 53 was based on positive international law, took account of progressive trends in its development and fully met the requirements of the Charter of the United Nations. He also endorsed what Mr. Villagrán Kramer had said in that regard.

33. Mr. YANKOV said that he supported the article under consideration, which combined elements of *lex lata* and elements of *lex ferenda*. First, it stated an obligation *erga omnes* to take account of the gravity of crimes. Secondly, subparagraphs (a) and (b) stated the consequences of the *erga omnes* nature of the obligation in question and, thirdly, subparagraphs (c) and (d) stated the principle of cooperation enunciated in more general terms in the Declaration of Principles of International Law on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations⁷ and in other instruments and it was to be hoped that it would one day become a generally recognized principle of international law.

34. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 53.

Article 53 was adopted.

35. Mr. ARANGIO-RUIZ said he did not think that his proposal that States should accept the compulsory juris-

⁵ See 2436th meeting, footnote 17.

⁶ See 2457th meeting, footnote 11.

⁷ General Assembly resolution 2625 (XXV), annex.

diction of ICJ for such a serious issue as the existence/attribution of an international crime had been "misconceived", to use Mr. Bowett's term. The misconception was rather, especially on the part of lawyers, to leave such an issue in the exclusive discretion of a restricted political body like the Security Council: which is precisely what the "mouse", produced by the Drafting Committee, actually did. By not attributing any role to the Court, the Commission would be missing an opportunity to do something positive and would inevitably achieve a negative result.

36. The Commission was missing an opportunity to develop the law and prepare for the future because, in the first place, it would probably be several decades before a convention on State responsibility could be adopted and States would thus have plenty of time to think about a proposal *de lege ferenda* which the Commission would submit to them on the role of ICJ in relation to crimes. Secondly, the Vienna Convention on the Law of Treaties and, in particular, its articles 64 and 66 provided for the compulsory jurisdiction of the Court in one respect, namely, *jus cogens*, which was fairly close to the subject-matter of chapter IV. Thirdly, Mr. Bowett himself had admitted that a judicial decision was necessary as far as crimes were concerned, merely suggesting, however, that in view of the slowness of the Court's proceedings, the task of determining the existence/attribution of a crime should be entrusted to an ad hoc body. However, there was no sign of that compromise in the text proposed by the Drafting Committee. Fourthly, the role which would be assigned to the Court would not cover the entire subject-matter of crimes and the Court would thus not be requested to deal with all the issues to which a crime gave rise. What he had been proposing, in his capacity as Special Rapporteur, was that the Court should make a finding of the existence/attribution of a crime after the General Assembly or the Security Council had made a preliminary political finding of *fumus criminis*. The aim was thus not to establish the compulsory jurisdiction of the Court in respect of any issues whatsoever relating to State crimes. The Court would only pronounce itself, if seized by either side, on existence/attribution. The rest would remain in the hands of States.

37. Consideration must also be given, as Mr. Bowett had not seemed to do, of the other side of the coin, namely, the negative result the Commission was achieving because, by not giving the Court any role, it was leaving the matter of crimes entirely in the hands of political bodies, primarily those of the Security Council, whose action was being looked at with growing concern by Governments and scholars throughout the world. In fact, the opposition to any role for the Court showed that there was a basic difference of opinion about the Commission's role in the progressive development of international law. His belief was that, by not assigning the Court any role in chapter IV of part two of the draft articles, the Commission was taking a step backwards and endorsing a regression in the development of the law of State responsibility and the law of collective security. Mr. Rosenstock's comments very clearly showed how justified his concerns were about the consequences of the choice the Commission would be making by adopting chapter IV as proposed by the Drafting Committee.

PART THREE (Settlement of disputes) (*continued*)

38. The CHAIRMAN, referring to the proposal which Mr. Eiriksson and Mr. Pellet had submitted at the preceding meeting in connection with part three of the draft articles (ILC(XLVIII)/CRD.4/Add.1),⁸ recalled that, in view of the close link between that proposal and chapter IV of part two, it had been decided that the proposal should be considered before chapter IV as a whole was adopted.

39. Mr. BOWETT said that, although the proposal submitted by Mr. Eiriksson and Mr. Pellet was not without merit as to substance, it would be tactically wiser not to adopt it at the current stage because, in the articles it had already adopted, the Commission had provided for compulsory arbitration in respect of countermeasures and it was not known whether States would accept that initiative. He was almost certain that, in also providing for compulsory arbitration in respect of crimes, the very idea of compulsory arbitration might be rejected by States, in respect both of crimes and of countermeasures. He was therefore of the opinion that the proposal should be referred to in the commentary and that States should be expressly requested to make their views on it known. If they supported it, the Commission could come back to it on second reading.

40. It would, moreover, not be so serious not to provide for compulsory arbitration in respect of crimes. Under the proposed amendment to paragraph 1 contained in the proposal by Mr. Eiriksson and Mr. Pellet, the conciliation commission would indicate in its final report whether there was *prima facie* evidence that a crime might have been committed. The provisions already adopted implicitly had the same effect: either of the parties to the conciliation procedure before the conciliation commission, whose action was in any event already provided for as the draft now stood, might request it to rule on that point and it would be hard to imagine it refusing to do so.

41. Some members had been of the opinion that there had to be some monitoring of the implementation of the specific consequences of the attribution of a crime. He also considered that monitoring was necessary, but thought that it already existed in the draft as it stood. The specific consequences referred to in article 52, namely, the differences in restitution in kind and in satisfaction in the event of an international crime, would be taken into account as part of a procedure involving a third party, which would thus carry out monitoring. The obligations stated in article 53 involved a collective reaction that would usually take place under United Nations auspices and there too would be monitoring.

42. Mr. ROSENSTOCK said that the proposal by Mr. Eiriksson and Mr. Pellet would be interesting if the problem it was designed to solve actually existed, but that was not the case. It was euphemistic to say, as the authors of the proposal did, that the concept of crime was still controversial and uncertain. Moreover, no provision of chapter IV attributed such radical consequences to the existence of a crime as those which the Vienna

⁸ See 2457th meeting, footnote 15.

Convention on the Law of Treaties attributed to the emergence of a new norm of *jus cogens*. If countermeasures had been taken, moreover, the text already provided for a dispute settlement obligation. Mr. Bowett's comment on the obligation not to recognize as lawful the situation created by a crime was, of course, judicious, but that obligation was not limited to crimes, whatever meaning was given to that term. Many other violations of obligations *erga omnes* had the same consequence and, by placing the emphasis on crimes, as the authors of the proposal wanted to do, those other cases in which non-recognition was essential and for which no one had proposed any compulsory settlement procedure were being put on the back burner.

43. Far from being necessary, the proposed amendments would be harmful. In the first place, as Mr. Bowett had said, adopting them would further reduce the chances that States might accept part three of the draft articles. There might also be doubts about whether it was wise to request a conciliation body to rule on the existence of a crime because that might jeopardize chances of conciliation. Conciliation was a dispute settlement procedure which, by its very nature, ruled out any judgement. A conciliator was not asked the same thing as a judge. A conciliation procedure was supposed to lead to the settlement of the dispute, not to a compulsory ruling or judgement. For all those reasons, he considered that the proposal by Mr. Eiriksson and Mr. Pellet was neither necessary nor wise and that that was why the Drafting Committee had rejected it and why the Commission should do the same. If the proposal was to be maintained, he would request that it should be put to a vote and would vote against it.

44. Mr. EIRIKSSON, referring to the comments by Mr. Bowett, said he believed that Governments could consider and agree to a compulsory arbitration procedure in respect of crimes independently of the position they would adopt on compulsory arbitration in respect of countermeasures.

45. Mr. ARANGIO-RUIZ said that he agreed with the idea behind the proposal by Mr. Eiriksson and Mr. Pellet. With regard to the concern Mr. Bowett had expressed about conciliation, there was indeed a problem that would have to be solved, anyway. The problem was obviously for the Commission to envisage how, as a matter of law, a procedure involving an ad hoc body set up by only two States could bring about a finding whose effects would involve all the States participating in the convention on State responsibility. Subject to the solution of that problem, he did not think that, by adopting that proposal, the Commission would be lessening the chances that States would accept the compulsory arbitration procedure referred to in article 58 [5], paragraph 2. States must be credited with some legal intelligence. The proposal under consideration offered the advantage of involving a quasi-judicial body and, although he would have preferred that some role should have been assigned to the Court, he considered that, short of that, the Commission should at least provide for a compulsory arbitration procedure.

46. Mr. CRAWFORD said that it was necessary to propose a specific dispute settlement procedure for alle-

gations of crime, whose consequences, especially those provided for in article 53, were serious. However, he would have preferred a closer analogy between the system proposed for crimes and the system adopted for countermeasures. In the latter case, arbitration was a corollary of countermeasures, but that was not true of crimes. Mere allegations of crime should not have consequences with regard to dispute settlement or, in other words, should not be enough to impose compulsory arbitration any more than the mere allegation of wrongful conduct not accompanied by actual countermeasures. The event giving rise to an obligation of compulsory arbitration should be the adoption by States of measures in specific response to conduct characterized as criminal.

47. Mr. Rosenstock had been right to say that the obligations stated in article 53 were not peculiar to crimes; that might call into question the need for further analysis of the concept of crime—and that was, of course, exactly what Mr. Rosenstock had wanted to demonstrate. All the provisions relating to crime, including article 19 of part one, should therefore be analysed in very great detail on second reading. On first reading, however, the Commission should adopt the proposal under consideration, if only to attract the attention of States and provoke a debate on the question.

48. Mr. VILLAGRÁN KRAMER said that the proposal was particularly interesting for small States. When a small State, or even a medium-sized State, was the victim of an international crime, it had two options: it could either bring the case before the Security Council, in the hope that a permanent member would take its side and there would be no veto, or it could follow the course that the Commission was now mapping out in the draft articles. In the event of aggression, for example, a small country's fate was in the hands of the Council. If the Council took action, as in the case of Kuwait, the country concerned could hope for a result, but, if the Council did not take action, the country would find itself at a dead end. The advantage of the proposal under consideration was that it was designed to institutionalize a system that would enable States to obtain a finding of a crime through conciliation. It made available to small States a body to which they could apply and, from that point of view, arbitration was better than relying on ICJ. Apart from being extremely slow, proceedings before the Court were a heavy financial burden for small countries. Arbitration had the advantage of being both faster and less costly.

49. Mr. YANKOV noting that the topic under consideration was a new step in the direction of the development of international law, said that the position of the members who were not sure that the results of the approach being followed would be acceptable was quite understandable. He nevertheless recalled that the Commission was only at the first reading stage and that there were good reasons for giving States some idea, in the articles under consideration and the commentaries thereto, of the innovations on which they would have to take a decision. His own position was based on three considerations.

50. First of all, the evidence which would, according to the amendment by Mr. Pellet and Mr. Eiriksson, be sub-

mitted to the conciliation commission for it to decide whether, *prima facie*, a crime had been committed would obviously be provided by the States concerned, but would be evaluated by a third party, namely, the conciliation commission chosen by agreement among the parties to the dispute. The conciliation commission would presumably include an analysis in its final report of the probative value of the evidence that was designed to determine whether the crime had been committed. That must be clearly stated in the commentary.

51. Secondly, from the point of view of method, the Commission had to choose between submitting the draft articles under consideration or stating its opinion in the commentary. As it was still on the first reading, the first solution was better because it would show, in the draft articles themselves, that there was a trend in the Commission in favour of compulsory settlement by a third party. That trend was, moreover, being confirmed in real life. For example, his own country had withdrawn the reservations on that point which it had formulated to major international conventions. That phenomenon must be taken into account and meant that the Commission had to be bolder. The proposed amendment by Mr. Pellet and Mr. Eiriksson should be adopted for that reason alone.

52. Thirdly, the situation went beyond the problem of countermeasures. At the forty-seventh session, the Drafting Committee had not encountered any serious problems in preparing part three of the draft articles. There was nothing to prevent the Commission from broadening the scope of that part and moving international law one more step ahead. For those reasons, he endorsed the proposed amendment to article 57 [4] and, in advance, the amendment relating to article 58 [5].

53. Mr. LUKASHUK said that he bowed to the logic of Mr. Bowett's arguments. Although the amendment proposed by Mr. Pellet and Mr. Eiriksson probably had the advantage of facilitating the implementation of the provisions on dispute settlement and, despite the desire to go as far as possible in the direction that that amendment indicated, he was of the opinion that the adoption of article 48, paragraph 1, which made it an obligation for the injured State taking countermeasures to fulfil the obligations on dispute settlement deriving from part three, had totally changed the situation. He could therefore no longer support that amendment.

54. Mr. GÜNEY said he regretted that he also could no longer support the amendment submitted by Mr. Pellet and Mr. Eiriksson. First of all, the international community's reticence, if not apprehension, about any idea of giving a third party compulsory jurisdiction was well known. Ignoring that fact and introducing the idea of a conciliation commission that would have decision-making power, that is to say the power to find in its report that a crime might have been committed, would be going too far.

55. Secondly, such power to make a finding would not relate only to crimes. There would also be obligations *erga omnes*, those which were binding on the parties. Moreover, according to the wording as it now stood, the jurisdiction of the conciliation commission would not be limited to crimes. The proposal under consideration would therefore reduce the chances of acceptance of the

whole of the draft, which was an important and complex instrument.

56. Mr. HE said that the mechanism proposed in the amendment by Mr. Eiriksson and Mr. Pellet would be superfluous. He referred to the footnote to article 40, which established a kind of equivalence between the term "crime" and the term "an internationally wrongful act of a serious nature". In the context of the specific consequences of a crime as compared to those of an internationally wrongful act, the characterization of an offence as a crime or as a serious act might be done by the mechanisms already provided for in the draft articles.

57. The crux of the problem was whether the conduct in question was an international crime. The injured State was the first to decide, its decision being reflected in the request for compensation it made in accordance with article 52, since it could base itself on subparagraph (b) in order not to apply paragraph 3 of article 45. Other States also decided in accordance with article 53, since each one must choose whether or not to comply with the obligations provided for in subparagraphs (a) to (d) of that article and to assume their responsibilities accordingly. It was also possible that, at the same time, the Security Council would not recognize the existence of a crime in a binding resolution, in the event that the case had been submitted to it.

58. If the wrongdoing State contested the characterization of crime thus made by the other States, the dispute existed. The dispute could, however, be settled by the current provisions of part three, whether it involved a crime or a serious internationally wrongful act. According to Article 33 of the Charter of the United Nations, moreover, every State had the right to apply to the Security Council if the continued existence of the dispute was likely to threaten the maintenance of international peace and security. Whatever provisions the Commission would ultimately adopt, they would in no way affect that right.

59. He therefore considered that the problem raised by the distinction between crimes and delicts could be settled by the provisions already contained in part three of the draft articles and in the Charter of the United Nations. He was opposed to the amendment proposed by Mr. Eiriksson and Mr. Pellet.

60. Mr. de SARAM recalled that he had already expressed the reservations he had about the inclusion of the concept of "crime" in the draft articles. With regard to the footnote to article 40, it seemed to him in any case that what was meant was an internationally wrongful act of very broad scope. Immediately after the adoption of article 40, moreover, he had made a statement in which he had explained that he understood that that article referred to any "breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community", as clearly stated in article 19, paragraph 2, of part one.

61. In his view, it only confused matters to bring up questions about the opposition between small and large and weak and strong States and even to refer to the Security Council. What was being done was to include crimes

in the area of State responsibility, whose main purpose was cessation and reparation. The concept of crime was, however, defined in treaties only to a very limited extent and, in article 19, entirely provisionally, on the basis of a non-exhaustive list which left much to be desired, as had already been pointed out. In the absence of a conventional definition of "State crime", the conclusion that a State had committed a particular crime could be derived from customary general international law.

62. The Commission was, moreover, dealing primarily with the problem of countermeasures. As was known and as the amendment proposed by Mr. Eiriksson and Mr. Pellet clearly showed, States would have the possibility of taking countermeasures against a State in situations *erga omnes* before the existence of the crime had been found out. Article 50 and, in particular its subparagraphs (a) and (b) obviously prohibited certain countermeasures, but that did not prevent a State from being seriously affected by reprisals even before the finding by a third party that a "crime" had been committed.

63. The proposal by Mr. Eiriksson and Mr. Pellet was relatively modest. Alongside the right to countermeasures, it established a system which made recourse to arbitration by a third party available not only to the accusing State, but also to the accused State. That possibility was offered after the conciliation phase (arts. 56 [3] and 57 [4]), a reasonable link-up point, although it would have been better for the finding of the crime and its compulsory effects to occur before countermeasures. It was in that way that the proposed amendment was not so bold: it was designed only to enable the State accused of a crime to resort to conciliation and, if necessary, to compulsory arbitration.

64. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that, at first glance, he had found the proposed amendment by Mr. Eiriksson and Mr. Pellet attractive, but, after some thought, he was not sure that it really served any purpose. It had a number of drawbacks resulting from the fact that article 53 established obligations for all States whenever an international crime had been committed. From that point of view, the finding that a crime had actually been committed was thus of particular importance for the entire international community. In the new paragraph 6 that was to be added to article 57 [4], a role in that regard was now entrusted to the conciliation commission, which must say "whether there is prima facie evidence that an international crime may have been committed". However, conciliation was a relatively lengthy process and that could be a problem for States which needed to know as of when they were bound by the obligations deriving from article 53.

65. If conciliation had failed, article 58 [5] provided for arbitration, but, from the point of view of article 53, could the decision of an arbitral tribunal chosen by the parties to the dispute have effects for all States? In fact, only the solution which had been advocated by the former Special Rapporteur, Mr. Arangio-Ruiz, and which was to rely on ICJ for a finding of a crime was genuinely satisfactory, but it had been rejected for various reasons.

66. However imperfect it might be, the amendment under consideration could nevertheless be regarded as a first stage and he would therefore not stand in the way of consensus if the Commission decided to adopt it.

67. Mr. FOMBA said that he fully supported the proposed amendment by Mr. Eiriksson and Mr. Pellet, which was logical, modest and quite well balanced, and he thanked Mr. Villagrán Kramer for his arguments in favour of weaker countries.

68. Mr. ARANGIO-RUIZ, speaking on a point of clarification, said that, when he had considered the question of the "finding" that an international crime had been committed in connection with article 19 of part one, he had never proposed that States should be entitled to apply directly to ICJ. In his view, the Court should be seized by the parties only to confirm (or reject) a prior finding by the General Assembly or the Security Council that there was prima facie evidence of the commission of a crime. The solution he was advocating had the advantage of striking a balance between the respective roles of the political bodies and the judicial body of the United Nations. The proposal by Mr. Eiriksson and Mr. Pellet led in a way to a replacement of the two political bodies, the Assembly and the Council, by a conciliation commission, the next stage being an arbitral tribunal. He would at least like the idea of compulsory arbitration to be kept, thereby making available the services of the "group of jurists" to which Mr. Bowett had suggested an application should be made when he had said that the proceedings of ICJ were too slow. However, as he had already pointed out, the question of the extent to which the decisions of such a tribunal might have effects for all the contracting States still had to be answered.

69. In any case, he did not see why the Commission was so hesitant to entrust the Court with what was after all a very limited role, namely, deciding that a crime had been or was being committed. Following such a decision, it would be for States to draw the consequences under the relevant provisions of the State responsibility convention.

70. Mr. MIKULKA said that he agreed with Mr. Calero Rodrigues' comments on the proposed amendment by Mr. Eiriksson and Mr. Pellet. Although a provision on the compulsory settlement of disputes by a third party could be included in a convention dealing with specific crimes, that would be very utopian in such a general instrument as the convention on State responsibility that the Commission was trying to draft.

71. Several references had been made to the analogy with the provision of article 66, subparagraph (a), of the Vienna Convention on the Law of Treaties, which related to the application and interpretation of articles 53 and 64 on *jus cogens*. In that Convention, however, it was not to make a finding of the existence of a norm of *jus cogens*, but to draw some conclusions therefrom, that the parties had to submit to the compulsory jurisdiction of ICJ.

72. In the draft articles under consideration, the situation was very different. If there was prima facie evidence that a crime might have been committed, States should

undertake to submit to the compulsory jurisdiction of the arbitral tribunal. It was not very realistic to impose such a restriction on them. In the light of those comments, he was not sure whether the proposed amendment should be retained and invited its sponsors to decide whether it was really necessary.

73. Mr. CRAWFORD said that he agreed with Mr. Mikulka's reservations. He also pointed out that the proposed amendment by Mr. Eiriksson and Mr. Pellet might lead to an absurd situation. Supposing that, during a dispute between two States, State A accused State B of having committed a crime and the allegation was confirmed by the *prima facie* findings of the conciliation commission, State B would then be entitled to bring the case before an arbitral tribunal, which might well consider that what had been committed was not a crime, but simply an "internationally wrongful act", and that, consequently, it did not have jurisdiction. The proposed solution went, as it were, half way towards compulsory arbitration.

74. Mr. BENNOUNA said that, like many of the speakers who have preceded him, he was not sure about the need for the proposed amendment by Mr. Eiriksson and Mr. Pellet. In principle, the compulsory jurisdiction of ICJ would be better than that of an arbitral tribunal because it would have the advantage of offering consistent and continuing jurisprudence. He nevertheless regretted that he had not had time to give further thought to the proposal, which definitely deserved more detailed consideration. He would particularly like the Commission to take the time to analyse all its consequences. He therefore proposed that any decision on that proposal should be postponed until the following meeting.

75. Mr. GÜNEY said that he endorsed the comments by Mr. Mikulka and Mr. Bennouna and supported Mr. Bennouna's suggestion that the adoption of a decision on the proposed amendment should be postponed until the following meeting.

76. The CHAIRMAN suggested that, in order to speed up the work, Mr. Eiriksson, Mr. Mikulka and Mr. Crawford should meet to try to find a common position for the next meeting.

The meeting rose at 6.05 p.m.

2459th MEETING

Friday, 12 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr.

Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*concluded*) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE²
PROPOSED BY THE DRAFTING COMMITTEE³
(*concluded*)

PART THREE (Settlement of disputes) (*continued*)

1. Mr. EIRIKSSON said that, at the Chairman's request, he had met with a small group of members to study, in the light of the discussion at the preceding meeting, the proposals on articles 57 [4] and 58 [5] already submitted by Mr. Pellet and himself (ILC(XLVIII)/CRD.4/Add.1).⁴ The result of that meeting was a new proposal for the incorporation of a paragraph 6 in article 57 [4], one that would read:

"6. If the dispute in question arises between a State which has committed an international crime and an injured State as to the legal consequences of that crime under these articles, the Commission shall, at the request of either party, indicate in its final report whether there is *prima facie* evidence that an international crime has been committed."

2. Again, the proposal for article 58 [5], paragraph 2 (b), would be revised to read:

"(b) In the case of a dispute to which paragraph 6 of article 57 applies and in which the Conciliation Commission has indicated that there is *prima facie* evidence that an international crime has been committed, by either party to the dispute."

3. The intended effect of the new formulation was to refer explicitly to a dispute, thereby tightening the link to the whole subject of the settlement of disputes that was the focus of part three, and making it clear that spurious allegations that had not reached the level of a dispute would not be the subject of judicial proceedings under

¹ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 et seq.

³ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

⁴ See 2457th meeting, footnote 15.

article 57 [4]. The new form of language likewise connected the dispute to the legal consequences of an international crime, something that was only fitting in a set of articles that dealt with precisely that subject. It had been pointed out that the legal consequences of an international crime did not differ significantly from those of other internationally wrongful acts, but because of the serious nature of an international crime, it had been felt that provision should be made for the option of third party settlement mechanisms. The new text did not touch on the *erga omnes* aspect of international crimes—the fact that numerous parties might be affected—since the Commission had not decided to establish a particular category of specially affected States, though it had recognized in its discussions that such a category might well exist. At the dispute settlement stage, it had been felt that the emphasis should be placed on bilateral relations.

4. He commended the texts to the Commission and hoped that any remaining problems would be cleared up during the second reading of the draft articles.

5. Mr. ARANGIO-RUIZ said he was grateful for the efforts made to work out the new formulations and had great sympathy for the idea behind them: anything that involved a third party in the determination of the existence or the consequences of an international crime was a positive contribution. He was puzzled, however, as to how the proponents of the texts envisaged the relationship between the *erga omnes* nature of an international crime and *erga omnes* scope of article 53 with the bilateral nature of both the conciliation and the arbitration procedures. Were third-party States affected, or not affected, by a *prima facie* finding by the conciliation commission of the existence of a crime or by the determination by the arbitral tribunal? The Commission had rejected the idea that States could accept the compulsory jurisdiction of ICJ, a body which was already in existence, was based on a multilateral treaty and was an organ of the United Nations. Yet, in connection with crimes the proposal interjected a conciliation procedure for a *prima facie* determination of the existence of a crime, involving certain decisions by the conciliation commission and arbitral tribunal. Were those decisions in any way binding on States that were obliged to comply with article 53, for example?

6. Mr. ROSENSTOCK said the proposal had undergone so many reincarnations that it was difficult to come to grips with the latest of them, which, though more elegant than earlier versions, retained many of the same problems and posed new ones. He would not support its inclusion in the draft for the simple reason that the Commission did not have sufficient time to give it thoroughgoing consideration.

7. In addition to the valid questions raised by Mr. Arangio-Ruiz, he noted that the reasons behind the proposal had still not been clearly explicated, nor had the relationship of the scheme to the mechanisms of the United Nations. The proposal presupposed a prior determination that a crime had been committed. Yet what if a State that had committed an international crime did not accept such a determination? Apparently, the whole scheme outlined in the proposal could not then apply.

8. He agreed with Mr. Bowett's suggestion (2458th meeting) that the whole, complex issue should be raised in the commentary, with a request for Government comments. Incorporating the proposal, even on first reading, would be premature and unproductive.

9. Mr. de SARAM thanked those who had worked out the proposal, but thought that any proposal dealing with State crimes that potentially involved countermeasures in *erga omnes* situations must be viewed with great caution. The Commission had not yet defined in sufficiently precise terms what constituted a State crime. Any system it set up to deal with such crimes might encroach on areas governed by the Charter of the United Nations. Notwithstanding all the criticisms levelled at the Charter of the United Nations, it embodied the best existing guarantee of security and order for small States. He could not condone any system that might in any way undermine the authority of the Charter by establishing an institution for the determination of the existence of crime.

10. The situation touched on by the proposal was extremely complex. A substantial body of opinion held that certain types of relations between a Government and people within its territorial jurisdiction could, under customary international law, constitute a crime. Countermeasures, when taken to preserve the political independence and territorial integrity of one State, could have a substantial impact on another State. An example could be taken from the experience of his own country, Sri Lanka, after the Gulf war. With the imposition by the Security Council of sanctions on Iraq, which furnished nearly all of his country's oil supply, the private sector had greatly feared that the entire Sri Lankan economy would grind to a halt within three months. Such considerations explained his difficulties with the proposal, though he would not stand in the way of including it in the articles to be adopted on first reading, for the purposes of comments by Governments.

11. Mr. BOWETT said he was not convinced of the system's workability, for he did not think the conciliation commission would be dealing so much with the consequences of a crime as with the very existence of a crime. If the system was to be instituted, it was when demands for remedies—restitution or satisfaction—were made by the victim State that it should come into play. In other words, it was only after the conciliation commission had determined that there was *prima facie* evidence that a crime had been committed that it would be useful to have a mechanism whereby the State alleged to have committed the crime could insist upon arbitration. He did not oppose the proposal altogether—he simply believed it had not been sufficiently thought through.

12. Mr. EIRIKSSON, responding to comments on the proposal, noted that the suggested scheme's interrelations with the Charter of the United Nations and the Security Council were covered in article 39 of part two. Such interrelations were no more triggered by crimes and countermeasures than by anything else in the draft articles. In line with the wording chosen elsewhere in the draft, the proposal referred to a State which had committed an internationally wrongful act—not one that had allegedly committed such an act. Part three, in fact, dealt

not so much with whether such an act had been committed, as with the legal consequences.

13. The problem of countermeasures had been raised, but there was a separate regime for them, and the system under discussion was entirely independent. It had been argued that the compulsory mechanism relating to countermeasures would actually encourage their use, but the proposed system would circumvent the need to adopt a countermeasure in order to have judicial proceedings instituted.

14. As to the *erga omnes* problem, he would point out that the focus of the proposal was the most directly affected State. But the consequences for other States would be dealt with by the general operation of the dispute settlement mechanism as between two parties and involving a third party. That whole issue would have to be taken up in the context of the articles as a whole, and at the stage of the second reading.

15. Mr. BENNOUNA said the new proposal was even more problematic than the previous one. The main problem was the attempt to propose a bilateral mechanism for dealing with multilateral situations. When an international crime was committed, all countries potentially became injured States. The result might well be a series of successive bilateral conflicts to be adjudicated by a string of arbitral tribunals and conciliation commissions. There was an inherent inconsistency, moreover, in invoking *prima facie* evidence if numerous conciliation commissions were at work.

16. With the proposal before it, the Commission appeared to be trying to square the circle, but that was impossible. The only way out was to envisage a role for ICJ, as had been done by the Vienna Convention on the Law of Treaties. Yet since that approach was ruled out, the Commission's report should outline the attempts made to resolve a difficult issue, incorporate the proposal now before it, explain that further work needed to be done on the proposal, and indicate the Commission's intention to pursue that work on second reading.

17. Mr. ARANGIO-RUIZ said it was his impression that Mr. Eiriksson had not really answered his question of how to reconcile the possibility of one or more bilaterally valid decisions or recommendations of the conciliation commission with the multilateral, even universal *erga omnes* nature of the consequences established by article 53. The idea of incorporating the text with a view to refining it on second reading was unacceptable: the text to be adopted now must be as close to a finished product as possible. He was also worried by the reference to article 39. Unfortunately, it had been adopted, but article 39 did not solve any of the problems involved. If so, the problems were solved in the wrong way, as he had explained on earlier occasions. He likewise took issue with the comments regarding the Charter of the United Nations—it went without saying that nothing must be done to undermine it, but it was not sacrosanct, either. Its procedures might actually be put to good use in the context of State responsibility, with regard either to crimes or to delicts, provided there was a willingness to envisage bold solutions, something on

which he would not insist, for he had no wish to preach again in favour of his own proposals.

18. Mr. MIKULKA said that, though he had participated in the discussion leading to the proposal before the Commission, he had to dissociate himself from the proposal itself, on which he had a number of reservations. It did indeed pose many problems, some of them not apparent at first glance, and the Commission must not hastily incorporate it in the articles on first reading without giving very serious consideration to all the possible consequences. The remaining problems did not vitiate the proposal's potential usefulness, but merely revealed that more had to be done to develop a workable system for compulsory jurisdiction. He endorsed the stance taken by Mr. Bowett and Mr. Bennouna in favour of reflecting in the report the whole range of difficulties identified, and perhaps incorporating the proposal itself in a footnote for the information and reaction of States, but of not including the proposal in the articles adopted on first reading.

19. Mr. FOMBA, referring to the form of the proposal, said that as long as the existence of a dispute did not prejudice the legal status of the situation created by the behaviour of a State accused of an internationally wrongful act, the State should be described as "allegedly" having committed that act. On substance, the problems being encountered were clearly linked to the weakness of the current world institutional order. Though he welcomed the efforts made to refine the proposal, further consideration was needed and he agreed with Mr. Mikulka that the entire problem, in all its complexity, should be placed before States for their reaction, to enable the Commission to look into the subject in greater depth during its consideration of the articles on second reading.

20. Mr. HE said he appreciated the efforts behind the revised proposal before the Commission but still experienced many difficulties with it. The term "crime" was used only for consistency with article 19 of part one; hence, an alternative reference, such as to an internationally wrongful act of a serious nature, could be used instead, and there was no need to create a separate regime in part three. However, even if the Commission wished to establish a separate regime for the determination of the existence of a crime, the proposal would not be workable. It was open to question whether the conciliation commission had the competence to judge on the *prima facie* evidence whether a crime had been committed. If a case was to be referred for arbitration on the basis of such *prima facie* evidence, arbitration would become compulsory.

21. Mr. VILLAGRÁN KRAMER said that it would be very surprising if, having agreed to make negotiations a preliminary condition for the taking of countermeasures for international crimes, the Commission failed to provide a legal mechanism for that purpose. Members had spoken of squaring the circle, but surely the circle was squared once and for all by Article 33 of the Charter of the United Nations. In his view, the Commission should either adopt the text proposed by the Drafting Committee, revise paragraph 1 of article 58 [5] or adopt Mr. Eiriksson's proposals. For his part, he could support either version.

22. Mr. LUKASHUK said that Mr. Eiriksson's proposal on article 57 [4] was inconsistent with the definition of the task of the conciliation commission provided for in paragraph 1 of that article. To collect all necessary information was one thing and to decide whether there was prima facie evidence that an international crime had been committed was quite another. Such a finding would be a matter entailing legal consequences of the greatest importance and would lie quite outside the competence of the conciliation commission. For that reason, he could not support the proposal.

23. The CHAIRMAN said that Mr. Eiriksson's proposal had met with sympathy on the part of many members of the Commission, but it required further reflection which the Commission was unable to give it at the current juncture owing to pressure of time. He therefore suggested, in accordance with the views expressed by Mr. Bowett, Mr. Bennouna and Mr. Mikulka, that the Commission should draw attention to the problem in its report, appending the text of Mr. Eiriksson's proposal and explaining that it had had no time to discuss it in depth at the current session. The issue would thus remain open for decision at the stage of the second reading.

It was so agreed.

24. Mr. CRAWFORD said he had no objection to that course of action, provided it was made clear that the solution proposed in article 57 [4] was not the only one. There was much to be said for the solution originally proposed by the former Special Rapporteur, namely, that disputes should be referred to ICJ.

25. The CHAIRMAN said it would be made completely clear that the Commission intended to explore all solutions in the light of the reactions of Governments.

26. Mr. EIRIKSSON, pointing out that he had not objected to the course of action suggested by the Chairman, thanked those who would have supported his proposals for insertion in the text of articles 57 [4] and 58 [5]. He would add, parenthetically, that the more unreasonable a proposal was, the more likely it was to be adopted.

27. Mr. YANKOV said that, while he was in favour of any effort to strengthen the system of compulsory third-party settlement, he was greatly concerned to find serious gaps in terms of institutional arrangements and procedural rules for dealing with the legal consequences of breaches of *erga omnes* obligations. He had great sympathy with the former Special Rapporteur's proposal that disputes should be brought before ICJ, but was not sure that the Court had the jurisprudence and practice to deal with *erga omnes* consequences. As for bringing the matter to the attention of the General Assembly or the Security Council, was it conceivable that any permanent member of the Council could ever be accused of having committed a crime? Most disturbingly, it seemed that *erga omnes* obligations were easily accepted, but the world was not ready to deal with breaches of them.

28. Mr. ARANGIO-RUIZ said that, while it might be true that a permanent member of the Security Council could never be accused of a crime, for the very simple reason that the Council would not admit it, it was with

that problem in mind that he had included in his text of draft article 19 of part two⁵ a provision whereby a preliminary finding of a crime—or, as the Commission had now decided to put it, prima facie evidence that an international crime had been committed—had not been reserved for the Council. He had also mentioned the General Assembly, a body in which no State enjoyed special immunity. That had also been the purpose of his proposal.

29. Mr. YANKOV remarked that General Assembly resolutions did not have legally binding force. The question of an adequate mechanism for dealing with international crimes still remained unsolved. He did not wish to argue with anyone but only to avail himself of what was probably his last opportunity in the Commission to draw attention to what he believed to be a major problem in regard to *erga omnes* obligations.

PART TWO (Content, forms and degrees of international responsibility) (*concluded*)

CHAPTER IV (International crimes) (*concluded*)

30. Mr. ARANGIO-RUIZ requested a vote on the whole of chapter IV of part two.

Chapter IV was adopted by 12 votes to 2, with 9 abstentions.

31. Mr. ARANGIO-RUIZ, explaining his abstention, said that although, as must be clear by now, he did not like chapter IV, he was nevertheless glad to see it there because it meant that the concept of international crimes was still alive despite the efforts of those who would have liked to see article 19 of part one eliminated. It meant that the notion of crimes, however called in footnotes to the text, remained. That was definitely a gain. For that reason, he had not voted against the chapter. He had, however, abstained because the chapter was utterly inadequate in meeting the problem, including the one mentioned by Mr. Yankov, namely the problem of the *erga omnes* effect, including the proper use of the existing institutional mechanism, which consisted not only of the Security Council but also of the General Assembly, where all States were equal, and of ICJ, where the law was supposed to be applied equally for every State.

32. Mr. ROSENSTOCK said that the adoption of chapter IV could not be taken to indicate a reaffirmation of article 19 of part one. The rules of the game required that, since that article still existed, members should not question its existence by reopening the debate on that subject. Their readiness to adopt chapter IV was, however, quite without prejudice to their position on the substance of article 19.

33. Mr. EIRIKSSON said that, having been a member of the Drafting Committee at the time of its work on chapter IV, he remained loyal to its decisions.

34. Mr. KABATSI said that he had voted against the chapter for three reasons. First, he did not subscribe to the idea that States, as opposed to individuals, could

⁵ See 2436th meeting, footnote 9.

commit crimes. Secondly, with reference to the remarks just made by Mr. Yankov, he thought that to create a problem without devising some means of resolving it was unacceptable. Thirdly, if crimes committed by States did exist—with all the devastating consequences that would entail—then it was unfair that, because of the composition of the Security Council, not all States could be adjudged criminal.

35. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt part two, as amended.

Part two, as amended, was adopted.

PART THREE (Settlement of disputes) (*concluded*)

Article 54 (Negotiation),

Article 55 (Good offices and mediation),

Article 56 (Conciliation),

Article 57 (Task of the Conciliation Commission),

Article 58 (Arbitration),

Article 59 (Terms of reference of the Arbitral Tribunal),

Article 60 (Validity of an arbitral award), and

Annexes I (The Conciliation Commission) and II (The Arbitral Tribunal)

36. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), introducing part three of the draft, said that he could be very brief, for two reasons. The first was that the seven articles and two annexes that constituted part three had been approved only the previous year at the forty-seventh session. The second reason was that the Drafting Committee had not made any substantial changes in the text. In fact, part three remained practically intact. The word “draft” before the “articles” had been deleted throughout in order to keep the language uniform. In article 55 [2] (Good offices and mediation), the order of the initiative of a State party wishing to tender good offices or offer to mediate, on the one hand, and a request of the parties for good offices or mediation, on the other, had been reversed, the latter now being mentioned first. The text adopted at the forty-seventh session had contained one annex with two articles, one on the conciliation commission and the other on the arbitral tribunal. The Drafting Committee currently proposed two annexes, one on the conciliation commission and another on the arbitral tribunal, but the text was exactly the same as the previous year. The Drafting Committee recommended the adoption of the seven articles of part three (arts. 54 [1] to 60 [7]) and its two annexes. With that recommendation, he concluded the second report of the Drafting Committee.

37. Mr. BENNOUNA said that the words “Failing the establishment of the conciliation commission provided for in article 56 or” at the beginning of paragraph 1 of article 58 [5] were unnecessary and should be deleted. The establishment of the conciliation commission was not in doubt, as the provisions set out in annex I governing the appointment of its members confirmed.

38. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, as he understood it, the first part of article 58 [5], paragraph 1, was necessary because the establishment of the conciliation commission depended entirely on the parties to the dispute.

39. Mr. EIRIKSSON said that the necessity for the first part of article 58 [5], paragraph 1, was explained in the commentary. Omitting it would presuppose that a report had been made, which was not always the case.

40. Mr. BENNOUNA said that he was not satisfied by those answers. Article 56 provided that, subject to certain conditions, any party to the dispute could submit it to conciliation. Article 57 [4] spoke of the report of the conciliation commission. Annex I covered every detail of the conciliation commission’s establishment, membership, and so on, leaving absolutely no lacunae. From those facts he deduced that the conciliation commission was established automatically at the request of one of the parties. If a State failed to request the establishment of a conciliation commission, that meant it did not intend to resort to conciliation. He failed to see the legal logic of the sentence in question.

41. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he withdrew his previous remarks and accepted Mr. Bennouna’s arguments.

42. Mr. VARGAS CARREÑO said that there were many examples of countries deciding to go straight to arbitration without first submitting a dispute to a conciliation commission. The 1984 dispute between Argentina and Chile was a case in point. The current text of article 58 [5], paragraph 1, should be maintained for that reason, an appropriate explanation being included in the commentary.

43. Mr. BOWETT said that Mr. Bennouna was right in saying that the conciliation commission was established as soon as one of the parties requested it. It was clear from article 56 [3], however, that if neither party sought conciliation, no conciliation commission would be established. That possibility had to be provided for. He suggested that Mr. Bennouna’s point could be met by replacing the words “Failing the establishment of” at the beginning of article 58 [5], paragraph 1, by the words “Failing a reference to”.

44. Mr. BENNOUNA said that there remained the time factor. Before the wording of the article could be finally adopted, the period following which the parties could have recourse to arbitration should be specified. The Commission must be clear about what it was adopting.

45. Mr. BARBOZA said that, if the parties decided not to go to conciliation first but to go straight to arbitration, that was what would happen; if, on the other hand, one party proposed arbitration and the other refused, preferring to go first to conciliation, then that was what would happen. There was no need for any time limit: the mechanism provided would work spontaneously.

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), agreeing that the words “Failing the establishment of” could give rise to confusion,

suggested that Mr. Bowett's proposal should be modified by adding the words "of the dispute". The opening words of paragraph 1 would then read "Failing a reference of the dispute to the Conciliation Commission".

47. Mr. GÜNEY proposed that mention of the conciliation commission should be omitted: the opening words of the paragraph would then read "Failing a reference to conciliation".

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, although the proposal had merit, the wording of the whole text would have to be changed and an explanation would have to be given of what precisely was meant by conciliation.

49. The CHAIRMAN said that Mr. Güney's proposal could perhaps be reconsidered on the second reading of the draft articles.

50. Mr. LUKASHUK noted that paragraphs 3 and 5 of article 57 [4] referred, respectively, to "final recommendations" and a "final report". Paragraph 4, however, referred to recommendations of a different legal nature, namely, those made in order to get a response. The words "The recommendations", at the beginning of paragraph 4, should therefore be replaced by "Preliminary recommendations" and, in paragraph 5, the word "preliminary" should be inserted before "recommendations", at the beginning of paragraph 5, and the word "final" before "recommendations", at the end of the paragraph. That would more accurately reflect the position and would also have the necessary legal rigour. As a consequential amendment, the words "final recommendations", at the end of paragraph 3, should be replaced by "future recommendations". Again, in paragraph 1 of article 58 [5], the word "final" should be added before "report". Lastly, the word "validity" which appeared in the title for article 60 [7], embraced a very broad notion. Article 60 [7], however, was concerned not so much with validity as with a challenge to validity and he therefore proposed that the title should be reworded to read: "Challenge to the validity of an arbitral award".

51. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, to his mind, the title was satisfactory. As was apparent from paragraph 1, article 60 [7] covered not only a challenge to the validity of an arbitral award but also what would ensue as a result of such a challenge, namely, confirmation or otherwise by ICJ of the validity of the award.

52. So far as Mr. Lukashuk's other points were concerned, he saw no need to modify article 57 [4]. Possibly the best way of clarifying matters would be to add the word "final" before the word "report", in paragraph 1 of article 58 [5], to make what was implicit explicit.

53. Mr. YANKOV, agreeing with the suggestion by the Chairman of the Drafting Committee, said he did not think that paragraph 4 of article 57 [4] would be improved by adding the word "preliminary" before "recommendations", and the other paragraphs of the article were in any event self-explanatory. He had no strong feelings about the matter, however, and would not object if Mr. Lukashuk insisted on his proposal.

54. Mr. BOWETT said that Mr. Lukashuk was right and his point could be met, first, by replacing the words "final recommendations" at the end of paragraph 3 of article 57 [4], by "later recommendations" and, secondly, by replacing the word "The", at the beginning of paragraph 4, by "Preliminary".

55. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said Mr. Bowett's first proposal was very useful but he could not agree to the second, which would only confuse the situation rather than clarify it.

56. Mr. MIKULKA said he supported that view.

57. The CHAIRMAN, appealing to the Commission not to allow itself to be turned into a drafting committee, asked Mr. Lukashuk whether Mr. Bowett's first suggestion was acceptable to him.

58. Mr. LUKASHUK said that, though he had some difficulty with the appearance of the word "recommendations" twice in paragraph 5 of article 57 [4], he would not press his points.

59. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt part three, as a whole, with the understanding that the word "final", in paragraph 3 of article 57 [4], should be replaced by the word "later", and the words "Failing the establishment of the Conciliation Commission", in paragraph 1 of article 58 [5], should be replaced by "Failing a reference of the dispute to the Conciliation Commission".

It was so agreed.

Part three, as amended, was adopted.

ADOPTION OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY ON FIRST READING

60. The CHAIRMAN said that the Commission had completed its consideration on first reading of the draft articles on State responsibility, and invited the Commission to provisionally adopt the draft articles, on first reading, as a whole, as amended.

61. Mr. LUKASHUK, referring to the title of the draft, said that, while "State responsibility" might be all right for the title of an agenda item, it was not suitable for a title of an ambitious draft. It would be preferable to use the title "The law of State responsibility" which would reflect the content of the draft more accurately.

62. Another problem concerned the reference in the articles to international responsibility and international obligations. The nature of such responsibilities and obligations could, however, differ inasmuch as they could be moral, political and so on. Furthermore, the draft spoke of wrongful acts, which, in all languages, could mean not only acts that were illegal but also acts that were immoral. It would therefore be advisable to introduce in article 3, subparagraph (b), a reference to a breach of an international "legal" obligation or an obligation "under international law". It was interesting to note in that con-

nection that the Organization on Security and Cooperation in Europe now had a code of political obligations.

63. The CHAIRMAN, noting that the draft before the Commission was the outcome of a compromise, said he trusted that it would be adopted by consensus and that there would be no need to have recourse to a vote.

64. Mr. ROSENSTOCK said that there was a slight difference between adoption by consensus and adoption without a vote. He would prefer the latter, since some members, including himself, had voted against certain parts of the draft. To adopt it by consensus would suggest that the Commission was fully satisfied with the general balance of the draft, while adopting it without a vote would indicate that the Commission was fully satisfied that the draft should go forward.

The draft articles on State responsibility, as a whole, as amended, were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEURS

65. The CHAIRMAN said that, in accordance with the Commission's practice and in recognition of the valuable contribution Mr. Arangio-Ruiz and his predecessors as Special Rapporteurs had made to the Commission's work on the draft articles on State responsibility, he would invite the Commission to consider the following draft resolution:

"The International Law Commission,

"Having provisionally adopted the draft articles on State responsibility,

"Wishes to express to the three Special Rapporteurs, Mr. Roberto Ago, Mr. Willem Riphagen and Mr. Gaetano Arangio-Ruiz, its deep appreciation for the outstanding contribution that their erudition and vast experience made to work on the topic as a result of which the Commission has completed its consideration on first reading of the draft articles on State responsibility."

The draft resolution was adopted by acclamation.

66. The CHAIRMAN said that he was speaking not only as Chairman but also as a member of the Commission. It was the last year in which Mr. Arangio-Ruiz, like he himself, would be serving on the Commission. He had learned much from Mr. Arangio-Ruiz. To see him, with the same vigour of mind and of body, the same dash and the same alertness as he had displayed in 1985, it was hard to think in terms of age. Mr. Arangio-Ruiz was one of those members who saw the law in its loftiest forms, albeit perhaps tinged with a degree of Utopian idealism—but, as everyone knew, the Utopia of today was often the reality of tomorrow. As a professor himself, he shared that element of Utopian idealism. There were those who were bold, daring and somewhat extreme, though Mr. Arangio-Ruiz's only link with extremism lay perhaps in his courage. While he himself had not always endorsed Mr. Arangio-Ruiz's approach, it was simply because he had not dared to be so bold and because he had made more concessions to realpolitik, to

raison d'État, for States were omnipresent even if the members of the Commission were not their representatives. From time to time, when the Commission had had difficult problems to tackle, he was inclined to think of the alpinists who made that most terrible of all climbs, the north face of the Eiger. For the members of the Commission, State sovereignty represented the north face of the Eiger and in tackling the difficulties inherent in State sovereignty it was the special rapporteurs who were first on the rope, there to guide and help the Commission. But the Commission must not go too far and break away from States too much, because States would not then follow the Commission. It was necessary for the Commission's membership to include not only the realist but also the person who pushed a little further; and it was the role of members of the Commission, as jurists, to encourage States to go a little further. The kind of debate in which they had engaged was extremely useful even if their fervour would be tempered later, either in discussions in the Commission or in the Sixth Committee of the General Assembly or by States themselves. He thanked Mr. Arangio-Ruiz for having been among those first on the rope and for urging the Commission to go as far as possible, while taking account of international reality.

67. Mr. BARBOZA said that the completion of the first reading of the draft on State responsibility was a historic moment. The exercise had started many years before with the Latin American jurist, Mr. Amador, had continued under Mr. Ago and Mr. Riphagen, and had almost been concluded by Mr. Arangio-Ruiz. "Almost" was, however, an unfortunate word, for the Commission as a whole profoundly regretted that Mr. Arangio-Ruiz had felt compelled to resign as Special Rapporteur. None the less, with the completion of the first reading of the draft articles, the Commission, the academic community, and those United Nations circles engaged in the development and codification of international law would certainly acknowledge the extraordinary contribution to the law of State responsibility made by Mr. Arangio-Ruiz. It was thanks to him that the Commission had made great progress towards clarifying the main problems that arose in a complicated area of customary law. Many aspects of the work that the Commission had done with Mr. Arangio-Ruiz's help would remain for ever. He thanked Mr. Arangio-Ruiz for his efforts and his brilliant contribution and dedication to the cause of the rule of law which all members of the Commission espoused.

68. Mr. THIAM said that the Chairman had given full expression to the sentiments of the Commission with regard to Mr. Arangio-Ruiz, a great jurist and fine person. As a special rapporteur himself, he could well understand the decision made by Mr. Arangio-Ruiz to withdraw from that position. In fact, one could not actually speak of his resignation, because Mr. Arangio-Ruiz had completed his work, having done it with brio and bringing to it his exceptional talents. In his statements to the Commission, Mr. Arangio-Ruiz had always expressed himself with a generosity of spirit, strong force of character and a full sense of his convictions. Indeed, the strength of conviction displayed in elaborating his reports would serve as an example to members in their future work. He had been among those who had been highly sensitive about the use of the term "State

crimes". While he might have regretted certain of his statements, his beliefs in that regard remained unchanged. In any event, the criticisms made of the reports had been directed at the language rather than the substance, about which the Special Rapporteur had always been correct.

69. Mr. Arangio-Ruiz, as Special Rapporteur, would always hold a special place in the collective memory of the Commission. He was a man of firm beliefs, concerned with the difficulties not just of the powerful States but also the smaller States, and it was true that there could be no international peace and security without a balance between the interests of the great and the small.

State succession and its impact on the nationality of natural and legal persons (concluded) (A/CN.4/472/Add.1, sect. B, A/CN.4/474⁶)

[Agenda item 6]

RECOMMENDATIONS OF THE WORKING GROUP ON STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS (concluded)*

70. The CHAIRMAN invited the Special Rapporteur to continue his report on the work of the Working Group on State succession and its impact on the nationality of natural and legal persons.

71. Mr. MIKULKA (Special Rapporteur) said he wished first to express his great appreciation and admiration for the contribution made by Mr. Arangio-Ruiz to the codification of the law on State responsibility. Mr. Arangio-Ruiz was one of the members who had helped form the character and substance of the Commission, in which he (Mr. Mikulka) now had the honour to participate. He was certain that posterity would honour his contribution and that the ideas which had not been incorporated in the draft articles would certainly be considered at a later stage.

72. With regard to the work of the Working Group on State succession and its impact on the nationality of natural and legal persons, he had already presented a preliminary report on its work (2451st meeting). It had met once since that time and had continued its analysis of the ideas set forth by the Special Rapporteur, which might serve as a starting-point for a third report on the topic.

73. It was, in his view, time for the Commission to take action on the five recommendations made by the Working Group (ibid.), namely, (a) the consideration of the question of the nationality of natural persons should be separated from that of the nationality of legal persons, as they raised issues of a very different order; (b) the question of the nationality of natural persons should be addressed as a matter of priority; (c) the result of the

work on the topic should take the form of a non-binding instrument of a declaratory nature, consisting of articles with commentaries; (d) the first reading of those articles should be completed during the Commission's forty-ninth or, at the latest, fiftieth session; and (e) upon completion of the work on the nationality of natural persons, the Commission should decide, on the basis of comments by States, whether it would consider the question of the impact of State succession on the nationality of legal persons.

74. He wished to add one further recommendation. In response to comments made during the plenary meeting, the Working Group had considered the question of the title of the topic. In fact, the French and English titles did not correspond and the title in French, *La succession d'États et nationalité des personnes physiques et morales*, was the one which had given rise to reservations. The Working Group was therefore recommending that the title of the topic should be modified to read: "Nationality in relation to State succession" or, in French, *La nationalité en relation avec la succession d'États*. He thanked the members of the Working Group for their contributions.

75. Mr. GÜNEY said that he fully endorsed the Working Group's recommendations which were based on the discussions held in the Commission and on the reality of State practice. It had been generally agreed in the Commission that the question of the nationality of natural persons should be separated from that of the nationality of legal persons and dealt with first. He supported the recommendation that the Commission should elaborate a non-binding declaration on the topic. The schedule for the completion of the first reading of the draft articles would, of course, depend on the Commission's long-term agenda.

76. Mr. LUKASHUK said that the Special Rapporteur's second report (A/CN.4/474) was of high professional quality and had already been referred to in other international forums as an authoritative source. He fully endorsed the recommendations made by the Working Group.

77. In formulating the draft articles on nationality in relation to State succession, the Commission should bear in mind a number of principles, which would set forth a legal basis for the assignment of nationality: (a) every person had the right to a nationality; (b) every child had the right to acquire a nationality; (c) every person had the right to the nationality of the State on the territory of which he was born or, if he did not have the right to any other nationality, on the territory of which he was living; (d) no one should be arbitrarily deprived of his nationality or denied the right to change it; (e) no person or group of persons could be deprived of the right to nationality on racial, ethnic, religious or political grounds; and (f) women and men were equally entitled to acquire, change or retain their nationality.

78. The draft articles should also make reference to the primacy of international human rights norms, the importance of the rule of law and the principle of non-discrimination, and the need to avoid situations of statelessness. They should include mention of the Convention on the Reduction of Statelessness and should include a

* Resumed from the 2451st meeting.

⁶ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

provision according to which the term "State succession" covered all types of transfer of sovereignty. The draft articles should emphasize that even in the case where permanent residents of a State were not granted citizenship, they should, except in some strictly limited cases, enjoy the same fundamental social and economic rights as nationals of the State concerned.

79. Lastly, he fully agreed that the future instrument should take the form of a General Assembly resolution. He hoped that the Commission could complete the first reading of the draft articles at the next session so that it could submit them to the General Assembly for the fiftieth anniversary of the Universal Declaration of Human Rights.⁷

80. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve the recommendations made by the Working Group.

It was so agreed.

**Programme, procedures and working methods of the Commission, and its documentation
(A/CN.4/472/Add.1, sect. F)**

[Agenda item 7]

REPORT OF THE PLANNING GROUP

81. Mr. ROSENSTOCK (Chairman of the Planning Group), introducing the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1),⁸ said that, in response to General Assembly resolution 50/45, concerning the importance of examining ways and means of improving the effectiveness and efficiency of the United Nations system, the Commission had decided to do a survey of how the Commission had been functioning and what it could do to become more effective and efficient. The survey was contained in the report of the Planning Group, which was intended to be as easy to deal with as possible. It contained an executive summary and a set of specific recommendations at the beginning to facilitate the task of those who might be unable to examine the entire report in detail. The Planning Group had gone over the contents of its report in great detail. The Commission would most likely not need to go over every chapter in detail but might wish to focus on the executive summary and the set of recommendations and then to adopt the report chapter by chapter.

82. After an exchange of views in which Messrs. EIRIKSSON, CALERO RODRIGUES, BENNOUNA, CRAWFORD, MIKULKA, GÜNEY and ROSENSTOCK took part, the CHAIRMAN said that, if he heard no objections, he would take it that the members

agreed to consider the report of the Planning Group at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2460th MEETING

Tuesday, 16 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

The law and practice relating to reservations to treaties (A/CN.4/472/Add.1, sect. E, A/CN.4/477 and Add.1 and A/CN.4/478¹)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur on the topic to introduce his second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) said that, in his second report, he had adopted a slightly different approach from the one he had announced during the introduction to his first report² at the forty-seventh session of the Commission. His original intention had been to deal at the current session with the definition of reservations and the legal regime of interpretative declarations. However, as a result of the new focus given to the problem of reservations by the positions recently adopted by the human rights treaty monitoring bodies, particularly the well-known general comment No. 24 (52),³ he had

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/470.

³ General comment on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (A/50/40, annex V).

⁷ See 2451st meeting, footnote 5.

⁸ The report of the Planning Group was not issued as an official document. The report, as amended and adopted by the Commission, is reproduced in *Yearbook . . . 1996*, vol. II (Part Two), chap. VII.

decided to give priority to the question of the unity or diversity of the legal regime for reservations to treaties.

3. The second report thus consisted of two separate chapters. The first, entitled "Overview of the study", was quite brief and drew conclusions for the future from the discussions which had been held on the topic at the preceding session. The second, which was much more detailed and specific, dealt with the difficult question whether there was unity or diversity in the legal regime for reservations to treaties.

4. The report also had three annexes. Annex I contained a bibliography to which he invited the members of the Commission to contribute, especially for works written in languages other than French and English. The questionnaire (ILC(XLVIII)/CRD.1) which the Commission had authorized him, at its forty-seventh session, to send to Member States, would be included in annex II. Fourteen Member States, which had recently been joined by Slovakia and France, had so far replied to the questionnaire and transmitted very useful information to him. Annex III, which would be issued later, would contain the questionnaire he had prepared for international organizations. For the sake of clarity, he would introduce the two chapters of the report successively.

5. In chapter I, section A, he dealt very briefly with the action taken on his first report. In section B, he tried to explain some points which, in the light of the summary records of the meetings of the preceding session, seemed to have been rather unclear in the minds of some members of the Commission and which included the concept of "model clauses" and that of the "guide to practice".

6. He drew the attention of the members of the Commission to the provisional general outline of the study, which he proposed at the end of chapter I, section B. He did not claim that the plan was either perfect or final and he would, moreover, be grateful for any suggestions designed to improve it, but he had tried to indicate as specifically as possible which questions he intended to deal with and in which order. There were two particularly important paragraphs in that regard: one at the beginning of section B.3, in which he attempted to define his objectives, and the other at the end of section C, in which he suggested a programme of work for the coming years. In his view, it should be possible to complete the consideration on first reading of the draft Guide to practice within four years if the Commission completed its study, at its next session, of parts II, Definition of reservations, and III, Formulation and withdrawal of reservations, acceptances and objections, if it considered part IV, Effects of reservations, acceptances and objections, in 1998 and if it managed to complete its consideration of part V, Fate of reservations, acceptances and objections in the case of succession of States, and part VI, The settlement of disputes linked to the regime for reservations, in 1999. That programme was, of course, purely of a contingent nature.

7. In chapter II of his second report, he tried to deal as thoroughly as possible with the complex problem of the unity or diversity of the legal regime for reservations to treaties, to which attention had been drawn by several members of the Commission at the preceding session. In his opinion, the problem came down to a few simple

propositions: first, the legal regime of reservations was "one"; secondly, it was "one" because it was flexible and adaptable; thirdly, as a result of such flexibility and adaptability, it was applied generally, including to normative treaties and human rights instruments; fourthly, the real peculiarity of the latter instruments, in relation to the regime of reservations, was not that they related to fundamental human rights, but, rather, that they often established monitoring bodies; fifthly, however, it would be inconceivable that those bodies should not be able to evaluate the permissibility of the reservations formulated by the States parties, as part of their monitoring functions; but, sixthly, it would also be inconceivable that they should be able to take the place of the reserving States in deciding whether or not they were bound by a particular treaty despite the non-permissibility of their reservations.

8. In order not to take up too much of the Commission's time, he would simply give a general idea of the reasoning on which those six propositions were based.

9. As he explained in chapter II, section B, of his second report, there could be no objective answer to the question whether it was appropriate or not to allow reservations to normative treaties, including human rights instruments; and the Commission's role was, moreover, not to act as a kind of "reservations court" ruling on the merits of the principle of the reservation. If it was also considered that there should be no reservations to a particular convention, that could always be decided on in the convention itself because—and that was one of the first elements of flexibility of the ordinary law regime of reservations provided for in articles 19 to 23 of the Vienna Convention on the Law of Treaties—that was only an optional residual regime that the negotiators could always reject. What had been called the "Vienna regime" contained other elements of flexibility, but the most important probably lay in the famous principle which had been established by ICJ in the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*⁴ and endorsed by article 19, subparagraph (c), of the Vienna Convention on the Law of Treaties, which provided that a State could not formulate a reservation "incompatible with the object and purpose of the treaty". That principle meant, first, that reservations could not change the nature of treaty undertakings and, secondly, that taking the object of the treaty into account lay at the heart of the Vienna regime. That was a very strong argument in favour of the unity of the reservations regime: since the compatibility of the reservation with the object of the treaty was the fundamental criterion on the basis of which the permissibility of the reservation would be evaluated, it became a priori unnecessary to adopt diversified regimes depending on the object of the treaty. The Commission had, moreover, already reached the same conclusion during the preparation of the draft articles on the law of treaties in 1962.⁵

⁴ *I.C.J. Reports 1951*, p. 15.

⁵ *Yearbook . . . 1962*, vol. II, document A/5209, p. 180.

10. As a result of its flexibility and adaptability, the Vienna regime was suited to all types of multilateral treaties and struck a sound balance between the two main considerations which formed the basis for any reservations regime, namely, efforts to achieve universality—since reservations enabled more States to express their consent to be bound because they could adapt such consent—and the concern to preserve the integrity of the treaty—since reservations might break up the unity of the treaty regime. Similarly, the Vienna rules satisfactorily safeguarded the will of the reserving State, which could adapt the expression of its consent, and that of the other States, which could object to a reservation and refuse, if they so wished, to be bound with the reserving State.

11. Did that perfectly balanced general regime give rise to particular problems as far as human rights instruments were concerned? Such treaties did, of course, have very definite characteristics. First of all, they were designed to establish a single legal framework applicable not only as between the States parties, but also in the territory of the States parties themselves; secondly, individuals were the direct recipients and beneficiaries; and, thirdly, as a result of the preceding proposition, they were not based on the reciprocity of the undertakings entered into by States, but were designed to embody shared values. It was obvious that such specific features of human rights treaties called for a number of explanations which he had tried to provide in his report, but it could not be concluded for all that that the ordinary reservations regime was not applicable to them. Apart from the fact that the possibility of prohibiting reservations to a particular treaty still existed, the principle established by article 19, subparagraph (c), of the Vienna Convention on the Law of Treaties, which prohibited reservations incompatible with the object and purpose of the treaty, was a safeguard that was equally valid in the area of human rights. ICJ had established that rule in 1951 in the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, which, in its judgment of 11 July 1996,⁶ it had characterized as a human rights treaty par excellence. A reservation could therefore not deprive a human rights treaty of its object or divert it from its purpose any more than it could in the case of any other kind of treaty.

12. Moreover, human rights treaties often stated rules of *jus cogens* and a prohibition on reservations to those peremptory norms of general international law was yet another guarantee as far as they were concerned.

13. Two arguments had nevertheless been put forward in favour of the non-applicability of the Vienna regime to reservations to normative treaties and, in particular, to human rights treaties. It had been maintained that the application of the common regime would undermine the equality of the parties and the principle of non-reciprocity. Those arguments were analysed in chapter II, section B.3, of the second report. It could be asked whether the equality of the parties was threatened more

in the case of a State party which did not formulate reservations and a State party which did or in the case of a State party and a non-State party. In addition, a State party always had the possibility of objecting to a reservation and thus preventing the treaty from entering into force as between itself and between the reserving State, thereby re-establishing the equality that the reservation might have threatened. An objection based on non-reciprocity was in fact virtually meaningless in the context of human rights. In agreeing to be bound by a human rights treaty, a State was obviously not expecting any reciprocity on the part of other States.

14. If the Commission looked at what happened in practice, it would see, first of all, that it was quite rare that human rights instruments prohibited reservations; secondly, that, if they contained provisions on the possibility of reservations, they often used the criterion of the object and purpose of the treaty (art. 75 of the American Convention on Human Rights went so far as to refer specifically to the provisions of the Vienna Convention on the Law of Treaties on reservations); and, thirdly, that, when they had to evaluate the permissibility of reservations to the instruments setting them up, human rights treaty bodies applied that same basic criterion, when such instruments were silent, of the compatibility of the reservation with the object and purpose of the treaty, whose relevance was reaffirmed by general comment No. 24 (52) of the Human Rights Committee.

15. There was thus no doubt that the Vienna regime was not only applicable to human rights treaties, but that it was actually applied to them in inter-State practice. There was, however, still the more difficult, if not more burning, issue of the competence of human rights treaty monitoring bodies to evaluate the permissibility of reservations and the consequences to be drawn from such an evaluation. That twofold problem, which was a matter of concern both to monitoring bodies themselves and to ministries of foreign affairs, was dealt with at some length in chapter II, section C, of the report, in which he had tried to explain the two positions.

16. It was only a slight exaggeration to say that the most extreme positions were the following: some considered that monitoring bodies had no power to evaluate the permissibility of reservations, which they would have to accept. They would then have to apply them without asking any questions, since the evaluation would be the responsibility of the traditional inter-State machinery. Others took the opposite view that, since monitoring bodies existed, they had sole responsibility for evaluating the permissibility of reservations and they alone could draw conclusions from a finding that a reservation was not permissible and decide that the reserving State was bound by the treaty as a whole, including the provisions to which the impermissible reservation related.

17. Although he did not systematically advocate middle-of-the-road solutions, he was convinced in the present case that an objective analysis of the problems under consideration, without any of the “anti-legal” passion that too often fired up the persons taking part in the discussion, would inevitably lead to a happy medium contained in the two propositions he had already stated,

⁶ Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, I.C.J. Reports 1996.

namely, that the monitoring bodies in question must be able, in the exercise of their functions, to evaluate the permissibility of reservations formulated by States and that States alone could decide whether they intended to be bound in the absence of reservations that had been found to be impermissible or whether they preferred not to be parties in such conditions.

18. Those conclusions were based solely on the following strictly legal reasoning. As far as the first conclusion was concerned, it was enough to note that the possibility for monitoring bodies of evaluating the permissibility of reservations formulated by States derived from the very functions of those bodies. By definition, under their terms of reference, they were responsible for monitoring compliance by States parties with their obligations under the treaty establishing them. However, they could not carry out their functions without being sure of the exact extent of their jurisdiction in respect of the States that submitted cases to them and they could do so only globally on the basis of the treaty itself, any reservations which might have been formulated by the State concerned and general international law, which laid down the conditions to which such reservations were subject. Like any jurisdictional or quasi-judicial body, moreover, they had the power to determine their own jurisdiction. Contrary to what some individuals said, it was thus not the originality of those bodies that justified their jurisdiction, but, rather, their ordinariness. Being established by treaties, they derived their jurisdiction from such treaties and had to determine the extent of that jurisdiction on the basis of the consent of the States parties as seen in the light of the general rules of the law of treaties, including in respect of reservations, since the general reservations regime was applicable to human rights treaties.

19. Naturally, and consequently, the other ordinary mechanisms for the control of the permissibility of reservations existed at the same time. Such control could be exercised, first, by States themselves in accordance with the Vienna regime and, in relation to human rights instruments, States did exercise their right to formulate objections to reservations. It was also quite conceivable that the dispute settlement bodies which might be seized either in first or second instance of a dispute between two States over the permissibility of a reservation formulated by one of them might make a ruling on that point. In an area other than that of human rights, that was what had happened with the arbitral tribunal in the *English Channel* case in 1977⁷ and also coincidentally, with ICJ in some rare cases referred to in the second report. As recent Swiss practice showed, moreover, national courts themselves could also determine the admissibility of reservations under international law.

20. The power of human rights monitoring bodies, as part of their functions to evaluate the permissibility of reservations formulated by States parties did not, of course, authorize them to go beyond their general powers in the sense that the binding force of the findings

they might make in that regard was the same as that of other findings they might make: if they had decision-making power, a State was bound on the basis of their findings, but, if they had advisory or recommendatory power, their findings were only indications which the State must consider in good faith, but which had no binding force for it. In between those two cases, slight differences were possible and everything depended on the statutory jurisdiction of the “control organs”, the term used in the second report to cover both monitoring bodies and dispute settlement bodies.

21. However—and that was the second conclusion—he was convinced that, as part of its powers, a human rights monitoring body could rule on the permissibility or impermissibility of a reservation, but that it could not take the place of a sovereign reserving State to determine the consequences of a possible finding of impermissibility. By its very nature, a treaty was a conventional instrument whose compulsory nature was based exclusively on the willingness of each State to be bound. In the case where a State had made its consent contingent on a reservation, that reservation was perhaps, in its opinion, a *sine qua non* condition or might, on the contrary, be only of an accessory nature, but, in any event, only the reserving State could say so and it was unthinkable and inadmissible that it could be bound without having wanted to be. Otherwise, the very essence of the treaty and the conventional form would be called into question.

22. That limitation on the powers of monitoring bodies, which he believed was not open to discussion, could give rise to considerable specific problems in that monitoring bodies determined impermissibility, but, once they had put the ball back in the State’s court, it was up to the State to say whether or not it accepted the treaty without the reservation, and that might take some time, if only because, in some cases, parliamentary proceedings might have to be resumed. That element showed, moreover, that it was absurd to want to force a State to be bound without its reservation if the reservation had been the condition for ratification, either by the parliament or by a constitutionality monitoring body. Those problems were, however, not insurmountable in practice, since that was a kind of “reverse preliminary issue” and preliminary issues had never prevented justice from ultimately being done.

23. He was not unaware that the proposition he was putting forward might come up against another objection that was both theoretical and practical. The finding that a reservation was impermissible might take place long after the reservation had been formulated and it might be dangerous for the stability of legal situations to allow a State to be released from its treaty obligations. That objection was not irrelevant, but, apart from the fact that the lesser of two evils must be chosen, it could be considered that such a concern would be a factor that the State would take into account in finally deciding whether to stay within the circle of contracting States or to withdraw. It was quite likely that a State would be more inclined to remain a party without its reservation because such a situation might give rise to great problems for it as well. The State might also choose an in-between solution, which would be to reformulate its reservation in

⁷ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978 (UNRIIA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271).

such a way as to correct its defects and make it permissible. It should not be forgotten that, where a reservation was impermissible, the State had never been validly bound and it was thus only by "regularizing" its reservation that it would be properly expressing its consent to be bound. In practice, moreover, quite apart from any problem of the permissibility of reservations, it did happen that States amended earlier reservations, by restricting them of course, and that that did not give rise to any objections.

24. Human rights instruments did, of course, have particular characteristics, but, like any other treaty, they were subject to the basic principle of consent. That was the principle which formed the basis of his two propositions: the State which had consented to a human rights treaty establishing a monitoring body could not unduly restrict that body's functions by denying it the right to decide on the permissibility of the reservations which it had formulated, but, at the same time, that body could not "chop up" the State's consent and declare that it was bound by a treaty to which it had consented only subject to the express condition of a reservation.

25. The draft resolution contained at the end of chapter II of the second report summed up the main thrust in relatively simple terms. He considered that it would be useful if, after discussion, amendment and improvement, the Commission adopted a text of that kind in an area within its jurisdiction to which it had already given a great deal of time and effort in the more general framework of the law of treaties and which was a general topic that had the twofold characteristic of being both a matter of major controversy and an item on its agenda. He hoped that the Commission would be able to consider that resolution at its next session.

26. Mr. ROSENSTOCK said that the second report, whose content he agreed with for the most part, was remarkable. He nevertheless considered that the comparison which the Special Rapporteur had drawn between regional organizations and a universal organization in referring to the implicit powers of monitoring bodies might be a bit hasty. It would, moreover, be most regrettable if, for lack of time, the Commission was unable either to consider or to adopt the draft resolution contained at the end of chapter II of the report.

27. Mr. LUKASHUK said that he agreed with the very sound and well-substantiated elements contained in the Special Rapporteur's second report, which rightly emphasized the role that the Soviet delegation had played in broadening the right of States to formulate reservations at the United Nations Conference on the Law of Treaties.⁸ Since that time, however, the cold war, which had forced the Soviet Union to be "on its guard", had ended and there had been a process of harmonization within the international community. As a result of such changes,

⁸ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

there should be some restriction of the right of States to formulate reservations. He therefore fully endorsed the Special Rapporteur's idea that the right to formulate reservations was of a residual nature.

28. It was important that the Commission should focus its attention on questions such as the respective rights of the reserving State and the international community in relation to the formulation of reservations. It also had to consider the question of reservations to bilateral treaties, on which both it and the United Nations Conference on the Law of Treaties had been silent, but which the expanded role of parliaments in the field of foreign policy might well bring up again.

29. The rather complex concept of the object and purpose of the treaty should also be discussed at greater length, as should the question of the practical effect of reservations on the entry into force of treaties, since the provisions of the Vienna Convention on the Law of Treaties on that point were contradictory and precision and clarification were essential.

30. With regard to the question of reservations to additional protocols that was also raised in the report, it appeared that, since the principal treaty and the additional treaty were a single legal norm, reservations should be compatible with the purpose and object of the whole formed by the treaty and the protocol thereto. Another very interesting question was that of the nature of reservations to treaties which codified customary rules. If a convention embodied generally accepted rules, any reservation seemed impossible, but the question could be more complex if the convention embodied a customary rule in the making.

31. As far as the entirely new question of the role of monitoring bodies established by a treaty was concerned, he fully endorsed the compromise approach adopted by the Special Rapporteur. The very widespread idea that any reservation to normative agreements and, in particular, agreements in the area of human rights should be refused had not only been adopted by jurists and theoreticians, but had also been reflected in court decisions. The Special Rapporteur had, however, rightly recalled that the legal regime established by such treaties was based on the consent of the State, just as he had been right to say that the general system of reservations was also applicable in the case of human rights instruments. In conclusion, he hoped that the Special Rapporteur would continue to give the Commission the benefit of contributions that were as original as those contained in his second report.

32. Mr. YANKOV, paying a tribute to the Special Rapporteur's remarkable work, said that human rights treaties were not the only area in which reservations must be subject to a special regime. The Special Rapporteur had, of course, mentioned the rules of *jus cogens* as well, but reference should also be made to other types of treaties, as defined by the nature of the negotiations which had preceded their adoption. He was thinking in particular of peace treaties, disarmament treaties and perhaps treaties relating to the environment. The United Nations Convention on the Law of the Sea was a good example of that type of treaty: a look at the *travaux préparatoires* showed why it did not allow any reserva-

tions. Most of the issues with which it dealt had been regarded as indissociable and delegations had feared that reservations to a particular provision might destroy the entire edifice, regarded as a whole. He therefore suggested that the Special Rapporteur should consider the practice of States in respect of multilateral treaties of a global character.

33. The Special Rapporteur's treatment of the role of human rights treaty monitoring bodies was generally satisfactory, but more detailed consideration should be given to it, both by the Special Rapporteur and by the Commission.

34. He was not in principle opposed to the idea that the Commission should submit to the General Assembly the resolution at the end of the Special Rapporteur's second report on the question of reservations to multilateral normative treaties, including human rights treaties, but he thought it premature. He pointed out, in particular, that the first preambular paragraph did not faithfully reflect the situation, since the Commission had not yet considered the question. However, if most of the members supported that initiative, he would not object to it. He would nevertheless like a working group to be set up to consider the draft resolution proposed by the Special Rapporteur.

35. Mr. IDRIS congratulated the Special Rapporteur on his clear presentation and the extensive research he had done in preparing his second report. The bibliography it contained was very useful, although it could be improved. It was the practice of States that must serve as a basis for the work on the topic, particularly the regime of the Vienna Conventions (Vienna Convention on the Law of Treaties, Vienna Convention on Succession of States in Respect of Treaties, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations), whose applicability to human rights treaties must be studied in greater depth. Clarifications on that point were still necessary. The idea of the work plan proposed in chapter I, section C, of the report was not bad, but there should be some flexibility as to scheduling and substance.

36. Mr. PAMBOU-TCHIVOUNDA said he regretted that the Special Rapporteur's introduction to his report would not be of much help in enabling the members of the Commission to find their way around the maze of the question of reservations to treaties. He would have liked the Special Rapporteur's teaching abilities to show the way.

37. He had already made two comments at the preceding session. The first had been that, when dealing with the question of reservations to treaties, the Commission might have to consider other areas of treaty law and thus rewrite or recodify it. It had to be very careful if it worked in a piecemeal way.

38. Secondly, with regard to the "rival" institutions of reservations referred to in chapter I, section B, of the report, he doubted that they could prove useful alternatives to the employment of reservations, which they did not resemble either in theory or in legal or political terms.

39. As the Special Rapporteur stressed, moreover, the question of the permissibility of reservations was of a highly political nature. It was dealt with primarily at the political level, during the negotiation of treaties, and, if it was considered later in some cases, that was because that was how politicians wanted it and because they had also wanted to place restrictions on such consideration.

40. As far as human rights monitoring bodies were concerned, a distinction should perhaps have been made between political bodies and jurisdictional bodies. In any event, the question whether such bodies were or were not competent to rule on the permissibility of reservations arose in both cases.

41. It would be advisable for the Special Rapporteur to think about how much importance should be attached to the guide to practice to be prepared. Would it be an inevitable tool made available to States and, if so, how should the Commission go about preparing it in terms of method?

42. Mr. CALERO RODRIGUES said that, like Mr. Rosenstock, he found that the report was not only rich and well documented, but also very easy to read. It contained a five-part outline and then went straight into the consideration of part I, which was of immediate interest, since it related to reservations to human rights treaties. The Special Rapporteur demonstrated his complete mastery of the subject and a concern for its practical aspects. He also made a suggestion which might help to solve the problem that could arise when human rights instruments had established monitoring bodies. The Special Rapporteur recognized that those bodies definitely had powers, but he considered—and he had a solid grounding in international law for that purpose—that a body of that kind could declare that a reservation was not permissible, although it was for the State which had made that reservation to decide what should be done.

43. The only doubt there might be about the report as a whole related to the draft resolution proposed at the end. He did not think that the Commission should start deciding on resolutions or recommendations and, if he was present at the next session, he would not be able to support that proposal.

44. Mr. VARGAS CARREÑO, recalling that, at the preceding session, he had criticized the Special Rapporteur for not having taken sufficient account in his first report⁹ of inter-American practice, said that that shortcoming had been corrected in the second report which the Special Rapporteur had just introduced. The Special Rapporteur had, moreover, rightly taken as his point of departure the Vienna Convention on the Law of Treaties, as supplemented in 1978 with the Vienna Convention on Succession of States in Respect of Treaties and in 1986 with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. There was no question of changing the Vienna regime or of replacing it with another regime. The aim was simply to fill the gaps that had been created as a result of the development of international law and, in particular, the drafting of human rights instruments, even if those treaties were not the only ones in connection with which reservations give

⁹ See footnote 2 above.

rise to problems, as Mr. Yankov had pointed out. The idea of submitting a draft resolution to the General Assembly was a good one and he was in favour of the establishment of a working group which might rapidly consider the draft resolution and possibly amend it.

45. Mr. BENNOUNA, supported by Mr. THIAM, said that he shared Mr. Calero Rodrigues' doubts about the draft resolution. Even if the issue was an important one, there was no justification for singling out one aspect of the topic in the form of a resolution addressed to the General Assembly.

46. Mr. HE said he agreed with Mr. Yankov that it was too early to submit a resolution to the General Assembly because the Commission had not yet considered the report.

47. Mr. PELLET (Special Rapporteur) said that he would have no objection to the establishment of a working group, provided that it had a very specific mandate, such as that of deciding whether a resolution should be submitted to the General Assembly or considering the draft resolution contained at the end of his second report. Otherwise, it would be a waste of time to set up a working group.

48. Mr. MIKULKA, paying a tribute to the Special Rapporteur, said that he was not in principle opposed to the idea that the Commission should take a decision in the form of a resolution. That innovative proposal related to working methods and there was nothing to say that innovations might not help the Commission to perform its functions better. If a working group was set up, he agreed with Mr. Pellet that it should be given very specific terms of reference. The purpose of a working group was to solve technical problems and it was essential that the discussion of the Special Rapporteur's second report should take place in plenary.

49. Mr. AL-BAHARNA said he did not see how the Commission could adopt the draft resolution proposed by the Special Rapporteur because it had not yet considered his second report. The first paragraph of the preamble of the draft resolution began with the words "Having considered, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations". It would certainly be better to wait at least until the following session.

50. He also wondered whether it was the Commission's practice to submit resolutions to the General Assembly. Would it not be better for it to prepare a "declaration of principles", as it usually did? It could include the very clear general outline of the study contained in chapter I, section B, of the report and also refer to the end of section C, which was no less clear-cut.

51. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission decided to examine the second report of the Special Rapporteur on reservations to treaties at its forty-ninth session.

It was so agreed.

**Programme, procedures and working methods of the Commission, and its documentation
(continued) (A/CN.4/472/Add.1, sect. F)**

[Agenda item 7]

REPORT OF THE PLANNING GROUP (*continued*)

52. The CHAIRMAN, recalling that the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1)¹⁰ had been introduced by the Chairman of the Planning Group (2459th meeting), suggested that the Commission should consider it section by section.

PART I (Executive summary and principal conclusions)

Part I was adopted.

PART II (Detailed analysis)

SECTION I (Introduction) and SECTION II (The scope for continuing codification and progressive development)

Sections I and II were adopted.

SECTION III (The relations between the Commission and the General Assembly (Sixth Committee))

53. Mr. HE, referring to paragraph 36, said that, although the Sixth Committee usually took a very keen interest in what the Commission was doing, it could happen that it might be less interested in a topic and that the corresponding text was not postponed, but shelved. The words "rather than being postponed" should therefore be replaced by the words "rather than being shelved".

54. Mr. CRAWFORD said that paragraph 36 was designed mainly to make the General Assembly understand that, if it did not find a text to be useful, it should say so as soon possible, before the completion of the study. The paragraph might give an impression of reticence because the Planning Group did not want to offend the Sixth Committee. An amended text would be submitted later.

Section III was adopted on that understanding.

SECTION IV (The role of the Special Rapporteur)

55. Mr. BENNOUNA, proposing some changes to the text, said that paragraph 38 should indicate very clearly that the distribution of special rapporteurships among members from different regions was not a rule, but a practice that the Commission followed. The third sentence of that paragraph should be deleted because it was quite clumsy to say that a special rapporteur "could be less suitable". In paragraph 39, moreover, the words "a 'proprietary' approach to 'their' topic" were not at all appropriate and should be deleted. The idea that those words were supposed to convey had already been made clear enough in the rest of the paragraph.

56. Mr. CRAWFORD said that he agreed with Mr. Bennouna about the words 'proprietary' approach to 'their' topic' in paragraph 39. He suggested that paragraph 38 should be shortened to remove the impression of clumsiness to which Mr. Bennouna had referred. The second sentence would read: "The system has many advantages, provided that it is applied with flexibility".

¹⁰ See 2459th meeting, footnote 8.

57. Mr. PAMBOU-TCHIVOUNDA said that he had no doubt about the need for the Standing Consultative Group referred to in paragraphs 43 to 47, but he would like to know what its status, powers and working methods would be. In his view, the Commission would have to be much more specific and define how the work of the Group would fit in with that of the Codification Division and how it would cooperate with members of the Commission other than the Special Rapporteur when the Commission was not in session. In paragraph 47, he did not think that there was any need for the words “without regard to the distinction between codification and progressive development”.

58. Mr. ROSENSTOCK (Chairman of the Planning Group) said that the distinction between the codification and progressive development of international law was embodied in the statute of the Commission, but, with the completion of the traditional topics and historical change, it was becoming a handicap that would have to be removed from the statute if it was amended one day. The wording criticized by Mr. Pambou-Tchivounda referred to that possibility.

59. Mr. PELLET said that he agreed with Mr. Rosenstock’s reply and pointed out that the wording in question corresponded to what was stated in paragraph 43. He had never been in favour of the idea of a standing consultative group because it seemed too rigid. Now it was to be a statutory requirement. Some topics of study did not, moreover, lend themselves to such a system. Having expressed those reservations, he could go along with the consensus on that part of the report.

60. Mr. CRAWFORD said that the proposed text placed enough emphasis on the flexibility that should be guaranteed for the mechanism of the Standing Consultative Group. Paragraph 46 was devoted entirely to that point. The objective at present was simply to state the principle of the existence of that new body, with its functions and working methods to be discussed later.

61. The CHAIRMAN said that the written text of the amendments proposed orally and other changes to the document under consideration would be made available later.

The meeting rose at 1.10 p.m.

2461st MEETING

Tuesday, 16 July 1996, at 3.40 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby,

Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (continued) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT OF THE PLANNING GROUP (concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1).¹

PART II (Detailed analysis) (concluded)

SECTION IV (The role of the Special Rapporteur) (concluded)

2. Mr. CALERO RODRIGUES said that paragraph 51, on the important question of commentaries to draft articles, contained an excellent and innovative idea, namely that once the Drafting Committee had approved a particular article, the commentary to that article should be circulated either to members of the Drafting Committee or to the members of the consultative group for the topic. Thus, before going to the plenary, the commentaries prepared by the special rapporteur and the secretariat would have been reviewed by other members of the Commission.

3. The last sentence of paragraph 51 stated that “Draft articles should not be finally adopted without the Commission having approved the commentaries before it.” In his view, such a procedure led to an impasse: the Commission could not approve the commentaries unless it had already adopted the corresponding articles. The sentence should be amended to read: “As the statute makes clear, draft articles should not be considered finally adopted without the Commission having approved the commentaries before it.”

4. Mr. LUKASHUK said that it might be useful in some cases to appoint not only a special rapporteur but also one or two co-rapporteurs, duly representative of other legal systems, who could collaborate between sessions.

5. The CHAIRMAN said it might not be appropriate at that stage to introduce matters which had not been previously debated by the Planning Group or the corresponding working group. Those questions should be postponed until the next session.

¹ See 2459th meeting, footnote 8.

6. Mr. IDRIS said that he could accept the amendment to paragraph 51 proposed by Mr. Calero Rodrigues.

7. Mr. ROSENSTOCK (Chairman of the Planning Group) said that he too endorsed the proposal by Mr. Calero Rodrigues. The suggestion by Mr. Lukashuk was in fact already reflected in Section IV, in particular in paragraphs 43 and 44 which made reference to the fact that other bodies sometimes set up small consultative groups to assist the special rapporteur between sessions.

Section IV, as amended, was adopted.

SECTION V (The role and relationships of the plenary to the Drafting Committee and Working Groups)

8. Mr. YANKOV said that he had reservations about paragraph 69, which stated that there were two kinds of working groups, one kind which tried to resolve deadlocked issues and the other which was concerned with the handling of a topic as a whole. Such a characterization did not accurately reflect the work of the Commission. It would be a significant omission to leave out a third category of working group, namely groups which, before the appointment of a special rapporteur and formalization of the procedure for a particular topic, did essential preliminary work, for example feasibility studies, reviews of background information and surveys of State practice and jurisprudence. Such groups, sometimes called sub-committees rather than working groups, had been involved in the preparation of more than half of the topics that the Commission had dealt with over the years. A description of that third kind of working group should be added to paragraph 69. In general, he endorsed the Planning Group's suggestion that better use should be made of working groups and that their terms should be more flexible.

9. Mr. ROSENSTOCK (Chairman of the Planning Group) said that the type of working group mentioned by Mr. Yankov could be subsumed under the second category—groups which were concerned with the handling of a topic as a whole, as described in paragraph 69. The description of that category could be enlarged to include groups established at the commencement of consideration of a topic, to better reflect the reality of the Commission's working methods.

10. Mr. IDRIS said that the question was one of language rather than substance. As currently drafted, paragraph 69 might exclude the kind of working groups which had been set up in the past or might be established in the future. The first sentence of the paragraph should read: "Working groups may be established with various terms of reference". The two kinds of working groups currently mentioned in the paragraph could be cited as examples.

11. Mr. PELLET wondered whether, as stated in paragraph 71, a working group was always subordinate to the plenary. Might it not be subordinate to the Planning Group or the Drafting Committee?

12. The CHAIRMAN said that it might be useful to draw a distinction between "official" working groups established by the plenary and groups set up by other bodies of the Commission. In particular, the report

should mention that the Planning Group also had recourse to the method of setting up working groups.

Section V, as amended, was adopted.

SECTION VI (Structure of Commission meetings)

13. Mr. VILLAGRÁN KRAMER said that he endorsed the idea of a shorter session for the Commission. While the report recommended that the first split session should be scheduled for 1998, it might be best to try the experiment in 1997, which would show good faith on the part of the Commission.

14. Mr. LUKASHUK said that under article 18 of its statute, the Commission "shall survey the whole field of international law with a view to selecting topics for codification". To his knowledge, such a survey had been carried out only once, by Mr. Lauterpacht. Reference to article 18, with particular emphasis on the need for a survey to form the basis for long-term planning, should be made in paragraph 73 of the report.

15. Mr. CRAWFORD said that the compromise view had been that a split session would not be desirable in 1997 for various reasons, including budgetary considerations, and the fact that planning for the first year of the quinquennium was generally more difficult than for subsequent years. He agreed with Mr. Lukashuk that an overall survey of international law was needed. In that connection, the Planning Group had mentioned the Lauterpacht study in paragraph 12 of the report. The Planning Group would also be submitting another report to the Commission which contained the beginnings of such a survey.

16. Mr. PELLET said that a group chaired by Mr. Bowett was currently working on an overall survey of codification. With regard to paragraph 77, it was his view that the suggested 10-week session for 1997 was still too long. The explanation provided in paragraph 84 about the need for a split session was not entirely satisfactory. In fact, the Commission's work occurred in two stages. In the first stage, the plenary considered the reports of the Special Rapporteurs and the Drafting Committee completed its work. The real justification for a split session was to leave time for Special Rapporteurs and the secretariat, on the basis of the work done in that first half, to prepare documentation for consideration in the second half, at which point the Commission took up—for example—revised reports of the Drafting Committee, the report of the Planning Group, draft commentaries and, of course, the draft report of the Commission to the General Assembly. Thus, while he was wholly in favour of split sessions, he thought the wording of paragraph 84 none the less left a great deal to be desired.

17. Mr. CRAWFORD pointed out that the case for split sessions was actually made, not in paragraph 84, but in paragraph 81, which gave a number of arguments in favour, including the opportunity for the Drafting Committee to complete work in the first half, with the necessary follow-up and preparation of commentaries to be done in the interval before the second half. Paragraph 84 could be improved by deleting, from the first sentence the phrase "for example, reports which depend heavily on comments by States or on the summary

record of the previous year may need to be scheduled for the second part of the session". The paragraph would then concentrate on the planning of the split session, while the reasoning for the split would be entirely contained in paragraph 81.

18. Mr. PELLET said that that suggestion would not entirely dispel his concerns. He still maintained that reference should be made to a rational division of labour, such as the one he had just outlined, between the two halves of the session.

19. Mr. CALERO RODRIGUES said a measure of flexibility should be allowed for the actual division of labour between the two halves, and allowance should be made for the possibility of changing it from one session to the next. Though the breakdown sketched out by Mr. Pellet would be appropriate in some years, it would not in others. The reasons advanced by Mr. Pellet could be usefully incorporated in paragraph 81, however, and paragraph 84 redrafted along the lines suggested by Mr. Crawford, with mention of the need for flexibility and the possibility of dividing the work differently between the two halves in different years.

20. Mr. YANKOV said his experience as a special rapporteur confirmed the need for flexibility and pragmatism in determining the course to be followed in each individual session. At times it might be useful to schedule the consideration of two reports in the first half, and two in the second half. The Commission's tasks differed at different points in each quinquennium, the first year being particularly arduous. There were also time constraints. The General Assembly completed its deliberations and adopted its resolutions in December of each year, and special rapporteurs often wished to reflect that material in their reports. In order for a document to be distributed in all working languages for the Commission's session the following year, however, it had to be submitted by February. That placed a great burden on the Commission's secretariat.

21. Mr. PELLET, referring to paragraph 87B, said he found it shocking that only a single law review—and an English-language one at that—was cited as covering the Commission's work. Surely other publications also performed that service and could be mentioned.

22. Mr. CRAWFORD said references to other law reviews could readily be incorporated in the report.

Section VI, as amended, was adopted.

SECTION VII (The Commission's relationship with other bodies (within and outside the United Nations))

23. Mr. LUKASHUK noted that the statements at the present session by the representatives of the Asian-African Legal Consultative Committee and the European Committee on Legal Cooperation had revealed considerable overlapping between the topics being worked on by those bodies and by the Commission. It was an encouraging phenomenon, a sign of the relevance of the Commission's work, but also one that bespoke the need for increased coordination of the efforts of bodies working in the field of international law. It might be useful for the Commission to allow other forums to complete their

consideration of a given topic, and only then to address it itself, drawing on their work.

24. Mr. YANKOV said that the second subparagraph of paragraph 88 gave the impression that no work had been done to achieve coordination with other United Nations bodies. Reference should be made to instances of such coordination, for example, its work on the United Nations Convention on the Law of the Sea, when it had consulted FAO on fisheries and sedimentary resources; on the most-favoured-nation clause, when UNCITRAL had provided expert advice on arbitration and liability; and on the Convention on the Political Rights of Women, which the Economic and Social Council had adopted on the basis of a draft prepared by the Commission.

25. The Commission had also relied, and would increasingly rely on the advice of experts in technical fields. Advice of that kind had been invaluable in the work on the United Nations Convention on the Law of the Sea, and would be sorely needed if the Commission entered into the topic of environmental protection, for example. A reference could therefore be incorporated in the report to the Commission's involvement in work on new topics, for which technical expertise must be brought in through closer relations with specialized institutions.

26. Mr. VARGAS CARREÑO said that paragraph 89, describing cooperation with regional bodies for the codification and progressive development of international law, might usefully mention the work the Commission's secretariat could do in concert with the secretariats of such organizations. He would therefore suggest that the words "exchanges of documentation", at the end of paragraph 89, be replaced by "exchanges between the Commission's secretariat and that of the regional bodies for the codification and development of international law, especially in documentation".

Section VII, as amended, was adopted.

SECTION VIII (Possible revision of the statute)

27. Mr. PELLET said that the French version of paragraph 91 could be improved: *contient plus ou moins suffisamment de dispositions* was not an appropriate rendering of "makes more or less adequate provision".

28. Paragraph 94 raised issues that might merit consideration as part of a long-term process of revision of the statute. The fifth issue listed (whether topics involving codification and progressive development should be assimilated (including such matters as the use of a consultative group in all cases, etc.)) had already been mentioned in paragraph 93, however, and was superfluous. The second issue (whether a requirement for re-election should apply to members who are absent for an entire session without leave) was badly formulated in the French version, and in addition, seemed to be of minor importance.

29. The real problems lay with paragraph 95.² Did the Commission really wish to recommend to the General Assembly a revision of the statute? Certainly, such an exercise could be undertaken, but it seemed less important than work on more substantive—and potentially dangerous—matters. Paragraphs 91 to 93 aptly demonstrated that there was no real need for a revision of the statute, and that the modifications required in order for the Commission to function well in practice were possible even under the statute as it stood.

30. Mr. BENNOUNA said he fully agreed with Mr. Pellet and would even go so far as to suggest that the entire section should be deleted. The author of the report—he believed it was Mr. Crawford—had done an exemplary job but, perhaps carried away by inspiration, had gone a bit too far at the end. The general message conveyed in section VIII was the opposite of what was recommended in paragraph 95: that there was no need for revision of the statute. The matters set out in paragraph 94 had no bearing on the work of the Commission.

31. The CHAIRMAN pointed out that the report had been drafted by the Planning Group and submitted to the Enlarged Bureau. It did not exclusively reflect the views of a single member of the Commission.

32. Mr. CRAWFORD confirmed that the report was a collective endeavour and added that, in reality, he was opposed to three of the suggestions made in paragraph 94. He was none the less in favour of revision of the statute, if only to expunge anachronistic references, like the one to Franco's Spain, which he personally found repugnant. The real reason for the proposed revision was political: in the present circumstances, support in the General Assembly for a revision of the statute would amount to a renewal of the Commission's mandate. He would experience no difficulty if paragraphs 94 and 95 were deleted, but thought the ideas in paragraphs 91 to 93 deserved to be aired.

33. Mr. YANKOV said that previous speakers, particularly Mr. Crawford, had covered some of the points he wished to make. The Planning Group's proposal was perhaps unnecessarily detailed, but he agreed with the view expressed in paragraph 92 that some aspects of the statute warranted review as the Commission approached its fiftieth year. Article 26, paragraph 4, of the statute, which was mentioned in paragraph 92, was a good example in that regard. The recommendation that the "intergovernmental organizations whose task is the codification of international law could be broadened" to include others was worth making, but it should not be worded too rigidly and should not go into too much detail.

34. Mr. CALERO RODRIGUES said that he agreed with Mr. Yankov. The fiftieth anniversary of the Commission would be an appropriate time to revise the statute and particularly to raise the third item listed in para-

graph 94, namely, whether the system of re-election of the entire membership every five years could be replaced by a staggering of elections. True, the possibility of the entire membership being replaced at one time was largely theoretical, but it would be preferable if the statute could be adapted to preclude it. He could not agree that a review of the statute would be entirely unnecessary.

35. The CHAIRMAN said that staggered elections could indeed be useful. The possibility of renewal of the entire Commission was not desirable from the point of view of continuity.

36. Mr. ROSENSTOCK (Chairman of the Planning Group) said that, as Chairman of the Planning Group, he tended to resent the suggestion that the proposal in section VIII of the report was the brainchild of any one person. The Commission had, at the previous meeting, adopted the Planning Group's conclusions and recommendations, including that relating to the consolidation and updating of the statute. Accordingly, in the absence of a formal motion for reconsideration of the decision taken (2460th meeting), the recommendation in paragraph 95 of the report did not require further approval by the Commission. However, in order to meet some of the objections raised, he would suggest that the words "thorough revision" could be replaced by the single word "review". As for the five examples set out in paragraph 94, they had received strong support in the Planning Group, but the paragraph did not form part of the Planning Group's formal recommendation and for that reason did require the Commission's approval.

37. Mr. PELLET said that, having formed part of the working group which had prepared the report, he could testify that section VIII was not the invention of any one of its members. In his earlier remarks, he had not meant to condemn the entire section out of hand. He agreed with Mr. Calero Rodrigues that certain key suggestions, such as that for a staggering of elections, deserved consideration, although he did not share Mr. Yankov's view that certain anachronisms in the statute would justify a review; after all, the Charter of the United Nations itself was not completely blameless in that respect. His objection to section VIII was, rather, a matter of presentation and drafting. The Planning Group's report as a whole was a good document and it seemed a pity that its concluding section should, by comparison, seem rather lame.

38. Mr. VARGAS CARREÑO suggested that only the first sentence of paragraph 94 should be maintained, possibly as part of what was now paragraph 95. The examples contained in paragraph 94 were unnecessary at the present stage and could well be omitted.

39. Mr. AL-BAHARNA supported Mr. Rosenstock's suggestion to delete the word "thorough" in paragraph 95 and added that the recommendation could be made still more flexible by inserting the word "may" before "give thought".

40. Mr. CRAWFORD said that he favoured the suggestion made by Mr. Vargas Carreño. Some of the other matters listed in paragraph 94 were of a controversial

² The paragraph read:

"95. The Planning Group recommends that the Commission at its next session give thought to the possibility of recommending to the General Assembly a thorough revision of the statute to coincide with the fiftieth anniversary of the Commission in 1999."

nature and it would therefore be wise to dispense with the examples altogether, especially as the most important reason for seeking a review of the statute, namely, the renewal of the political mandate of the Commission, could not be mentioned. The best course would be to amalgamate paragraphs 94 and 95 and to omit the examples, thus leaving it for the next Commission to take up the matter in greater detail.

41. Mr. GÜNEY said he concurred with those remarks. The discussion had shown that most members were in favour of recommending a review of the statute, but that some had doubts as to the examples given in support of the recommendation. The solution suggested by Mr. Crawford could be satisfactory to all.

42. Mr. BENNOUNA said that, in the light of Mr. Crawford's and Mr. Rosenstock's remarks, he accepted that the recommendation for a revision of the statute was not the brainchild of any one person. However, he was still inclined to view the whole idea as a flight of the imagination. Merging paragraphs 94 and 95 along the lines suggested, possibly with a reformulation of paragraph 95 to indicate that the proposed revision would mainly consist in bringing the statute up to date, would make section VIII acceptable to him.

43. Mr. CALERO RODRIGUES said that he, too, would agree to an amalgamation of paragraphs 94 and 95, provided the reference to the replacement of the present system of re-election of the entire membership by a staggering of elections did not completely disappear.

44. Mr. HE said all members were agreed that the statute should be reviewed and that the most appropriate time for a review would be the year of the fiftieth anniversary of the Commission. The concrete proposals put forward in section VIII of the report reflected the views of all members of the Planning Group, and he was in favour of adopting them with some amendments as suggested in the course of the discussion.

45. Mr. MIKULKA said that he did not question the recommendation for a review of the statute and supported the idea that staggered elections deserved special attention. Nevertheless, for technical reasons, a system of rotation might well mean enlarging the size of the membership in order to avoid certain regions being disadvantaged. A larger membership was surely not desirable.

46. The CHAIRMAN suggested that the Commission should adopt section VIII on the understanding that paragraphs 94 and 95 would be redrafted in the light of the discussion.

It was so agreed.

Section VIII, as amended, was adopted on that understanding

Part II, as amended, was adopted.

47. After a short discussion in which Mr. PELLET and Mr. BENNOUNA took part, the CHAIRMAN suggested

that adoption of the report of the Planning Group as a whole should be deferred until a later meeting.

*It was so agreed.**

Draft Code of Crimes against the Peace and Security of Mankind³ (concluded) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3⁴)**

[Agenda item 3]

48. The CHAIRMAN suggested that the Commission should embark on a preliminary exchange of ideas concerning the recommendation on the draft Code of Crimes against the Peace and Security of Mankind it wished to submit to the General Assembly. A formal decision would be taken after the Commission had adopted the commentaries to the articles.

49. Mr. BENNOUNA said that the question involved more than procedure. The provisions of the Code ranked virtually as peremptory norms of international law and considerable difficulty would be created if the Code was submitted to the treaty procedure. It would be preferable for the Commission to recommend to the General Assembly that the Code should be adopted, directly and by all States, on the basis of a consensus, possibly in a resolution of the General Assembly, as had been the case with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations⁵ and the Definition of Aggression.⁶ Such a resolution would carry the stamp of universality.

50. Mr. de SARAM said he tended at that preliminary stage to take a somewhat different view. The articles of the Code had to a large extent been drafted in the light of existing conventions and were essentially such that they should be embodied in a treaty. Consequently, while a declaration by the General Assembly would have the advantage of simplicity, Governments should be allowed every opportunity to review the articles carefully, on the basis of specialist advice, in their own countries. Also, the Commission should not count on the possibility of any provisions included in a declaration of the General Assembly being deemed, after some time, to have become part of general international law.

51. Mr. ROSENSTOCK said that, while he shared many of Mr. de Saram's concerns, he was not altogether convinced that the treaty route was the only one. The Code would be before the Preparatory Committee on the international criminal court which was to meet in August

* The report of the Planning Group as a whole was adopted at the 2473rd meeting, under chapter VII of the report of the Commission on the work of its forty-eighth session.

** Resumed from the 2454th meeting.

³ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

⁴ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

⁵ See 2458th meeting, footnote 7.

⁶ See 2445th meeting, footnote 7.

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

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

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

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

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

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

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

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

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

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

The meeting rose at 5.30 p.m.

2462nd MEETING

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

Chairman: Mr. Ahmed MAHIU

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

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

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

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

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

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

2. Mr. ROSENSTOCK said he had noted that crimes against humanity did not include "imprisonment". He had learned from his discussions with other members of the Commission that, on first reading, it had adopted a text based word for word on the Charter of the Nürnberg Tribunal.¹ Between that first reading and the current session, however, the International Tribunal for the Former Yugoslavia² and the International Tribunal for Rwanda³ had been set up and their statutes did provide for the crime of "imprisonment". As that crime would probably have been committed in the regions where the Code was to be applied, it must be included among the types of conduct which the Code would punish. He intended to raise that question again during the consideration of the commentary to article 18 (Crimes against humanity), in which the necessary reference might be included in connection with the "other inhumane acts" listed in article 18 (j).

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

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

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

that the present Code covers exhaustively all crimes . . .".

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

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

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

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

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

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

Paragraph (3)

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

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

Paragraph (3) was adopted.

Paragraph (4)

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

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

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

Paragraph (4) was adopted.

¹ See 2439th meeting, footnote 5.

² See 2437th meeting, footnote 6.

³ Ibid., footnote 7.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

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

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

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

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

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

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

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

Paragraph (9), as amended, was adopted.

Paragraph (10)

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

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

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

Paragraph (10), as amended, was adopted.

Paragraph (11)

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

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

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

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

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

Paragraph (11) was adopted.

Paragraph (12)

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

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

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

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

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

Paragraph (12) was adopted on that understanding.

Commentary to article 2 (Individual responsibility)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

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

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

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

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

Paragraph (3)

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

38. Mr. PELLET said that he also objected to the last sentence of the paragraph, in which the Commission recognized “that there might be other crimes of the same character that were not covered by the Code”. His con-

cerns about the scope of the Code were much the same as Mr. Lukashuk’s.

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

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

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

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

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

Paragraph (3), as amended, was adopted.

Paragraph (4)

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

Paragraph (4), as amended, was adopted.

Paragraph (5)

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

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

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

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

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

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

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

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

Paragraph (6)

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

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

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

Paragraph (7)

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

porteur himself should amend the text to make it more concise and bring out its meaning more clearly.

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

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

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

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

It was so decided.

Paragraph (8)

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

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

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

Paragraph (8), as amended, was adopted.

Paragraph (9)

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

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

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

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

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

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

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

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

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

Paragraph (12), as amended, was adopted.

Paragraph (13)

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

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

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

Paragraph (13) was adopted on that understanding.

Paragraph (14)

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

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

Paragraph (14) was adopted.

Paragraphs (15) and (16)

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

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

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

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

Paragraph (17)

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

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

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

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

Paragraph (17) was adopted on that understanding.

Paragraph (18)

Paragraph (18) was adopted.

The meeting rose at 1 p.m.

2463rd MEETING

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

Chairman: Mr. Ahmed MAHIOU

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

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

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

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

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

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

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

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

Paragraph (7), as amended, was adopted.

New paragraph (8)

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

“(8) It is, in any event not necessary for an individual to know in advance the precise punishment so long as he knows that the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgment¹ and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

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

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

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

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

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

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

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

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

sion of another maxim, *ignorantia juris neminem excusat*. The two issues must not be confused.

11. Mr. ROSENSTOCK said that he would have no difficulty in deleting the words "he knows that" from his proposal, to meet Mr. Lukashuk's point, but he did attach considerable importance to a paragraph along the lines he was proposing.

12. Mr. VARGAS CARREÑO said that he fully shared Mr. Lukashuk's concern and was therefore pleased that Mr. Rosenstock had agreed to delete the words in question.

13. Mr. FOMBA, agreeing with Mr. Mikulka, said the main point was that the accused was bound to know that an accusation of a crime against the peace and security of mankind was an extremely grave matter and consequently must know that he would be punished accordingly if he committed such a crime.

14. The CHAIRMAN suggested, in the light of the discussion, that the Commission should adopt Mr. Rosenstock's proposal for a new paragraph (8), with the deletion of the words "he knows that".

It was so agreed.

New paragraph (8), as amended, was adopted.

The commentary to article 3, as amended, was adopted.

Commentary to article 4 (Responsibility of States)

Paragraph (1)

15. Mr. CALERO RODRIGUES proposed that, in the penultimate phrase, the words "with a State" should be added after "de facto relationship".

16. Mr. de SARAM said that he would prefer to delete the whole phrase, with or without the words proposed by Mr. Calero Rodrigues. It touched upon the question of State responsibility and it was going too far to suggest that any form of de facto relationship with a State would engage State responsibility.

17. Mr. THIAM (Special Rapporteur) said there were indeed instances in which a simple de facto relationship could engage the responsibility of a State. If the Commission wished to delete the phrase, so be it, but it was merely a statement of fact which appeared in the commentary.

18. Mr. FOMBA said that the Special Rapporteur was right, but if it was decided to omit the phrase, that should not affect the balance of the paragraph too much.

19. Mr. de SARAM said that, even if the statement appeared only in the commentary, it none the less represented the Commission's opinion. He did not doubt that an individual might commit a crime while in a de facto relationship with a State, but that could be regarded as involving State responsibility. For that reason, he would prefer to delete the phrase.

20. Mr. CALERO RODRIGUES said that the question of de facto relationships had been dealt with in the draft

articles on State responsibility in article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State). The commentary to that article¹ explained the circumstances under which a de facto relationship might exist. Article 8, subparagraph (b), referred to the case where a person or group of persons was exercising elements of the governmental authority in the absence of the official authorities. There, the Commission was focusing on circumstances in which, for one reason or another, the regular administrative authorities had disappeared. For example, during the Second World War, local authorities had sometimes fled from an invading or liberation army and persons acting on their own initiative had provisionally taken over the management of certain public concerns or had exercised elements of the governmental authority. It was also possible for private persons acting on their own initiative to assume functions of a military nature.

21. The Commission had decided that in such situations the responsibility of the State might be engaged. The inclusion in paragraph (1) of the commentary to article 4 of the draft Code of a reference to a simple de facto relationship was based on the same reasoning as that underlying article 8 of the draft on State responsibility.

22. Mr. ROSENSTOCK proposed that the word "simple" should be deleted because it indicated a degree of casualness which might give rise to concern.

23. Mr. THIAM (Special Rapporteur) said that he had no objection to deleting the word "simple". He would also point out that the concept of persons acting on behalf of the State was recognized in domestic law, in particular in administrative law.

Paragraph (1), as amended, was adopted.

Paragraph (2)

24. Mr. LUKASHUK proposed that the last sentence, which was somewhat naive in the context, should be deleted.

Paragraph (2), as amended, was adopted.

The commentary to article 4, as amended, was adopted.

Commentary to article 2 (Individual responsibility) (concluded)

25. The CHAIRMAN invited the Commission to revert to its consideration of paragraphs (5), (6) and (7) of the commentary to article 2, which had been left in abeyance at the previous meeting.

Paragraph (5) (concluded)

26. The CHAIRMAN reminded the Commission that Mr. Calero Rodrigues had submitted a proposal at the previous meeting, the English text of which had now been finalized and read:

"(5) Article 2, paragraph 2, deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3

¹ See *Yearbook . . . 1974*, vol. II (Part One), pp. 283 et seq.

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

27. Mr. ROSENSTOCK said that he could accept the replacement of the first sentence of paragraph (5) by the new sentence proposed. However, the second sentence, and the fourth and fifth sentences, which referred to the distinguishing features of the crime of aggression, should not be deleted from the original paragraph (5).

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (5) as proposed by Mr. Calero Rodrigues, provided the sentences indicated by Mr. Rosenstock were re-incorporated into the text.

It was so agreed.

Paragraph (5), as amended, was adopted.

Paragraph (6) (concluded)

29. Mr. CALERO RODRIGUES proposed that the first sentence of paragraph (6) should remain and that the rest of the paragraph should be replaced by the following:

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

The purpose of the proposed commentary was to explain why the Commission had decided to make express reference in article 2 to crimes which were actually committed or at least attempted.

30. Mr. ROSENSTOCK said that in the last sentence of the proposed amendment, the words "does not pretend" should be replaced by "does not purport".

Paragraph (6), as amended, was adopted.

Paragraph (7)

31. The CHAIRMAN drew the attention of the Commission to the amended version of paragraph (7). At the end of the second sentence, following "for this conduct", the words "under the present subparagraph" had been deleted. The third and seventh sentences in paragraph (7) had been deleted in their entirety.

32. Mr. ROSENSTOCK said that he would prefer to retain the seventh sentence.

33. Mr. VILLAGRÁN KRAMER said he too wished to maintain the seventh sentence of paragraph (7). Furthermore, he did not understand why the third sentence, which referred to the Nürnberg Tribunal, should be eliminated.

34. The CHAIRMAN said that if members did not insist on the proposed deletions, he would take it that the Commission wished to adopt paragraph (7) as it stood.

Paragraph (7) was adopted.

The commentary to article 2, as amended, was adopted.

Commentary to article 1 (Scope and application of the present Code) (concluded)

35. The CHAIRMAN drew the attention of the Commission to paragraph (3 bis), proposed by Mr. Pellet, which read:

"(3 bis). After lengthy debate, the Commission decided not to provide a general definition of crimes against the peace and security of mankind. It considered that State practice should determine the precise boundaries of the notion, which is a result of merging in a single concept the crimes against peace, war crimes and crimes against humanity distinguished in article 6 of the Charter of the Nürnberg Tribunal."

36. Mr. BENNOUNA said that it was not accurate, in legal terms, to assert that the notion of crimes against the peace and security of mankind had arisen from merging the three types of crimes in a single concept. Moreover, the use of the words "notion" and "concept" in referring to the same idea gave rise to confusion. He proposed that in the last sentence the words "to determine the precise boundaries of the notion, which is a result of merging in a single concept" should be replaced by "to determine the precise boundaries of the concept, which encompasses crimes against peace, war crimes and crimes against humanity".

37. Mr. ROSENSTOCK said that the words "After lengthy debate" should be deleted because they were not relevant. The rest of the paragraph was difficult to understand and he was not convinced that it accurately reflected the Commission's views. Nevertheless, if the majority wished to adopt the paragraph, he would join the consensus.

38. Mr. THIAM (Special Rapporteur) said it was true that there had been lengthy debate on whether to provide a general definition of crimes against the peace and security of mankind. In response to Mr. Bennouna's objec-

tion, he pointed out that, in his first report,² the three types of crimes had been placed in separate categories and the Commission had decided that they should be merged into one category. Moreover, all the literature and the experts on international criminal law were in agreement that the crimes in question should now be considered as a single concept.

39. Mr. VILLAGRÁN KRAMER said that according to the general theory of law, laws could not be merged. Rather, one law presupposed incorporation in another. The reference in the proposed text to the merging of three categories in a single concept did not correspond to the philosophy of law. He suggested, therefore, that the last part of the paragraph: “which is a result of . . .” should be deleted, although a reference to article 6 of the Charter of the Nürnberg Tribunal could be retained.

40. Mr. BOWETT said he wondered why the Commission needed a general definition of crimes against the peace and security of mankind when the individual crimes had already been defined.

41. The CHAIRMAN said that many requests for a general definition had been made, both in the Commission and in the Sixth Committee. It was therefore advisable for the Commission to explain that it had discussed the question at great length and had finally decided not to provide such a definition.

42. Mr. de SARAM said the statement that crimes against the peace and security of mankind derived from categories distinguished in article 6 of the Charter of the Nürnberg Tribunal imposed a limit on the concept of crimes against the peace and security of mankind, a concept that was much broader than what the Commission had established in the Code. With regard to the first sentence of the proposed text, the Commission had decided at the previous meeting that it should not refer in the commentary to the nature of the discussions it had held.

43. Mr. THIAM (Special Rapporteur) said that the reference to the lengthy debate did reflect what had actually taken place.

44. Mr. LUKASHUK said that the proposed commentary did not clarify the article and only gave rise to more debate.

45. Mr. CALERO RODRIGUES said that it was time for the Commission to stop discussing details. He was willing to accept paragraph (3 bis) as proposed, as long as the Commission moved ahead in its work.

46. Mr. PELLET said that he could accept the idea of deleting the first sentence and changing the wording in the way proposed by Mr. Bennouna. The result would, however, be minimalist and would fail to clarify how the Commission had arrived at the concept of crimes against the peace and security of mankind.

47. The CHAIRMAN read out the amended text of paragraph (3 bis):

“(3 bis). The Commission decided not to provide a general definition of crimes against the peace and security of mankind. It considered that State practice should determine the precise boundaries of the notion, which encompasses the crimes against peace, war crimes and crimes against humanity distinguished in article 6 of the Charter of the Nürnberg Tribunal.”

48. Mr. BENNOUNA said that the word “notion” should be replaced by “concept”.

Paragraph (3 bis), as amended, was adopted.

The commentary to article 1, as amended, was adopted.

Commentary to article 5 (Order of a Government or a superior) (A/CN.4/L.527/Add.3)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

49. Mr. ROSENSTOCK suggested that the words “the defence most frequently raised”, in the first sentence, should be replaced by “most frequently claimed as a defence”.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to article 5, as amended, was adopted.

Commentary to article 6 (Responsibility of the superior)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

50. Mr. CALERO RODRIGUES suggested that the words “of Additional Protocol I” should be inserted after “article 86”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to article 6, as amended, was adopted.

Commentary to article 7 (Official position and responsibility)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted, subject to an editing change in the French version of paragraph (2).

² Yearbook . . . 1983, vol. II (Part One), p. 137, document A/CN.4/364.

Paragraph (7)

51. Mr. BENNOUNA suggested that the last sentence should be placed at the beginning of the paragraph.

Paragraph (7), as amended, was adopted.

The commentary to article 7, as amended, was adopted.

Commentary to article 8 (Establishment of jurisdiction) (A/CN.4/L.527/Add.4)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. CALERO RODRIGUES noted that, as the Commission had agreed at the previous meeting, the use of the word "instance" should be avoided. He would therefore suggest that the first sentence of paragraph (2) should read:

"Article 8 establishes two separate jurisdictional regimes: one for the crimes set out in articles 17 to 20 and another for the crime set out in article 16."

Paragraph (2), as amended, was adopted.

Paragraph (3)

53. The CHAIRMAN suggested that consideration be given to whether the phrase "crimes against United Nations and associated personnel" should be retained in the list of the most serious crimes set out in the first sentence.

Paragraph (3) was adopted, on that understanding.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

54. Mr. ROSENSTOCK recalled that, in accordance with the understanding reached at the previous meeting, the last sentence of paragraph (5) should be deleted.

It was so agreed.

55. Mr. BENNOUNA, supported by Mr. PELLET, noted that the French version of the paragraph was defective and suggested that it should be reviewed for editorial consistency.

Paragraph (5), as amended, was adopted, on that understanding.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

56. Mr. CALERO RODRIGUES pointed out that the phrases "in the first instance" and "in the second instance", in the first sentence of paragraph (7), should be deleted, in line with the understanding he had already mentioned in connection with paragraph (2).

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

Paragraph (12)

57. Mr. BOWETT suggested that the phrase "rather than by a limited number of States acting on their own behalf", in the fourth sentence, should be deleted, as it appeared to cast aspersions on the work of the Nürnberg Tribunal.

58. Mr. ROSENSTOCK said he had no objection to the proposal, but it should be clearly pointed out that that part of the commentary was intended to preclude the possibility of two States setting up a bilateral institution and proclaiming it a court for the purposes of asserting jurisdiction over international crimes.

It was so agreed.

59. Mr. de SARAM suggested that the sixth sentence should be deleted. It set out modalities for establishing an international criminal court, but thus contradicted the seventh sentence, which stated that article 8 was not intended to indicate the method for establishing such a court.

Paragraph (12), as amended, was adopted.

Paragraph (13)

60. Mr. CALERO RODRIGUES queried the wording of the last part of the second sentence: "jurisdiction of the State which has committed aggression". The phrase implied a judgement as to the criminal act of a State. Rather, the reference should be to the jurisdiction of a State over its nationals.

61. Mr. ROSENSTOCK said that the phrase did sound peculiar, but it was correct and necessary. The reference was to aggression, a crime which, under the Code, could only be tried by an international court. The Code also provided that aggression was an act committed by a State, although an individual could be involved in planning it, for example. A State party was not precluded from trying its nationals for aggression—namely, nationals of the State that committed the aggression.

62. Mr. CALERO RODRIGUES said he still preferred a reference to the jurisdiction of a State over its nationals. While an individual might contribute to aggression committed by his or her own State, he or she could equally well contribute to aggression committed by another State. In some cases, a national of a given State could easily be involved in the politics or actions of a neighbouring State.

63. Mr. ROSENSTOCK said that, unfortunately, the faulty drafting of article 8 itself allowed for the interpretation given by Mr. Calero Rodrigues. It might be necessary to revise the formulation of the article. The intention was to permit a State that had formerly been under a rogue regime, and had committed aggression under that regime, to try its own nationals, including the leaders of the regime, for the crime of aggression. If there were no such provision, the basic message of article 8, which was that aggression should be adjudicated only by an international tribunal, would be undone. Only very limited

exceptions from that rule were to be allowed: to permit Uganda to try Idi Amin Dada, for example, or to prevent Iraq from claiming jurisdiction over Kuwaiti citizens involved in the Gulf war.

64. The CHAIRMAN suggested that the words “over its own nationals” should be inserted before “of the State” in the second sentence of the paragraph, in order to take account of the concerns expressed by Mr. Rosenstock.

65. Mr. ROSENSTOCK endorsed that suggestion.

66. Mr. THIAM (Special Rapporteur) said that he, too, could go along with the suggestion, particularly as it reflected the form of language used in article 8 itself.

67. Mr. MIKULKA said that, since all members of the Commission were in agreement on the commentary, which was intended to rectify a shortcoming in the drafting of article 8, perhaps it would be worthwhile to go back to the source of the problem and correct the wording of article 8 to make the meaning clearer.

68. The CHAIRMAN said he did not agree that article 8 needed to be revised.

69. Mr. MIKULKA said that such a revision was not absolutely necessary, but the need for extensive commentary to preclude the possibility of misinterpretation of article 8 would be obviated if article 8 was better worded. Now, it could be construed as meaning that a State that had not committed the crime of aggression could punish for that crime an individual who was a national of that State. Yet the Commission’s intention, about which everyone agreed, was to enable a State that had itself committed the crime of aggression to punish its own citizens, including former leaders, at a later stage.

70. Mr. CALERO RODRIGUES said he questioned whether all members of the Commission were in fact agreed on that single interpretation of article 8. He had understood the article to allow any State party to try its own nationals for the crime of aggression. He requested clarification on whether, when article 8 had been adopted, it had been decided that the interpretation given by Mr. Mikulka and Mr. Rosenstock was the proper one.

71. Mr. THIAM (Special Rapporteur) said that, to his recollection, the provision in question had been adopted in plenary following a proposal by Mr. Kabatsi supported by Mr. Lukashuk and Mr. Pellet.

72. Mr. BENNOUNA said that the commentary did not explain clearly enough the precise meaning of the second sentence of article 8. He could envisage a situation in which a State party trying its own nationals might be precluded by that provision from trying a national of another State who had acted as an accomplice to the crime. The difficulty appeared to be more than a simple matter of drafting and he therefore suggested that a small group including the Special Rapporteur and, possibly, Mr. Rosenstock and Mr. Lukashuk should be appointed to consider paragraph (13).

73. The CHAIRMAN said that the suggestion was a useful one and invited a small group consisting of the Special Rapporteur, Mr. Rosenstock, Mr. Calero Rodrigues and Mr. Mikulka to meet to consider possible amendments to the commentary relating to the second sentence of article 8. Paragraph (13) would in the meantime remain in abeyance.

It was so agreed.

74. Mr. MIKULKA said that he agreed to join the small working group, but would point out that the second sentence of article 8 had been adopted rather hurriedly with no thought given to problems such as dual nationality. In his earlier remarks, he had had no intention whatever of challenging Mr. Calero Rodrigues’ interpretation, but as he recalled, everyone at the time had understood the sentence to mean what Mr. Rosenstock had said it meant. The Commission should not be too rigid about the possibility of amending the text of article 8 in the interests of avoiding misunderstanding.

75. Mr. CALERO RODRIGUES requested the Chairman to invite the secretariat to provide the small working group with information about the precise history of the adoption of the provision in question.

76. The CHAIRMAN assured the members of the small working group that all necessary information would be placed before them.

77. Mr. THIAM (Special Rapporteur) said that he could recollect no previous case of an article being amended in plenary at the stage of adoption of the commentary. However, he did recognize that there was a problem in the present instance.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

78. Mr. CALERO RODRIGUES suggested that the paragraph should be left in abeyance pending the proposals of the small working group set up in connection with paragraph (13).

It was so agreed.

Commentary to article 9 (Obligation to extradite or prosecute)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

79. Mr. BENNOUNA, referring to the fourth sentence, suggested that the words “and trial” should be inserted between the words “the prosecution” and “of such an individual”.

80. The CHAIRMAN, pointing out that the article itself referred to extradition or prosecution but not to trial, remarked that prosecution did not necessarily lead to trial. It would be best to leave paragraph (3) of the com-

mentary as it stood or in any case to request the Special Rapporteur to verify whether Mr. Bennouna's proposal is acceptable under criminal law.

81. Mr. ROSENSTOCK and Mr. THIAM (Special Rapporteur) concurred.

82. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (3), on the understanding that the words "and trial" would be inserted in the fourth sentence.

Paragraph (3) was adopted on that understanding.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

The commentary to article 9, as amended, was adopted.

Commentary to article 10 (Extradition of alleged offenders)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

83. Mr. CALERO RODRIGUES suggested that, in the interests of greater clarity, the words "for extradition" should be inserted between the words "a request" and "and thereby fulfil" in the fourth sentence.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to article 10, as amended, was adopted.

Commentary to article 11 (Judicial guarantees) (A/CN.4/L.527/Add.5)

Paragraphs (1) to (15)

Paragraphs (1) to (15) were adopted.

Paragraph (16)

84. Mr. BOWETT suggested that the words "to defend against the charges", in the first sentence, should be replaced by "to defend himself against the charges" or "to offer defence against the charges".

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21)

Paragraphs (17) to (21) were adopted.

The commentary to article 11, as amended, was adopted.

Commentary to article 12 (Non bis in idem)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

85. Mr. ROSENSTOCK proposed that the word "committed", in the first sentence, should be replaced by "been accused of", that the words "by a given State" should be inserted before "for the same crime" in the second sentence, that the word "lightly" should be inserted between the words "not" and "be required" in the third sentence. Lastly, the phrase "and would violate the general principle of proportionality" at the end of the paragraph should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

86. Mr. ROSENSTOCK proposed that the words "As a compromise," at the beginning of the paragraph should be deleted and that the words "has attempted to strike", in the third sentence, should be replaced by "has struck". In line with the observations he had made at the previous meeting, he also proposed the words "Some members of", at the beginning of the second sentence should be omitted.

87. The CHAIRMAN suggested that the Special Rapporteur should be requested to review the wording of the second sentence.

Paragraph (4) was adopted on that understanding.

Paragraphs (5) to (13)

Paragraphs (5) to (13) were adopted.

The commentary to article 12, as amended, was adopted.

The meeting rose at 6 p.m.

2464th MEETING

Thursday, 18 July 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIU

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

Visit by a member of the United Nations Administrative Tribunal

1. The CHAIRMAN welcomed Mr. Balanda, a member of the United Nations Administrative Tribunal and a former member of the Commission.

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

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

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

2. The CHAIRMAN invited the members of the Commission to continue their consideration of the commentaries to the articles of the draft Code of Crimes Against the Peace and Security of Mankind, starting with article 13.

Commentary to article 13 (Non-retroactivity) (A/CN.4/L.527/Add.5)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

3. Mr. ROSENSTOCK said that, in accordance with the principle that had been adopted for all of the commentaries to the articles, paragraph (2) should be deleted.

Paragraph (2) was deleted.

Paragraph (3)

4. Mr. LUKASHUK (Rapporteur), said that the last sentence stated an obvious fact and could therefore be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

5. Mr. LUKASHUK (Rapporteur) referring to the fourth sentence, said that an individual might be tried and punished for the crime of genocide under national law as well because, in some countries, the Convention on the Prevention and Punishment of the Crime of Genocide was directly applicable or had been incorporated into national law. The fourth sentence should perhaps say so.

6. The CHAIRMAN said that the secretariat would make the necessary addition.

7. Mr. ROBINSON recalled that, when article 13 itself had been considered, the Commission's attention had been drawn to what had appeared to be a gap, namely, that there was no reference to the principle of non-retroactivity in respect of heavier penalties. That omis-

sion might be corrected by adding the following sentence at the end of paragraph (4):

“The principle of non-retroactivity as outlined in this article applies also to the imposing of a penalty which is heavier than the one that was applicable at the time when the criminal offence was committed.”

8. Mr. THIAM (Special Rapporteur) said that he had no objection to that sentence.

9. Mr. ROSENSTOCK said that that sentence was unnecessary and might therefore give rise to problems, but he would not object to it.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

10. Mr. LUKASHUK said that, in his opinion, there was no general principle of the supremacy of international law. The last two sentences should therefore be deleted.

11. Mr. ROBINSON said he had intended to propose an amendment to paragraph (6) along the lines of Mr. Lukashuk's suggestion. The first sentence would end after the words “national law”, the second sentence would be deleted and the third sentence would begin with the word “However,”, with the rest of the sentence being unchanged.

12. Mr. ARANGIO-RUIZ said that the second sentence was perhaps clumsy, but the existence of a hierarchy between national law and international law had to be recognized and it was, moreover, provided for in the constitutions of many States. National law was, of course, sovereign at the national level, but, at the international level, States were all subject to international law and could not invoke the provisions of their national law to justify a violation of international law.

13. The CHAIRMAN said that scholarly debates should be avoided and that Mr. Robinson's proposal, which was quite specific, would take care of the problem.

14. Mr. ROSENSTOCK said that he fully agreed with the comments by Mr. Arangio-Ruiz and considered that the second sentence could be left as it stood. The amendment proposed by Mr. Robinson was, however, not at all incompatible with the opinion expressed by Mr. Arangio-Ruiz.

15. Mr. PELLET said that, although he also belonged to the dualist school, he did not agree with Mr. Arangio-Ruiz. It was not accurate to refer to the supremacy of international law. At most, reference could be made to the superiority of that law, and only from the point of view of international law.

16. Mr. CALERO RODRIGUES said that, quite apart from the scholarly debate on the hierarchy between national law and international law, the second sentence

should be deleted for the simple reason that it had absolutely no bearing on the text of article 13.

17. Mr. BARBOZA said that the second sentence could be left as it stood, but the third sentence should be deleted because it reflected an idea already expressed in the first sentence.

18. Mr. FOMBA said that he could agree to Mr. Robinson's proposal if it could help to solve the problem that some members had in agreeing that there was a general principle of the supremacy of international law. Saying that national law had to be consistent with international law nevertheless implied that there was some kind of hierarchy.

19. Mr. EIRIKSSON said the problem was that the Commission was trying to add a condition to the commentary that was not contained in article 13, paragraph 2, which referred to national law without any further qualification. The problem might be solved by indicating in the commentary that paragraph 2 did not allow the trial and conviction of an individual under provisions of national law that were not consistent with international law.

20. Mr. AL-BAHARNA said that he agreed with Mr. Calero Rodrigues that the second sentence should be deleted.

21. Mr. BENNOUNA, supported by Mr. THIAM (Special Rapporteur) and speaking on a point of order, requested the Chairman to stop the theoretical discussion so that the Commission could continue its consideration of the commentaries to the articles.

22. The CHAIRMAN said that the Special Rapporteur would amend paragraph (6) to take account of the comments that had been made.

Paragraph (6) was adopted on that understanding.

The commentary to article 13, as amended, was adopted.

23. The CHAIRMAN invited the members of the Commission to refer to the working paper, dated 17 July 1996, which had been distributed to them and which contained a revised version of the commentaries to articles 14, 15, 17, 18 and 19.

24. Mr. ROSENSTOCK said that there had generally been no need to shorten the commentaries under consideration. The Commission had decided otherwise, but he personally preferred the earlier version.

Commentary to article 14 (Defences) (A/CN.4/L.527/Add.6/Rev.1)

25. Mr. ROBINSON said that the commentary to article 14 did not explain that provision. The applicable general principles of law should have been stated by reference to the decisions of international and national courts. It would have been useful for the competent court to have a statement of the general principles of law that could guide it in its assessment of the existence of defences.

26. Mr. LUKASHUK (Rapporteur) said that he was all the more in agreement with Mr. Robinson in that some commentaries seemed to deal not with defences, but with extenuating circumstances.

Paragraph (1)

Paragraph (1) was adopted.

27. After an exchange of views in which Messrs. de SARAM, CRAWFORD, ROBINSON, ROSENSTOCK, THIAM (Special Rapporteur), CALERO RODRIGUES and EIRIKSSON took part, the CHAIRMAN suggested that the Commission should come back later to the commentary to article 14, as well as to the commentaries to articles 15 and 16.

It was so decided.

Commentary to article 17 (Crime of genocide)

Paragraphs (1) and (2)

28. Mr. PELLET said that he was generally dissatisfied with the commentary to article 17. It did not give enough examples, although national and international jurisprudence did exist. That point of view was to be contrasted with the commentary to article 19 on crimes against United Nations and associated personnel, which was nevertheless an entirely new example.

29. The CHAIRMAN said he understood Mr. Pellet's concern that there should be more frequent references to jurisprudence and doctrine, particularly as ICJ had just handed down an advisory opinion on the crime of genocide.

Paragraphs (1) and (2) were adopted.

Paragraph (3)

30. Mr. LUKASHUK (Rapporteur) said that the fourth sentence was too wordy. It should be shortened and combined with the fifth sentence, to read: "Article II of the Convention provides a definition of the crime of genocide in terms of the necessary intent and the prohibited acts."

31. Mr. MIKULKA and Mr. ROSENSTOCK said that the paragraph should be retained as it stood because, otherwise, its various parts would not make sense.

Paragraph (3) was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

32. Mr. LUKASHUK (Rapporteur) said that the words "state of mind" should be deleted. It was enough to refer to "intent".

Paragraph (5), as amended, was adopted.

Paragraph (6)

33. Mr. LUKASHUK (Rapporteur) said that, in his opinion, paragraph (6) should be divided up because it was too long.

34. Mr. PELLET said that the words “from every corner of the globe” at the end of the tenth sentence were inappropriate. The words “throughout the world” or some similar expression would be better.

35. Mr. CRAWFORD, referring to the eleventh sentence, said he had doubts about the definition of the crime of genocide requiring the intention to destroy “at least a substantial part of a particular group”, since the word “substantial” was not contained in the Convention on the Prevention and Punishment of the Crime of Genocide itself. That objective implied that, if the crime of genocide was to exist, a proportion of a particular group had to be targeted. That shade of meaning was important because it was quite likely that some individuals would soon be tried for that crime and there must be no ambiguity. In his view, the eleventh sentence and the related footnote should be deleted.

36. Mr. ROSENSTOCK and Mr. THIAM (Special Rapporteur) said that the main constituent element of the crime of genocide was intent. The number of victims was not directly relevant.

37. Mr. KABATSI said that, if the number of victims was not relevant, the word “substantial” should be deleted, as Mr. Crawford had suggested.

38. Mr. PELLET, supported by Mr. ROBINSON, proposed that, in the eleventh sentence, the words “involves a multiplicity of victims which” should be deleted.

39. Mr. BARBOZA said that, if there must be intent in order for genocide to exist, intent must, according to the definition of that crime, involve “a multiplicity of victims”. He would, however, not object to the deletion of that term.

40. Mr. CRAWFORD proposed that the eleventh sentence should be amended to read:

“Nonetheless, the crime of genocide, by its very nature, involves the intention to destroy at least a substantial part of a particular group in circumstances which amount to an attack on the group as such.”

41. The CHAIRMAN suggested that, with the assistance of the secretariat, the Special Rapporteur should redraft the commentary in the light of the various opinions expressed during the discussions.

42. Mr. PELLET said he was not sure about the method of allowing the Special Rapporteur and the secretariat to prepare the final text. He asked when the Commission would have an opportunity to see the commentary in its final form.

43. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (6) on the understanding that it would be amended in the light of the comments which had been made.

Paragraph (6) was adopted on that understanding.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

44. Mr. ROBINSON said that the end of the last sentence was unnecessary and suggested that the entire sentence should be amended to read:

“The Commission decided in favour of that solution because the present Code is a criminal Code and has to reflect the *nullum crimen sine lege* principle.”

45. The penultimate sentence stated that the list of acts prohibited in article 17 was exhaustive. Such a statement might give the impression that the same was true of all the lists of crimes contained in the Code, but, if his memory served him correctly, that was not the case, for example, of the list of war crimes. He therefore wondered whether the reference to the *nullum crimen sine lege* principle should not simply be deleted.

46. The CHAIRMAN said that that did give rise to a problem of consistency.

47. Mr. ROSENSTOCK said that reference in question had been maintained to keep the text close to the draft Code adopted by the Commission in 1954, but there was no reason why it could not be deleted. Moreover, if the last sentence as from the words “and the need” gave rise to problems because the words “not to stray too far from a text widely accepted” were not very felicitous, it could be drafted differently.

48. Mr. CRAWFORD suggested that the entire sentence should be amended to read: “The Commission decided in favour of that solution having regard to the need to conform with a text widely accepted by the international community”.

It was so agreed.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (17)

Paragraphs (9) to (17) were adopted.

The commentary to article 17, as amended, was adopted.

*Commentary to article 18 (Crimes against humanity)**

49. Mr. ROSENSTOCK, commenting on the text of article 18, said that, among the crimes against humanity that were listed, the detention of some groups of persons in camps, as had unfortunately been the case in Yugoslavia, Rwanda and elsewhere, had apparently been forgotten. He therefore proposed that a new subparagraph entitled “imprisonment” should be added between subparagraphs (d) and (e). The draft Code would thus be

* Article 18 was adopted as article 17 by the Commission at its 2445th meeting.

brought into line with other modern-day texts, such as the statute of the International Tribunal for Rwanda¹ and the statute of the International Tribunal for the Former Yugoslavia,² according to which "imprisonment" was a crime against humanity.

50. Mr. THIAM (Special Rapporteur) said that he had no objection to the inclusion of imprisonment in the list of crimes referred to in article 18, but that term should perhaps be qualified because "imprisonments" were not all unlawful and were not necessarily crimes against humanity.

51. Mr. BOWETT said that he agreed with the Special Rapporteur. It should perhaps be made clear that imprisonment without trial was what was meant, although that could be stated in the commentary.

52. Mr. de SARAM said that that explanation was not necessary. If the definition at the beginning of article 18 was read carefully, it was obvious that not just any kind of imprisonment was meant, but, rather, an act committed systematically or on a large scale. He therefore had no objection to the adoption of the amendment proposed by Mr. Rosenstock, for the addition of the word "imprisonment".

53. Mr. KABATSI said he agreed that the definition given at the beginning of article 18 did bring out the idea that acts such as imprisonment must be committed in a systematic manner or on a certain scale, but that did not mean that it must not also be specified that what were meant were unlawful imprisonments during which fundamental human rights were violated.

54. Mr. FOMBA said that the proposal gave rise to a number of questions, including whether it related to situations that took place in time of war or in time of peace. In view, moreover, of the criteria that the Commission had defined to justify the inclusion of some types of reprehensible conduct as crimes against the peace and security of mankind, it could be asked what the specific basis of such a proposal might be. The nature of imprisonment would also have to be defined and it would have to be decided whether it should be of a deliberately arbitrary nature.

55. He considered that the inclusion of such a provision might give rise to a number of problems that it would not be easy to solve. The Commission should therefore leave the text as it stood and rely on the practice of courts for the drafting of jurisprudence on article 18, particularly on the basis of subparagraphs (g) and (j).

56. Mr. PELLET said that the draft Code should reflect the most recent developments in the positive law relating to crimes against the peace and security of mankind and use the same term as the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda, namely, "imprisonment".

57. The questions raised by Mr. Kabatsi and Mr. Fomba were not really problems at all because the intro-

ductory clause of article 18 indicated that crimes must have been committed in a systematic manner or on a large scale and paragraph (6) of the commentary made it clear that crimes against humanity were autonomous from war crimes.

58. Mr. VARGAS CARREÑO said that the Commission had to be very careful. Imprisonment was, of course, a serious violation of human rights, but it was not comparable to the other violations listed in article 18. Moreover, human rights conventions allowed arbitrary deprivation of freedom in some cases and a reference to imprisonment in article 18 might create problems for Governments when they came to analyse the Code. In order to take account of recent experience, the Commission might consider the question of imprisonment not by including it in the article as a new kind of crime against humanity, but by referring to it in the commentary as an example of discrimination on racial, religious or ethnic grounds under subparagraph (f).

59. Mr. LUKASHUK proposed the inclusion of the following new subparagraph (d), to read: "arbitrary imprisonment for the purposes indicated in subparagraphs (a), (b) and (c) above".

60. Mr. BENNOUNA said that he would have no objection if the Commission decided to take account of recent events, such as the detention of groups of persons in camps for long periods of time in a massive and systematic manner, an act whose seriousness would justify its characterization as a crime against humanity. The term "detention" would, in his view, be better than the term "imprisonment", which referred more to a lawful situation. In view of the entirely "arbitrary" nature of that crime, the problem might be dealt with by including the term "detention" at the beginning of subparagraph (g), on the understanding that it would be explained in the introductory clause of article 18.

61. Mr. KABATSI said that he supported Mr. Bennouna's proposal. With regard to the introductory clause, he pointed out that the one contained in article 18 of the draft Code differed from those of the corresponding articles of the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda, which were not identical either.

62. Mr. ROSENSTOCK said that the idea of including imprisonment as a crime against humanity was not new, since it dated back to Control Council Law No. 10,³ which was an integral part of the Nürnberg process. If only in order to prevent conclusions *a contrario* being drawn from a comparison with the earlier instruments, however, he would be prepared to support Mr. Bennouna's proposal.

63. Mr. THIAM (Special Rapporteur) said he agreed that that was an omission that could be remedied in subparagraph (g). Control Council Law No. 10 and the statutes of the recently created international tribunals did

³ Law relating to the punishment of persons guilty of war crimes, crimes against the peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

¹ See 2437th meeting, footnote 7.

² *Ibid.*, footnote 6.

refer to “imprisonment”, but, since the Commission wanted to emphasize the arbitrary nature of imprisonment, it could, as a departure from its usual practice of using the wording of existing instruments, refer to “arbitrary detention”.

64. Mr. HE and Mr. FOMBA said that they fully supported Mr. Bennouna’s proposal.

65. Mr. PELLET said that the Commission should use the term “imprisonment”, which was contained in the texts in force. Otherwise, it would have to indicate in the commentary why it had substituted the word “detention” for the usual term “imprisonment”. He pointed out that the inclusion of the term “arbitrary detention” at the beginning of subparagraph (g) would create a problem, since the words “detention of population” did not mean anything.

66. Mr. VILLAGRÁN KRAMER, supported by Mr. VARGAS CARREÑO, said that the time element was essential if imprisonment was to constitute a crime against humanity. Even when carried out on a systematic basis and a large scale, imprisonment was not a crime against humanity if it lasted a short time. In order to achieve a consensus, the Commission would have to consider the possibility of referring to “extended and arbitrary” detention.

67. Mr. ROSENSTOCK said that he objected to the idea of referring expressly to the extended nature of detention because such a qualification had not been and must not be used for the other crimes, the only qualification being that contained in the introductory clause. The idea of duration could, however, be conveyed by replacing the word “detention” by the word “imprisonment”.

68. Mr. THIAM (Special Rapporteur) said that the word “extended” did not mean much and that, if the Commission chose the word “imprisonment”, the only justification would be conformity with existing instruments. The time element might be referred to in the commentary.

69. Mr. VILLAGRÁN KRAMER said that such wording did not make imprisonment a crime against humanity.

70. Mr. MIKULKA, supported by Mr. ROSENSTOCK, referring to a comment by Mr. CALERO RODRIGUES, said that the Commission would be able to avoid many drafting and translation problems if it referred to “arbitrary imprisonment” in a new subparagraph, particularly as no substantive argument justified the inclusion of that crime in subparagraph (g).

71. The CHAIRMAN suggested that, in the light of the discussions, the members of the Commission should consider the possibility of adding a new subparagraph, provisionally designated as “(g) bis”, to article 18, and reading: “Arbitrary imprisonment”. He said that, if he heard no objections, he would take it that the Commission decided to add such a subparagraph to article 18.

It was so decided.

72. Mr. ROSENSTOCK pointed out that, in subparagraph (f), the terms “fundamental human rights and free-

doms” should be replaced by the usual term “human rights and fundamental freedoms”.

73. Mr. VILLAGRÁN KRAMER said it was essential that the word “fundamental” should also modify the words “human rights”.

74. The CHAIRMAN said that the problem did not seem to arise in French. The commentary to article 18 would be considered at the following meeting.

The meeting rose at 1.10 p.m.

2465th MEETING

Friday, 19 July 1996, at 10.10 a.m.

Chairman: Mr. Robert ROSENSTOCK

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Robinson, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

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

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

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

Commentary to article 8 (Establishment of jurisdiction) (*concluded*)* (A/CN.4/L.527/Add.4)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in the course of considering the commentaries to the articles, the Commission had (2463rd meeting) examined the question of the possible interpretation of the last sentence of article 8** and established a small working group to redraft the sentence so as to leave no doubt about its precise meaning. The small working group had met on 18 July 1996 and

* Resumed from the 2463rd meeting.

** Article 8 was adopted as article 7 by the Commission at its 2454th meeting.

had concluded that the interpretation given in plenary by Mr. Mikulka had indeed been the correct one, namely, that only the State which had committed the aggression could exercise jurisdiction over its nationals for that crime. Accordingly, it was now proposed that the last sentence of article 8 should read:

“However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.”

2. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new wording of the last sentence of article 8.

Article 8, as amended, was adopted.

3. Mr. VILLAGRÁN KRAMER said that he wished to place on record his inability to join the consensus on the provision in question. It was his considered opinion that no State should be precluded from trying its nationals for any of the extremely serious crimes covered by the Code.

4. Mr. de SARAM said that he understood the reference to “article 16” in the sentence just approved by the Commission to refer to article 16 of the Code.

Paragraph (13) (concluded)*

Paragraph (13), as amended, was adopted.

Paragraph (15) (concluded)*

Paragraph (15) was adopted.

Commentary to article 18 (Crimes against humanity) (concluded)

New paragraph (13) bis

5. The CHAIRMAN, recalling that the Commission had adopted a new subparagraph (g) bis to article 18 (2464th meeting) and had agreed that a commentary should be prepared, read out the proposed text of the commentary:

“(13) bis. The eighth prohibited act is ‘arbitrary imprisonment’ under subparagraph (g) bis. The term ‘imprisonment’ encompasses deprivation of liberty of the individual and the term ‘arbitrary’ establishes the requirement that the deprivation be without due process of law. This conduct is contrary to the human rights of individuals recognized in the Universal Declaration of Human Rights (article 9) and in the International Covenant on Civil and Political Rights (article 9). The latter instrument specifically provides that ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ Subparagraph (g) bis would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps, detention camps or other forms of long-term detention. ‘Imprisonment’ is included as a crime against humanity in Control Council Law No. 10 (article II, paragraph (c)) as well as the statutes of the International Tribunal for the Former Yugoslavia (article 5) and the International Tribunal for Rwanda (article 3).”

Unfortunately, translations into the other languages were not yet available. If he heard no objection, he would take it that the Commission wished, in principle, to adopt the proposed new paragraph.

New paragraph (13) bis was adopted.

6. Mr. VARGAS CARREÑO said that he had no objection to the paragraph just adopted by the Commission but had a few comments to make in the light of his remarks at the previous meeting. First, he wished to thank the Chairman for his efforts to achieve the broadest possible consensus on the issue of arbitrary imprisonment. While convinced that arbitrary imprisonment was a serious violation of human rights and an offence on the part of the individual who ordered it to be committed, he did not think it necessarily and in all cases constituted a crime against the peace and security of mankind. The elements listed in the new paragraph, important as they were, were in his view incomplete. Circumstances could exist where arbitrary imprisonment might constitute a human rights violation but not a crime against the peace and security of mankind. For example, that might be the case with arbitrary imprisonment for a short period. While appreciating the efforts made to meet the point he had raised, he thought the Commission ought to abide by the principle of including only the most heinous crimes in the Code.

7. The CHAIRMAN invited the Commission to consider the rest of the commentary to article 18.

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

8. Mr. LUKASHUK proposed that the phrase “such as the use of a weapon of mass destruction against members of a particular racial or ethnic group in violation of subparagraph (e)”, at the end of the sixth sentence, should be deleted. The use of a weapon of mass destruction was not a good example of persecution.

9. Mr. BOWETT said he supported that proposal.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

10. Mr. LUKASHUK proposed the deletion of the second sentence, beginning with the words “In contrast, the Nürnberg Charter . . .”. The commentary already contained several references to the Nürnberg Charter and it was unnecessary to quote the same passage yet again.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

11. Mr. de SARAM, noting that the paragraph seemed to imply that the definition of torture provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was the only possible one. Was that interpretation correct?

12. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the question of the need to provide a definition of torture in the draft Code had been considered by the Drafting Committee at the previous session at the suggestion of the Special Rapporteur. The Drafting Committee had come to the conclusion that, in view of the standard character of the definition already provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Commission should not embark upon the lengthy exercise of redefining what was already a widely accepted concept.

13. Mr. CRAWFORD said that the point raised by Mr. de Saram also caused him some concern. While the definition in article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adequate in so far as the character of the act of torture was concerned, that was not, perhaps, the case with regard to the question of who might commit the act of torture. Under the Convention, the act had to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, whereas the *chapeau* of article 18 spoke of acts “instigated or directed by a Government or by any organization or group”, which undoubtedly could include an opposition group. If it was not too late to do so, he would suggest that paragraph (9) should be amended to indicate that the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was relevant so far as the character of the crime was concerned, but that, in accordance with the *chapeau* of article 18, torture as a crime against humanity could be committed not only by a government official but also by someone acting on behalf of any organization or group.

14. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph (9) as amended by Mr. Crawford.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

15. Mr. LUKASHUK, referring to the third sentence, commented that the whole field of public health or safety was governed not only by international law but also by the national laws of each country. It would therefore be preferable to replace the words “in accordance with international law” by “not contrary to international law”.

16. Mr. BENNOUNA said he agreed. The definition of arbitrary deportation or forcible transfer of population under subparagraph (g) required the utmost accuracy and

care. The reference to safety, or *sécurité* in French, was also open to criticism. Whose safety, precisely, was meant? The sentence as a whole should be reviewed.

17. After a brief discussion in which Mr. LUKASHUK, Mr. THIAM and Mr. BENNOUNA took part, the CHAIRMAN suggested that the second part of the sentence should read: “. . . such as public health or well-being, in a manner consistent with international law”.

It was so agreed.

18. Mr. ROBINSON wondered whether it was necessary to maintain the reference to “legitimate reasons” in the first part of the sentence as well as the reference to international law in the second part.

19. Mr. LUKASHUK, Mr. de SARAM, Mr. ALBAHARNA and Mr. FOMBA said that they were in favour of maintaining both those references.

Paragraph (13), as amended, was adopted.

20. The CHAIRMAN noted that the new paragraph (13) *bis* had already been adopted earlier in the meeting.

Paragraph (14)

21. Mr. VARGAS CARREÑO proposed that the words “because of its extreme cruelty and gravity” should be added at the end of the last sentence.

Paragraph (14), as amended, was adopted.

Paragraph (15)

22. Mr. ROBINSON proposed the insertion of a footnote to the fourth sentence citing the document in which the conclusion of the National Commission for Truth and Justice referred to in that sentence had been published.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Paragraph (16) was adopted.

The commentary to article 18, as amended, was adopted.

Commentary to article 19 (Crimes against United Nations and associated personnel) (A/CN.4/L.527/Add.10 and Corr.1)

Paragraph (1)

23. Mr. LUKASHUK proposed that the first sentence, which was purely narrative in character, should be deleted, together with the word “Thus,” at the beginning of the second sentence. Again, the whole of the third sentence and the words “In this regard,” at the beginning of the following sentence, should be omitted.

24. Mr. THIAM (Special Rapporteur) said that, although he was not the author of the commentaries under consideration, he felt bound to point out that when a commentary was short it tended to be criticized for being too short and when it was long, it was said to be too

long. The passages in question were a matter of history and he failed to see why they should give rise to any objection.

25. Mr. YANKOV suggested that it should be left to the secretariat to condense the paragraph.

26. Mr. HE said that some of the key terms in article 19 had still not been precisely explained in the commentary. The term "United Nations operation", in particular, required clarification. Yet the commentary still used the definition laid down in the Convention on the Safety of United Nations and Associated Personnel, which would cover not only peace-keeping activities but also election monitoring and other activities. Also, the term "associated personnel", as defined in that Convention, covered a wide range of persons engaged in such activities, but no clear explanation appeared in the commentary. In some cases, very complex political factors were involved, with the international community and the United Nations divided as to the best way of dealing with the situation. To group all such situations together under the same article without further clarification of such key terms would only add to the difficulties of applying the article.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he agreed with Mr. Lukashuk but not with Mr. Yankov. In the first place, the already very busy secretariat should not be overloaded with work. Mr. Lukashuk's proposal merely involved the deletion of two unnecessary sentences and the commentaries were in any event too long and should be reduced for the sake of clarity.

28. Mr. AL-BAHARNA said that, despite the admitted length of the commentaries, the Commission should adopt them as drafted. It would be imprudent, given the time factor, to become involved in deleting certain sentences. The articles were what mattered most, not the commentaries.

29. Mr. YANKOV said that the purpose of his proposal was precisely to save time. Mr. Lukashuk's proposals should be accepted but the order of the paragraph should also be rearranged to refer first to the position of the General Assembly and then to quote excerpts from the report of the Secretary-General.

30. The CHAIRMAN, speaking as a member of the Commission, said that he would be very sorry to see the quotation from the report of the Secretary-General go. In the historical flow of things, there was something to be said for a reminder that, "working under the banner of the United Nations has provided its personnel with safe passage and an unwritten guarantee of protection". A restatement of that goal was worth a few extra lines in a commentary.

31. Speaking as Chairman, he asked whether the Commission would agree to accept Mr. Lukashuk's proposed deletions, without the further deletions proposed by Mr. Yankov, while recognizing that the paragraph could be rearranged as suggested.

32. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), agreeing with the Chairman, said

that the sentence which referred to the report of the Secretary-General was in the nature of an introduction to the next sentence starting with the words "The seriousness and magnitude". If the reference to the Secretary-General were omitted, much rewriting would be needed.

33. The CHAIRMAN, noting that Mr. Yankov did not insist on his proposal, suggested that the Commission should adopt paragraph (1) of the commentary as amended by Mr. Lukashuk.

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

34. Mr. BENNOUNA said that the paragraph was poorly drafted and did not reflect the discussion in plenary on the adoption of the article at all well. It should therefore be reviewed. During the Commission's debate, a distinction had been drawn between general intention, which was explained at far too much length in the first part of the paragraph, and deliberate intention, which was dealt with in the second part of the paragraph. Regrettably, at no point did the commentary bring out the distinction between crimes against the peace and security of mankind and the crimes covered by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Also, a compromise had been reached in a working group whereby it had been agreed that, for a crime against the United Nations to rank as a crime against the peace and security of mankind, it must involve action designed to prevent the United Nations from fulfilling its mission. It had further been agreed that a distinction must be drawn between such action and minor incidents; indeed, the Chairman himself, who had been a member of the working group, had recognized the need for such a distinction. He was therefore quite unable to accept the paragraph as drafted, since it in no way corresponded to the *travaux préparatoires*.

35. Mr. CRAWFORD said that he agreed with Mr. Bennouna. It was, however, a question of emphasis: too much was said about general intention in the first part of the article and not enough in the second part dealing with specific requirement. At the same time it was made perfectly clear, at the end of the paragraph, that a different test was involved from that imposed by the Convention on the Safety of United Nations and Associated Personnel. As he had had some responsibility for the compromise reached in the working group, he would be happy to redraft paragraph (5) in the light of those remarks.

36. The CHAIRMAN, speaking as a member of the Commission, said that, while he would have no objection to any drafting changes, he could not agree that the commentary was other than a reflection of what had been agreed, as he understood the position. Nonetheless, a redraft of the paragraph, as suggested by Mr. Crawford, would be welcome.

37. Mr. THIAM (Special Rapporteur) said that he agreed with Mr. Bennouna. When a substantive matter had not been properly treated, it must be amended and, since Mr. Crawford had been responsible for the commentary to the article, he should draft that amendment.

38. Mr. BENNOUNA said that, in his view, the commentary should have been referred back for review by the working group at which the compromise agreement had been reached.

39. The CHAIRMAN suggested that further discussion on paragraph (5) should be deferred until the paragraph had been redrafted for the Commission's consideration.

It was so agreed.

Paragraph (6)

40. Mr. VILLAGRÁN KRAMER said that his point also pertained to paragraph (5) to some extent. Some unlawful acts which affected the international community as a whole gave rise to State responsibility. Others, which were described as crimes, could affect the institutionalized international community, in other words, the United Nations. For the first time, the Commission was dealing with such a crime and he would therefore ask Mr. Crawford if he could mark that distinction in the re-draft he was to prepare of the commentary to paragraph (5). A crime against the United Nations must be clearly differentiated from other international crimes on account of its nature, importance and gravity.

Paragraph (6) was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

41. Mr. PELLET said that the commentary to article 19 had still not convinced him that crimes against United Nations and associated personnel amounted to crimes against the peace and security of mankind. Had he been present during the debate in plenary, he would have voted against the article and would even have requested a vote on the Code as a whole. The adoption of the article would have prevented him from voting in favour of the Code.

42. Mr. FOMBA said he endorsed those remarks.

43. Mr. YANKOV said that he was not opposed to improved protection for United Nations personnel but he was not convinced by the text the Commission had adopted. His reservation should be placed on record, but he would not stand in the way of the adoption of the commentary as a whole.

44. Mr. LUKASHUK suggested that the term "law of international armed conflict", which appeared in paragraph 2 of article 19, should be replaced, throughout the draft, by the term "international humanitarian law". Also, it might be useful to refer to the latest decision of ICJ and its reference to the fact that the laws and customs of war had later come to be termed international humanitarian law.

45. The CHAIRMAN said he believed that the use of the term "international armed conflict" was deliberate and based on action taken by the General Assembly. Did Mr. Lukashuk insist on his suggestion?

46. Mr. LUKASHUK said that he would not insist, but would suggest as an alternative that some explanation of the point should be added to the draft in a separate paragraph.

47. The CHAIRMAN suggested that Mr. Lukashuk should be asked to draft an explanation for possible incorporation in a footnote, that the term "international armed conflict" meant the relevant portions of "international humanitarian law".

It was so agreed.

**Programme, procedures and working methods
of the Commission, and its documentation
(continued)* (A/CN.4/472/Add.1, sect. F)**

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK

48. The CHAIRMAN drew the attention of the Commission to the report of the Working Group on the long-term programme of work (ILC(XLVIII)/WG/LTPW/2/Rev.1).¹

49. Mr. LUKASHUK said that, among the possible future topics listed in section I (Sources of international law) of the general scheme, he wished to draw particular attention to the law of unilateral acts and customary international law, which dealt with very important issues. The last topic on the list—"non-binding instruments"—should read "legally non-binding instruments".

50. Among the possible future topics listed in section IV (State jurisdiction/immunity from jurisdiction), extraterritorial jurisdiction should be a priority. In the list of future topics in section VI (Position of the individual in international law), he would delete the suggested topic of "The individual as a subject of international law". In reference to section VII (International criminal law), he pointed out that the Commission had done enough work on international criminal law and could postpone further work on that matter. The possible future topics listed in section VIII (Law of international spaces) were already being dealt with, and rightly so, by specialized international bodies. He pointed out in that connection that the future topics of ownership and protection of maritime wrecks should not be considered as a priority. Among the future topics in section IX (Law of international relations/responsibility), diplomatic protection was of great importance. The topics listed in section X (Law of the environment and of economic relations)

* Resumed from the 2461st meeting.

¹ The report was not issued as an official document. The report on the long-term programme of work, as amended and adopted by the Commission, is reproduced in *Yearbook . . . 1996*, vol. II (Part Two), annex II.

were already being dealt with by other organizations which were better suited than the Commission to handle those matters. Among the future topics in section XII (Settlement of disputes), pacific settlement of international disputes was appropriate for the Commission's agenda.

51. By and large, the general scheme proposed by the Working Group was a useful tool for the Commission.

52. The CHAIRMAN said that the Commission would continue its discussion of the report of the Working Group at its next plenary meeting.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/472/Add.1, sect. D, A/CN.4/475 and Add.1,² A/CN.4/L.533 and Add.1)**

[Agenda item 4]

REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

53. Mr. BARBOZA (Special Rapporteur), introducing the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.533 and Add.1), said that the Commission had established a working group (2450th meeting) to consolidate work already done on the topic and to see if provisional solutions to some unresolved questions could be reached, with a view to examining all aspects of the topic and making a recommendation to the Commission. It was hoped that the Commission would then be able at the forty-ninth session to make informed decisions with regard to the handling of the topic during the next quinquennium.

54. The Working Group had held six meetings and had operated strictly within the framework of the topic. It had discussed three pressing issues: the activities to which the topic applied; the issue of prevention; and the question of compensation or other relief. The report of the Working Group contained a complete set of draft articles accompanied by commentaries.

55. He wished to express his gratitude to the members of the Working Group for their hard work and cooperation and, in particular, to Mr. Crawford and Mr. Eiriksson, who had carried a substantial burden of the drafting.

56. The draft articles proposed by the Working Group were limited in scope and residual in character. To the extent that existing or future rules of international law, whether conventional or customary in origin, prohibited certain conduct or consequences, they would operate within the field of State responsibility and would by definition fall outside the scope of the present draft articles (article 8). At the same time, the field of State

responsibility for wrongful acts was neatly separated from the scope of the present articles by granting permission to the State of origin to pursue the activity "at its own risk", as set forth in article 11 *in fine* and article 17, provisionally adopted by the Commission as articles 13 and 18, respectively.³

57. The topic of international liability for injurious consequences arising out of acts not prohibited by international law covered two basic aspects. The first was the prevention of transboundary harm arising from acts not prohibited by international law, in other words, prevention of certain harmful consequences outside the field of State responsibility. Prevention was dealt with in a broad sense, including notification of risks of harm, whether those risks were inherent in the operation of the activity or arose, or were considered as arising, at some later stage. The second aspect was the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. That aspect was based on the principle that States were not precluded from carrying out activities not prohibited by international law, notwithstanding the fact that there might be a risk of transboundary harm arising from those activities, and the fact that their freedom of action in that regard was not unlimited and in particular might give rise to liability for compensation or other relief, notwithstanding the continued characterization of the acts in question as lawful. Of particular significance was the principle that the victim of transboundary harm should not be left to bear the entire loss.

58. The draft articles were divided into three chapters: chapter I (General provisions), chapter II (Prevention) and chapter III (Compensation or other relief). Most of the provisions of chapters I and II had already been adopted by the Commission. Of particular interest in chapter I was the scope of activities to which the topic applied. Article 1 distinguished between two categories of activities not prohibited by international law: those which involved a risk of causing significant transboundary harm (subparagraph (a)) and those which did not involve such a risk but which did cause such harm (subparagraph (b)). Subparagraph (b) had been placed in square brackets because not all the members of the Working Group had agreed on it. In paragraph 26 of the commentary to article 1, the attention of Governments was drawn to that question and their views on it were welcomed.

59. The articles in chapter II had already been adopted by the Commission. Chapter III was new. In the opinion of the Working Group, the articles on the topic did not follow the principle of "strict" or "absolute" liability as commonly understood: while the concepts were familiar and developed in domestic law in many States and in relation to certain activities in international law, they had not yet been fully developed in international law in relation to a large group of activities, such as those covered under article 1. As in domestic law, it followed from the principle of justice and fairness and from social policy that those who had suffered harm because of the activ-

** Resumed from the 2450th meeting.

² Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

³ See 2450th meeting, footnote 3.

ities of others should be compensated. Chapter III thus provided for two procedures whereby injured parties could seek remedies: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. The existence of two different ways of obtaining redress had some resemblance to the solutions proposed in his sixth report.⁴ Those two procedures were, of course, without prejudice to any other arrangements to which the parties might have agreed, or to due exercise of the jurisdiction of the courts of the States where the injury occurred. The present articles would not affect the latter jurisdiction if it existed in accordance with the applicable principles of private international law.

60. Chapter III contained three articles: article 20 dealt with non-discrimination in access to the national court of the State causing transboundary harm; article 21 dealt with negotiations with respect to compensation; and article 22 dealt with factors to be considered during such negotiations.

61. In view of the Commission's commitment to completing the draft articles on other topics at the current session, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law had not been reviewed by the Drafting Committee and would not be debated in detail in plenary. At the same time, in its resolution 50/45, the General Assembly had urged the Commission to resume work on the topic "in order to complete the first reading of the draft articles relating to activities that risk causing transboundary harm".

62. The Working Group had considered that, under the circumstances, it would be appropriate for the Commission to annex to its report to the General Assembly the report of the Working Group and to transmit it to Governments for comment as a basis for the future work of the Commission on the topic. In so doing, the Commission would not be committing itself to any specific decision with regard to the direction of the topic or to any particular formulations, although much of the substance of chapter I and the whole of chapter II had been approved by the Commission at earlier sessions.

63. In making its recommendation, the Working Group had borne in mind the analogous procedure adopted by the Commission at its forty-fifth session in relation to the report of the Working Group on a draft statute for an international criminal court, which, without the benefit of a complete first reading in plenary, had been annexed to the report of the Commission⁵ and been transmitted to the General Assembly and to Governments for comment. It was on the basis of that procedure that the Commission had been able to deal expeditiously with the draft statute for an international criminal court at its forty-sixth session.

64. That arrangement would make available for comment a complete text of draft articles on international liability for injurious consequences arising out of acts

not prohibited by international law which could form the basis for future work on the topic and help the Commission, at the next session, make a fully informed decision on how to proceed.

65. The CHAIRMAN suggested that members should first direct their comments to the recommendation of the Working Group that its report should be annexed to the report of the Commission and be transmitted to Governments for comment. Members would then have a chance to comment on the topic in general.

66. Mr. CRAWFORD said that, as a member of the Working Group, he naturally supported its conclusions. The Working Group's primary aim had not been to get the Commission to take a position on what was generally acknowledged to be a controversial and difficult problem but to produce a rationalized version of the work completed so far. The Commission, in its current composition, would thus be leaving a historical record for the next quinquennium without committing future compositions to any particular orientation. The Commission, in its next composition, would then be fully informed and free to decide how to proceed.

67. Mr. VILLAGRÁN KRAMER said that the Commission had made considerable progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law in the past few years. It should be kept in mind that the topic was a matter of great interest to both the industrialized and the developing countries. The former viewed with apprehension certain aspects of the topic, notably the proposed regulatory models. The latter were becoming aware of the risks which might arise from the activities of foreign enterprises operating on their territories. Because the topic was of such great importance, he endorsed the recommendation of the Working Group to transmit its report to Governments. He wished, however, to express one caveat: the Commission must not let the topic fall into oblivion because of reservations on the part of States and should continue to discuss it once Governments had made their views known.

68. Mr. PELLET said that it was difficult to decide how to deal with the Working Group's report without having had the time to read it, since the French text was not yet available. He therefore reserved the right to present his final views at a later time.

69. He was not entirely satisfied with the Working Group's recommendation. The Special Rapporteur had emphasized the precedent set by the Commission when it had decided to annex to its report to the General Assembly the report of the Working Group on a draft statute for an international criminal court. However, the circumstances had been different: the General Assembly had been urgently requesting the draft articles on that topic, something that was not the case with regard to the articles on international liability for injurious consequences arising out of acts not prohibited by international law. Thus, he was not certain whether such a departure from the Commission's usual procedures was justified.

70. It was not appropriate, moreover, to request the views of States on such a varied collection of articles.

⁴ *Ibid.*, footnote 7.

⁵ *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

Articles 9 to 19 of chapter II (Prevention) had been provisionally adopted by the Commission and thus had proper status. They should be separated from the rest. They were well designed, went as far as was possible in terms of codification and progressive development of the law, and could be transmitted to the General Assembly as a separate and complete set, following the usual procedure of the Commission.

71. The Commission might indeed wish to annex the full report of the Working Group to its own final report. However, requesting the views of States on that report would effectively be adding a third step to an already complex procedure: the Commission would be asking States to react to a report which had not been debated in plenary. It was a precedent that the Commission should not set.

72. Mr. de SARAM said that the Commission could handle the report of the Working Group in three ways. First, it might decide simply to take note of the report and state that it had not had time to discuss the articles on international liability for injurious consequences arising out of acts not prohibited by international law. Secondly, it might transmit the report to the General Assembly with the observation that what was contained in the articles represented only one of the possible ways in which the issues might be resolved from a legal perspective. Thirdly, it could recommend to the General Assembly that the report should be forwarded to Governments for comment.

73. While he was willing to endorse the first or second solution, he had reservations about the third. On receiving the Working Group's report, Governments might well wonder whether it presented definitive solutions to the problems raised, when that was, to his mind, not the case. Furthermore, there had been no decision to transmit other reports of working groups to Governments.

74. Mr. CALERO RODRIGUES said that he fully endorsed the recommendation made by the Working Group. It would be extremely useful to know whether Governments thought that the Commission's work so far on international liability for injurious consequences arising out of acts not prohibited by international law was heading in the right direction, especially as a new special rapporteur would be taking over at the next session. Most of the work already accomplished was on prevention: the core of the topic—liability—had barely been touched upon. In most instances, the Commission transmitted to the General Assembly articles that it had approved on first reading. That meant it could not take the Assembly's opinions into account in the initial stage of its work. The advantage in the instance would be that it was sending something that was not a finished product, so the Assembly could provide guidance for future work.

75. Mr. VARGAS CARREÑO said he wished to express his appreciation for the Working Group's efforts and to pay special tribute to the Special Rapporteur who, over a period of many years, had made significant contributions to the development of a new and complex topic of international law. The recommendation was entirely acceptable. It would enable States to make known their views on international liability for injurious consequences arising out of acts not prohibited by interna-

tional law, something they had had virtually no opportunity to do before, and it would provide impetus for the Commission to move forward in its work.

76. Mr. YANKOV expressed his appreciation to the Special Rapporteur and the Working Group for the enormous amount of work done at the current session. As to the recommendation, flexibility was needed with regard to the Commission's methods of work: approaches taken in the past need not always be adhered to. He saw no difficulty in making it clear that the Commission had neither discussed nor adopted the report, and that it wished to place before the General Assembly the end result of its work on the topic in the past quinquennium. He agreed that the report should be transmitted to the General Assembly for comment, but did not think it should be sent direct to Governments.

77. The CHAIRMAN recalled that Mr. de Saram had proposed that the report be transmitted to the General Assembly, but not to Governments directly. That proposal might form a viable and acceptable compromise.

78. Mr. LUKASHUK said he could go along with that proposal in the interests of consensus. The Working Group—of which he had been a member—had none the less drafted its report and recommendation as a collective endeavour, and the results aptly reflected the various views heard during its discussion. He agreed with other speakers that one of the main obstacles to progress was that the Commission was in the dark about the opinions of States on the topic.

79. Mr. PAMBOU-TCHIVOUNDA said the Commission should not simply take note of the Working Group's report and annex it to its own report to the General Assembly. It must make every effort to find time, before the end of the current session, to consider it in depth, particularly as that report had been prepared in response to the Commission's own request. Perhaps a discussion could be scheduled once the report was available in working languages other than English.

80. Mr. GÜNEY said he had no objection to the Commission's taking note of the report and stating that it had not been able to consider it in depth for lack of time. He had great difficulty, however, with the recommendation that the views and observations of Member States should be elicited: an additional stage should not be incorporated in what was already a highly burdensome procedure.

81. Mr. BENNOUNA suggested that the report to be sent to the General Assembly should suggest a change in the title of the topic, given that very little material in the draft articles dealt with liability or responsibility—it was mostly on prevention. He had no objection to asking for the views of States through their representatives in the Assembly, and could accept the compromise proposal put forward by Mr. de Saram along those lines. The report should be presented as the end result of the work done for so many years by the Special Rapporteur, to whom special tribute was due.

82. Mr. SZEKELY said that, as a member of the Working Group, he wholly supported its recommendation. A very conscious effort had been made, when draft-

ing the recommendation, to achieve clarity and precision and to avoid prejudging the Commission's future work on the topic. The very form of language used had been chosen precisely to take account of the concerns raised at the current meeting. It would be truly unfortunate if a rigid approach to working methods were to preclude the possibility of hearing the reactions of States. As Mr. Calero Rodrigues had pointed out, since there would be a new special rapporteur in the next quinquennium, such reactions were of special importance. He therefore did not think the "compromise proposal" was really a compromise at all: it merely allowed the views of some members to predominate over those of others. He appealed to members to rally to the wording of the Working Group's carefully crafted recommendation.

83. Mr. CALERO RODRIGUES, referring to the possibility of sending the report to the General Assembly, said that, in practical terms, the Assembly would have very few opportunities to consider the report, since it was also to receive draft articles on a number of other topics from the Commission. Perhaps the proposal by Mr. de Saram could be supplemented to make it clear that the report was being transmitted to the General Assembly for comment, but that any observations from Governments in writing would be greatly appreciated as well.

84. Mr. THIAM said it was not only appropriate, but indispensable, for the Commission to report to the General Assembly on what it had done on the topic during the quinquennium. To transmit the report direct to Governments, however, would be to break with the long-established tradition of requesting comments by Governments only at the stage of first reading. He did not believe the Commission should alter that practice.

85. Mr. FOMBA said that, as a member of the Working Group, he fully supported the outcome of its work. He could, however, accept the compromise proposal, as amended by Mr. Calero Rodrigues, as a way out of the current impasse.

86. Mr. KABATSI said he fully supported the course of action proposed by the Special Rapporteur and did not feel comfortable with the alternative suggested by Mr. de Saram, which would deprive the Commission of the benefit of guidance from States on its future work on the topic. On the other hand, he could go along with Mr. de Saram's proposal as amended by Mr. Calero Rodrigues, because the Commission would then be able to hear the comments of States.

87. Mr. EIRIKSSON, joined by Mr. SZEKELY, Mr. HE and Mr. AL-BAHARNA, said they endorsed the proposal made by Mr. de Saram, as amended by Mr. Calero Rodrigues.

88. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt that proposal, together with the amendment thereto.

It was so decided.

89. The CHAIRMAN inquired whether, having taken that decision, the Commission wished to consider its dis-

ussion of the topic concluded, or would prefer to take it up again in order to record views on the substance of the matter, at a meeting in the final week of its session.

90. Mr. BOWETT, Mr. PAMBOU-TCHIVOUNDA and Mr. BENNOUNA spoke in favour of devoting an additional meeting to the topic.

91. Mr. AL-BAHARNA said he, too, was in favour of such a course, on the understanding that nothing that would be said would call into question in any way the procedural decision just taken.

It was so agreed.

The meeting rose at 1.05 p.m.

2466th MEETING

Monday, 22 July 1996, at 3.10 p.m.

Chairman: Mr. Ahmed MAHIU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Visit by a former member of the International Law Commission

1. The CHAIRMAN said he welcomed Mr. Graefrath, who had been a member of the Commission from 1987 to 1991 and the Chairman of its forty-first session in 1989.

Programme, procedures and working methods of the Commission, and its documentation (continued) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK (continued)

2. The CHAIRMAN invited Mr. Bowett, coordinator of the Working Group on the long-term programme of

work, to introduce the report of the Working Group (ILC(XLVIII)/WG/LTPW/2/Rev.1).¹

3. Mr. BOWETT said that the report was divided into two parts consisting of a general scheme and three addenda.

4. In the general scheme, which had been prepared by Mr. Pellet, international law as a whole was reviewed subject by subject in 12 sections. Each section was organized so as to show the topics which had already been completed or which had been taken up, but abandoned, the topics under consideration by the Commission and the topics which the Commission might study in future. He invited the members of the Commission not to attach too much importance to the wording of the possible future topics because they were only ideas that were not binding either on the Commission or on its members.

5. The more important part of the report was the second, in which the Working Group put forward three of the possible future topics, each one in a separate addendum. Addendum 1, on diplomatic protection, was designed to supplement and explain the proposal which the Commission had, following its forty-seventh session, submitted to the General Assembly.² It would give the Sixth Committee a relatively clear idea of what the Commission meant by that topic. Addendum 2, on ownership and protection of wrecks beyond the limits of national maritime jurisdiction, was based on a proposal that the Commission had made three years previously and contained an abridged version of the detailed outline it had proposed at that time.³ Addendum 3, on unilateral acts of States, related to a proposal which had been made at the current session, which the members of the Working Group had generally well received, and contained an analysis of the possible content of the topic.

6. Neither the Commission nor any future special rapporteur would be bound by the content of the topics as contained in the three addenda. The aim was to enlighten the Sixth Committee so that it might evaluate the various proposals on their merits.

7. The CHAIRMAN suggested that the Commission should consider the introduction paragraph by paragraph, the general scheme section by section and then the addenda.

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

GENERAL SCHEME

8. The CHAIRMAN, supported by Mr. ROSENSTOCK, said that only the heading in each section entitled "Possible future topics" was likely to be commented on, since that heading related not to topics that the Commission should study, but to topics that it might consider taking up because no codification work had yet been done on them.

SECTION I (Sources of international law)

Section I was adopted.

SECTION II (Subjects of international law)

9. Mr. de SARAM said that the topic of democratic government under the subheading of "Statehood" seemed to be of less legal relevance than other topics under that subheading and that it was more political than strictly legal. He would like to have some further explanations on that point.

10. Mr. LUKASHUK said that he did not understand Mr. de Saram's concerns. That topic reflected the new trend in international law, especially in the field of co-operation in Europe and elsewhere. Research on it should therefore be carried out.

11. Mr. BOWETT said that the topic was not of a purely political nature because democracy required legal structures and some principles of democratic government could be stated in the form of constitutional principles. A statement of those principles might be helpful to some Governments.

12. The CHAIRMAN said that the problem might be one of wording because it could be that the idea of democratic government made people think of the internal system of government.

13. Mr. PELLET said that, although public international law had long been defined as a law that was indifferent to systems of government, the problem of democratic government now arose in modern-day law as a result of the growth of pluralist democracy, as shown by the statutes of the European Bank for Reconstruction and Development, IMF "conditionality" and the guidelines for the recognition of States being applied by the European Union to the new States of central and eastern Europe. In any event, the topic was probably not ripe for codification and, in that connection, he reaffirmed the need to take that part of the report for what it was, namely, a statement of a number of topics which had either been formally proposed at one time or another in the Commission's work or which might be of some interest because they were governed by rules of customary law in connection with which codification might be a possibility. That part of the report was therefore designed only to show the members of the Sixth Committee that there were very broad sections of international law, whether traditional or more recent, which were still to be codified, but it did not commit the Commission to anything for the future. It might, moreover, be stated in a footnote that the Commission reserved the right to give further consideration to the various topics at its next session.

14. Mr. VILLAGRÁN KRAMER said that, on the American continent, the problem of democratic government continued to be discussed in legal and political terms from two very important points of view: as an inherent component of the State and as a commitment of the State to strengthen democracy in its territory and, where necessary, implement machinery to protect it. Since the question had been raised, he considered it positive and constructive that the Commission should

¹ See 2465th meeting, footnote 1.

² *Yearbook* . . . 1995, vol. II (Part Two), para. 501.

³ See *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/454.

include it on its agenda, but he expressed reservations about any right of interference in the internal affairs of States.

15. Mr. ROSENSTOCK said that he was in favour of keeping that topic on the list of topics for future study in the hope that, sooner or later, the Commission would be called upon to draft a text on the legal consequences of the principle that Governments derived their legitimacy from the freely given consent of the people.

16. Mr. ROBINSON said that it would not be difficult to define some legal principles relating to democratic government, but he understood Mr. de Saram's concern that the wording of the topic might suggest that democratic government was a necessary condition for Statehood. More neutral wording, such as "forms of government", might be more acceptable.

17. Mr. SZEKELY said that that topic must be kept on the list of topics that the Commission might consider in future because it was of the greatest importance both for those who were concerned about excessive international pressures and for those who were sincerely attached to the principle that Governments derived their power from the will of the people.

18. Mr. MIKULKA said that, in his view, the topic of "Succession" of governments should be moved to heading 1 (Topics taken up, but abandoned), because he seemed to remember that the question had been discussed in 1963 and that the Commission had then reached some conclusions.

19. Mr. TOMUSCHAT, supported by Mr. ALBAHARNA, said that, although democratic government was an important topic in today's world, he thought that it was a question that related to the recognition of Governments rather than being a criterion for statehood. He therefore proposed that it should be moved to the sub-heading of "Government".

20. Mr. PELLET said that he would not object to such a move, but he would also be prepared to accept Mr. Mikulka's suggestion, subject to verification. With regard to the form of the general scheme, he regretted that the structure that had originally been chosen for each section had been changed and he invited the Commission to change back to the following presentation: 1. Topics already completed; 2. Topics under consideration by the Commission; 3. Topics taken up but abandoned; 4. Possible future topics.

21. Mr. LUKASHUK said that "democratic government" referred not to the executive power, but to the democratic system, at the heart of which lay human rights. If human rights were recognized, the idea of democratic government had to be accepted.

22. Mr. BENNOUNA said that he agreed with the comment by Mr. Tomuschat. The idea was very controversial and it did not at present lend itself either to codification or to progressive development. He therefore proposed that the topic should simply be deleted.

23. Mr. ROSENSTOCK, supported by Mr. SZEKELY, said that, since it had been proposed by way of a compromise that that topic should be moved to the sub-

heading of "Government", it could be deleted only by means of a vote.

24. Mr. BENNOUNA said that the solution might be to replace the word "democratic" by the word "representative".

It was so decided.

Section II, as amended, was adopted.

SECTIONS III (Succession of States and other legal persons), IV (State jurisdiction/immunity from jurisdiction) and V (Law of international organizations)

Sections III, IV and V were adopted.

SECTION VI (Position of the individual in international law)

25. Mr. LUKASHUK said that the item "The individual as a subject of international law" under heading 2 was a concept of international law, not the title of a topic. He therefore proposed that it should be deleted.

26. Mr. ARANGIO-RUIZ said that, in order to avoid the adoption of any doctrinal positions, the topic should be entitled "The individual in international law".

It was so decided.

27. Mr. VILLAGRÁN KRAMER said that the title "Minimum standards of civilization" under heading 2 was not very felicitous and recalled that, until the nineteenth century, Europe had characterized the rest of the world as "uncivilized" in order to justify its own privileges.

28. Mr. PELLET said that, although that was a very common expression, that topic should be deleted in order to avoid any discussion and enable the Commission to gain time.

It was so decided.

29. Mr. TOMUSCHAT, said that the last two topics under heading 2 were in a category that usually came within the competence of the Commission on Human Rights and the Subcommittee on Prevention of Discrimination and Protection of Minorities. The International Law Commission had never played an active role in that field, but, if it wanted to do so, it might give the impression that it was calling in question the work of the Commission on Human Rights.

30. Mr. PELLET pointed out that the Convention on the Reduction of Statelessness had originated with the Commission. The two topics referred to by Mr. Tomuschat had, moreover, been proposed and selected for consideration. If the Commission wanted to delete them, it would have to reconsider the entire report. It would be able to delete them when it came to drawing up the final list of topics that it really wanted to study.

31. The CHAIRMAN, supported by Mr. ROSENSTOCK, said it should perhaps be indicated in the introduction that the topics listed in the general scheme were not topics that the Commission had to study, but only

topics that might lend themselves to codification, not necessarily by the Commission itself.

32. Mr. SZEKELY, referring to Mr. Tomuschat's comment, said that the majority of topics contained in the general scheme had been or were being considered by other bodies within or outside the United Nations system. That should not curtail the freedom of action of the Commission, which was the subsidiary organ of the General Assembly with particular responsibility for the codification and progressive development of international law. The last two topics under heading 2 of section VI should therefore be retained.

33. Mr. VILLAGRÁN KRAMER said that there was practically no field of international law that was not in some way connected with the question of human rights. The last two topics should therefore be retained.

34. Mr. BOWETT recalled that the topic of human rights and defence of democracy had been proposed in 1962. With regard to Mr. Tomuschat's comment, paragraph 2 of the introduction expressly indicated that some topics proposed in the paper have been taken up by other bodies.

35. Mr. ROBINSON, noting that the topic of extradition came under the subheading "Treatment of aliens", asked whether the Commission would study extradition only from the human rights point of view or as a whole and as a much broader topic.

36. The CHAIRMAN said that the topic had been proposed in 1949, but had not been defined.

Section VI, as amended, was adopted.

SECTION VII (International criminal law)

37. Mr. BARBOZA said he was surprised that the topic of crimes against humanity had been included under heading 2 (Possible future topics) because the Commission had been studying those crimes as part of its work on the draft Code of Crimes against the Peace and Security of Mankind.

38. Mr. PELLET said that Mr. Barboza's comment was not illogical, but the Commission had not yet exhausted the topic.

39. Mr. VILLAGRÁN KRAMER proposed that the topic might be entitled "Other crimes against humanity".

40. The CHAIRMAN said that there was indeed a problem, particularly in the year when the Commission was submitting its draft Code of Crimes against the Peace and Security of Mankind to the General Assembly. The topic of "Crimes against humanity" should perhaps be deleted, on the understanding that it could be reintroduced at a more appropriate time.

41. Mr. BENNOUNA said that the draft Code was not exhaustive and that some crimes of the greatest importance for the international community, such as international terrorism and large-scale drug trafficking, had been left aside. Perhaps the topic could be entitled

"Other crimes against the peace and security of mankind".

42. Mr. CALERO RODRIGUES said he agreed with the Chairman that it might seem strange to the General Assembly for the Commission to be referring to crimes against humanity as a topic for future study just at the time when it was submitting the draft Code. It was nevertheless also true that the draft Code did not cover all international crimes.

43. Mr. PELLET proposed that the topic should be entitled "International crimes other than those contained in the draft Code of Crimes against the Peace and Security of Mankind".

It was so decided.

Section VII, as amended, was adopted.

SECTION VIII (Law of international spaces)

44. Mr. GÜNEY said that the question of the legal regime of international rivers appeared both under heading 1 and under heading 3 of this section. Under heading 3, it covered navigation on international rivers, a welcome topic that followed on logically from the law of the non-navigational uses of international watercourses, and the law of confined international groundwaters. The latter topic had been regarded as premature by the Commission, which had not been able to agree on it. In addition, the General Assembly had not yet taken a decision on the earlier draft relating to watercourses. In his opinion, the topic of confined groundwaters should be removed from the list.

45. Mr. MIKULKA, also referring to the topic of the law of confined international groundwaters, asked whether it belonged under the subheading "Legal regime of international rivers and related topics". For the Commission, the term "confined groundwaters" meant anything other than watercourses. The topic should therefore be placed under the subheading "Shared resources".

46. Mr. ROSENSTOCK said that he was in favour of such a change.

47. Mr. SZEKELY, supported by Mr. PELLET, said that, although the topic of the law of confined international groundwaters had been discussed, but no decision had been taken on it, it had been proposed in 1993.⁴ It should therefore be included in the list. Perhaps it should be placed under the subheading "Shared resources".

48. Mr. LUKASHUK referring to the topic of the law of space in the section under consideration, said he had the same problem as the one Mr. Tomuschat had pointed out with regard to human rights in the preceding section: the Sixth Committee might ask why the Commission had included space as a possible future topic when the United Nations had a specialized body for that purpose, namely, the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space.

⁴ Ibid.

49. The CHAIRMAN, supported by Mr. MIKULKA, pointed out that the topic had been proposed by the Commission in 1962, even before the establishment of the body to which Mr. Lukashuk had just referred. He recalled that paragraph 2 of the introduction stated that some topics proposed in the paper have been taken up by other bodies.

50. Mr. SZEKELY said that the term “Shared resources”, which was no longer used, should be replaced by the commonly used term “Transboundary resources”.

51. Mr. PELLET, Mr. CALERO RODRIGUES, Mr. BARBOZA and Mr. GÜNEY said they agreed with that amendment.

52. The CHAIRMAN suggested that the subheading “Legal regime of international rivers and related topics” should be deleted, that the subheading “Shared resources” should be replaced by the subheading “Transboundary resources” and that that new subheading should include the following topics: the law of confined international groundwaters; navigation on international rivers; the global commons; and the common heritage of mankind.

53. Mr. BARBOZA proposed that a fifth topic, “The common concern of humankind”, should be added to that list. Further consideration had demonstrated the limits of the concept of the common heritage of mankind: it was difficult to consider the moon and other celestial bodies, or biological diversity, from the heritage point of view. The principle of the common concern of humankind was already included in the preambles to the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, as well as in some General Assembly resolutions. That topic was also very close to the international community’s modern-day concerns.

54. Mr. PELLET said he agreed with that proposal.

55. Mr. CALERO RODRIGUES said that the proposed topic had been referred to at a UNEP meeting held recently in Malta.

56. The CHAIRMAN said that the Commission was prepared to add “The common concern of humankind” to the list of possible future topics.

57. Mr. TOMUSCHAT said that he was not sure about the title of heading 3 (Possible future topics), because most of those topics had been proposed in the past and were, so to speak, historical.

58. Following a discussion in which Mr. MIKULKA, Mr. CALERO RODRIGUES, Mr. BOWETT and Mr. BARBOZA took part, the CHAIRMAN suggested that paragraph 2 (c) of the introduction to the report should be amended, as indicated by Mr. Pellet, to read:

“(c) Adding some other possible topics on which the Commission does not intend to take a definite decision as to the feasibility or advisability of their future consideration.”

It was so decided.

Section VIII, as amended, was adopted.

SECTION IX (Law of international relations/responsibility)

59. Mr. MIKULKA said that it was strange that the law of international relations and the law of international responsibility should be included in the same section. It would have been more logical to include the topic of international “quasi-diplomatic” representation of international organizations in section V, which dealt with the law of international organizations. He proposed that, at the least, the word “quasi-diplomatic” should be deleted.

60. Mr. PELLET said that he would have no objection if the word “quasi-diplomatic” were deleted. He was, however, opposed to the idea of moving the topic to section V because he thought it related directly to the title of section IX, namely, “Law of international relations/responsibility”. It was inevitable that some topics should overlap, with the result that their inclusion in one section or another could give rise to endless discussions.

61. Mr. MIKULKA, supported by Mr. GÜNEY, said that he maintained his reservation. It was important that the separation between sections should be as strict as possible.

62. Mr. LUKASHUK said that the law of diplomatic and consular relations should have been included in a separate section.

63. The CHAIRMAN said that he had taken note of the comments by the members of the Commission, but he thought that their reservations related more to form than to substance. He therefore suggested that section IX should be adopted as it stood.

Section IX was adopted.

SECTION X (Law of the environment and of economic relations)

64. Mr. TOMUSCHAT noted that the possible future topics included international legal problems connected with privatization of State properties. He was not sure whether such problems would actually arise in practice.

65. Mr. PELLET confirmed that there were many examples and that the General Assembly had even adopted resolutions on the question.

66. Mr. YANKOV said that he did not see why the law of the environment and the law of economic relations had been included in the same section. Even if environmental problems had an economic dimension, the two were quite different. He therefore proposed that section X should be divided into two separate sections.

67. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt that proposal, which involved only a minor problem of layout.

Section X, as amended, was adopted.

SECTION XI (Law of armed conflicts/disarmament)

68. Mr. ROSENSTOCK, noting that each section contained a reminder of relevant topics already taken up at some point or another by the Commission, said he believed that the Commission had studied questions relating to the law of armed conflict in the past. If so, that should be indicated.

69. The CHAIRMAN said that that would be checked. If he heard no further comments, he would take it that section XI was adopted.

Section XI was adopted.

SECTION XII (Settlement of disputes)

70. Mr. VILLAGRAN KRAMER said that resolution 50/50 which had recently been adopted by the General Assembly, on United Nations Model Rules for the Conciliation of Disputes between States, was directly linked to the section under consideration. Perhaps the Commission should take that into account as a possible future topic.

71. The CHAIRMAN recalled that paragraph 2 of the introduction clearly stated that some of the proposed topics had been taken up by other bodies.

72. Mr. MIKULKA noted that, in the draft articles on State responsibility, the Commission had proposed provisions relating to dispute settlement for the first time, whereas, in the past, its practice had been to let diplomatic conferences deal with that question. It might consider the possibility of systematically including such provisions in its codification drafts in future.

73. Mr. PELLET said that the second topic under heading 2, "Model clauses for the settlement of disputes relating to application or interpretation of codification conventions" would meet Mr. Mikulka's concern. For the sake of greater clarity, the word "future" should be added before the words "codification conventions".

It was so decided.

Section XII, as amended, was adopted.

The meeting rose at 6.10 p.m.

2467th MEETING

Tuesday, 23 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney,

Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (concluded) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK (concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the report of the Working Group on the long-term programme of work (ILC(XLVIII)/WG/LTPW/2/Rev.1).¹

ADDENDUM 1 (Diplomatic protection)

Addendum 1 was adopted.

ADDENDUM 2 (Ownership and protection of wrecks beyond the limits of national maritime jurisdiction)

Addendum 2 was adopted.

ADDENDUM 3 (Unilateral acts of States)

Addendum 3 was adopted.

2. Mr. VILLAGRÁN KRAMER said he had not wished to block the adoption of addendum 3, which contained timely proposals and was well drafted. He did wish, however, to place on record a number of observations. It was extremely unfortunate that the Commission had made very little tangible progress in its work on reservations to treaties, despite the excellent second report placed before it by Mr. Pellet (A/CN.4/477 and Add.1 and A/CN.4/478).² If that slow pace were maintained, it was to be feared that the Commission's only contribution on the topic would be a doctrinal study, instead of a legal instrument in line with the Commission's mandate for the codification and progressive development of international law.

3. Mr. SZEKELY pointed out that he had strong reservations about the removal, from the list of possible topics for the Commission's future work, of the topic of representative government.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the

¹ See 2465th meeting, footnote 1.

² *Yearbook . . . 1996*, vol. II (Part One).

report of the Working Group on the long-term programme of work.

It was so agreed.

The report of the Working Group on the long-term programme of work, as amended, was adopted.

5. The CHAIRMAN suggested that the report of the Working Group should be annexed to the report of the Commission to the General Assembly.

6. Mr. TOMUSCHAT said that that was usually done with documents the Commission itself had not considered. In the current instance, however, it had adopted the report of the Working Group, which could therefore be considered a constituent element of the Commission's work and should be incorporated in the body of its report.

7. After a procedural discussion in which Mr. BOWETT, Mr. CALERO RODRIGUES and Mr. THIAM took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to identify the report as having been produced by the Planning Group and adopted by the Commission and to incorporate it in an annex to its own report to the General Assembly.

It was so agreed.

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

8. The CHAIRMAN invited the Commission to continue its consideration of the draft report on the work of its forty-eighth session, and specifically, chapter III, on State responsibility, and the commentaries to articles 42 (para. 3), 47, 48 and 51 to 53.

CHAPTER III. State responsibility (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

9. Mr. TOMUSCHAT suggested that all the articles of parts two and three, together with the commentaries, should be reproduced in the report of the Commission to the General Assembly for ease of reference.

10. Mr. BENNOUNA concurred that that would be useful, especially for discussion in the Sixth Committee, and added that a separate document containing the same material, to be made available to researchers and international law specialists, should also be produced.

11. Mr. LEE (Secretary to the Commission) said the secretariat's intention had been to issue a document comprising all the articles in parts one, two and three of the draft on State responsibility. Footnotes to each article would direct readers to the commentary. The commentaries to parts one and two alone were extremely voluminous, and incorporating them in the report of the Com-

mission in time to meet the September deadline for submission of documents to the General Assembly would be extremely difficult. He would give the Commission a more precise indication of the financial implications at a later stage.

D. Draft articles on State responsibility (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

Commentary to paragraph 3 of article 42 (Reparation) (A/CN.4/L.528/Add.3 and Corr.1)

Paragraph (8) (a)

12. Mr. ROSENSTOCK said the commentary should indicate that some members of the Commission believed that article 42, paragraph 3, was a profound mistake and a serious departure from the law on the situation and that, at a minimum, provision should be made for the inapplicability of the limitation set out in the paragraph to circumstances in which the injured State would suffer if full reparation was not made. At the current stage of first reading, it was both traditional and proper to indicate in the commentaries the existence of dissenting views—as there most assuredly were dissenting views on article 42, paragraph 3.

13. Mr. ARANGIO-RUIZ said he agreed and thought that the commentary should specify the need for very careful interpretation of paragraph 3, to ensure that the injured State was in no way damaged.

14. Mr. CALERO RODRIGUES said that, at the current late stage in the Commission's work, any changes to the commentaries should be proposed in the form of specific amendments; otherwise, the Commission would never be able to complete its work.

15. Mr. KABATSI said it was his understanding that the Commission had decided not to incorporate in the commentaries, at the current stage, any references to dissenting views. He had no objection, however, to the point raised by Mr. Rosenstock and Mr. Arangio-Ruiz.

16. Mr. BOWETT suggested that the difficulty might be overcome by deleting the first five sentences of the commentary, together with the word "Accordingly" that began the sixth sentence.

17. Mr. VILLAGRÁN KRAMER said that, though the proposal amounted to radical surgery, he could accept it. He had initially been in favour of paragraph 3 of the article, for its purpose had been to guarantee essential means of subsistence. One had only to think of, for example, the fate suffered by Finland after the Second World War, when it had been subjected to extremely severe terms and conditions for compensating the Union of Soviet Socialist Republics, a situation that had adversely affected its economic development. Paragraph 3, however, spoke not of "essential", but of "its own", means of subsistence. It would be useful if a reference to the "essential" nature of the means of subsistence could be included in the commentary.

18. Mr. BENNOUNA said that he understood Mr. Bowett's "surgical" proposal but did not think that amputation was the proper remedy for whatever might be wrong with paragraph (8) (a). The sentences being

* Resumed from the 2465th meeting.

proposed for deletion made it clear that paragraph 3 of the article applied only to extreme cases in which *erga omnes* obligations of States came into play. It would be a pity to lose that important element of clarification. He would have no objection to seeing Mr. Rosenstock's point reflected in the commentary, although he did not share the view expressed.

19. Mr. ROSENSTOCK proposed the addition of the following text to paragraph (8) (a):

“Some members disagreed with the inclusion of paragraph 3. They were of the view that the provision was inappropriate and that in any event the provision should not apply where the population of the injured State would be similarly disadvantaged by a failure to make full reparation on such grounds.”

He was in favour of Mr. Bowett's proposal.

20. Mr. TOMUSCHAT said that the new provision in paragraph 3 was, in his view, appropriate and represented a very welcome addition to article 42. He agreed with Mr. Bennouna that the first few sentences of the commentary, which explained that the provision applied only to extreme situations, should be maintained. The idea of placing a limit on the notion of full reparation was firmly rooted in current-day positive international law. The Security Council's decision that Iraq should pay only 30 per cent of its oil revenues as reparations was an obvious example. It was, of course, quite natural that making reparation should have some adverse impact on the wrongdoing State, but that was not what the provision meant. As for the point raised by Mr. Rosenstock, the interests of the injured State were quite clearly taken care of by the provision as it stood.

21. Mr. ROBINSON said that, for his part, he was prepared to subscribe to paragraph (8) (a) of the commentary without any change. However, if Mr. Bowett insisted on shortening the paragraph, he would suggest that only the first four sentences should be deleted and that in the fifth sentence the words “These are of course extreme cases” should be replaced by the words “It was generally agreed that this paragraph only applies to extreme cases”.

22. Mr. PAMBOU-TCHIVOUNDA said that he also considered paragraph 3 to be a useful addition to article 42, in particular as a practical help to the judge or arbitrator in deciding the amount of reparations in a given case. Paragraph (8) (a) of the commentary was acceptable and he would not subscribe to any proposal to curtail it.

23. Mr. ARANGIO-RUIZ said that he agreed with the suggestion made by Mr. Robinson, which placed additional stress on the extreme nature of the cases covered by the provision in paragraph 3. He proposed that the expression “means of subsistence” should be replaced, in the commentary at least, by the expression “vital needs”, which could include moral interests as well as physical needs. It would be recalled that the expression had been used in connection with crimes.

24. Mr. VILLAGRÁN KRAMER said he endorsed that proposal.

25. Mr. CALERO RODRIGUES pointed out that the reference to the wrongdoing State appearing in the passage in brackets in the sixth sentence of paragraph (8) (a) was inappropriate; a reference to the injured State would be more to the point in the context. The whole passage could be deleted without any loss of meaning. In his opinion, the Commission should not attempt to change the wording of paragraph 3 itself but should confine itself to explaining in the commentary what was meant by the words “the population of a State” and “means of subsistence” or “vital needs”.

26. The CHAIRMAN suggested that the text proposed by Mr. Rosenstock should be added to paragraph (8) (a) and that, in accordance with Mr. Bowett's proposal, the second and third sentence of the paragraph should be deleted. The first sentence had a certain usefulness and should be maintained, as should the remainder of the paragraph from the fourth sentence onwards. The expression “means of subsistence” should be replaced by “vital needs”, and the passage in brackets in what was now the sixth sentence of the paragraph should be deleted.

It was so agreed.

Paragraph (8) (a), as amended, was adopted.

Commentary to article 47 (Countermeasures by an injured State)

Paragraphs (1) and (2)

27. Mr. LUKASHUK proposed that the sixth sentence of paragraph (1) should be deleted.

28. Mr. ROSENSTOCK proposed that the whole of paragraphs (1) and (2) should be deleted. He was not opposed to lengthy commentaries as such, but the paragraphs in question contained nothing necessary for the interpretation of article 47. Furthermore, the drafting of the paragraphs, and particularly of paragraph (2), was unsatisfactory. The commentary to article 47 would still be quite long enough.

29. Mr. ARANGIO-RUIZ said that he thought the system was indeed rudimentary, and that the fact needed stating somewhere in the commentary.

30. Mr. VILLAGRÁN KRAMER said he disagreed. When the Security Council authorized countermeasures, it did so within a highly centralized legal order which was far from rudimentary. He supported the proposal to delete paragraphs (1) and (2).

31. Mr. PAMBOU-TCHIVOUNDA said that paragraphs (1) and (2) were relevant to an understanding of paragraph 1 of article 47. On a drafting matter, he would suggest that the words *État fautif* in the French text should be replaced by *État auteur du fait illicite* throughout the commentary to article 47.

32. The CHAIRMAN said that it would be necessary to check whether the expression *État fautif* was employed in the commentary to part one of the draft. If so, its use in the commentary on article 47 was justified; otherwise, it should be replaced, as suggested.

33. Mr. BARBOZA said that he thought the system was rudimentary, but would have no objection to dropping paragraphs (1) and (2) of the commentary.
34. Mr. ROSENSTOCK emphasized that his proposal was designed to save time and avoid confusion. As to Mr. Pambou-Tchivounda's point, paragraph (3) of the commentary did all that was necessary with regard to paragraph 1 of article 47.
35. Mr. ROBINSON commented that since the Commission had avoided using the words "right" or "entitlement" in article 47 itself, it should perhaps try to avoid using those words in the commentary as well.
36. Mr. ARANGIO-RUIZ said that paragraphs (1) and (2) should be maintained, with the omission of any words or sentences the Commission regarded as superfluous. The main object was to stress that the existing system was not ideal and entailed a certain measure of inequality. The paragraphs in question summed up the debate as it had taken place, not only within the Commission but also in the Sixth Committee; in particular, he could recall a very eloquent statement on the subject made by Mr. de Saram (2457th meeting). Paragraphs (1) and (2) threw light on the commentary that followed, and for that reason should be maintained.
37. Mr. BENNOUNA endorsed that view. Commentaries to articles adopted on first reading were supposed to reflect what had taken place, which was precisely what paragraphs (1) and (2) did. Both paragraphs, along with the footnotes, should be maintained.
38. Mr. BOWETT said that he supported the idea of deleting paragraphs (1) and (2). With regard to the point raised by Mr. Robinson, the word "entitlement" in the first line of paragraph (3) could be replaced by the word "option" and the words "The right of", at the beginning of paragraph (4), by the words "Any decision by".
39. Mr. VILLAGRÁN KRAMER said that the Commission seemed to be acting as the theoretical exponent of legal ideas that were not shared by all its members. Those ideas related, on the one hand, to the question whether the system governing countermeasures was or was not rudimentary and, on the other hand, to the question whether recourse to countermeasures was or was not an entitlement or a right. On the first point, he pointed out that in the case of countermeasures the injured State was not applying sanctions against a culprit State but was simply inducing, through the acts or omissions of which the countermeasures consisted, the wrongdoing State to cease the internationally illicit act and to compensate the injury caused. He could not agree that the system which governed that process was a rudimentary one. It was simply a system whereby a State still enjoyed certain privileges. As for the more philosophical issue of the right or entitlement to take countermeasures, any *faculté* recognized and regulated by international law was, by that token, a right. Whether or not the Commission amended the text as suggested by Mr. Bowett—whose solution was the correct one—it could not ignore that fact.
40. Mr. KABATSI, agreeing that paragraphs (1) and (2) could be deleted, said that countermeasures became a right once a State had met certain preconditions and, in that sense, an option to do something was also a right.
41. Mr. ROBINSON said that his main concern was to ensure consistency between the article and the commentary. Historically, a very delicate compromise had been built into article 47, the main point being that the term "right" was not used. The commentary should not therefore state anything that was in opposition to the content of the article. In the light of that consideration, he supported Mr. Bowett's proposed amendment to paragraph (4) of the commentary. So far as paragraph (3) was concerned, it might perhaps be possible to redraft the opening clause of the first sentence to read "The basic notion is that the injured State does not comply".
42. Mr. TOMUSCHAT said that he could live with paragraphs (1) and (2) or, alternatively, could accept their deletion. As a compromise solution, however, paragraph (1) could perhaps be deleted and paragraph (2) placed at the end of the commentary to show that some members disagreed on account of the inherent dangers of countermeasures.
43. Mr. ROSENSTOCK said that he would prefer by far to delete paragraphs (1) and (2), but was prepared to accept that suggestion.
44. Mr. CALERO RODRIGUES said he was inclined to think that the notions reflected in paragraphs (1) and (2) should be included in the commentary despite the very poor drafting of those paragraphs. As there was no time to prepare a suitable alternative, however, he would agree to Mr. Rosenstock's suggestion, though he regretted the omission of the ideas reflected in the two paragraphs.
45. Mr. ARANGIO-RUIZ said that he failed to see why the Commission should decide, at a time when many members were absent, to remove something that had formed part and parcel of the whole debate on countermeasures. The job of the Commission, after all, was not only the codification but also the progressive development of international law. Should it not therefore at least call the attention of Governments to the fact that countermeasures were not the ideal system for enforcing the law in international society?
46. Mr. BENNOUNA said that, contrary to what Mr. Calero Rodrigues had said, the commentary was both balanced and well drafted. If the Commission set about deleting parts of it, that would only disturb the balance. Should Mr. Rosenstock insist on his point, some members, including himself, would feel bound to point out that the most difficult and controversial aspect of the whole regime of State responsibility was at issue and that a number of members had even proposed deletion of the entire chapter on countermeasures. The Commission must decide what it wanted, but the wisest course would be to retain the commentary as drafted, for otherwise the matter would not be settled for ages.
47. Mr. PAMBOU-TCHIVOUNDA said that the Commission would be wrong to delete paragraphs (1) and (2), both of which had a valid place in the commentary. They not only recorded the debate on countermeasures,

but also contained a statement of positive law in the matter.

48. Mr. ROSENSTOCK said he could not agree more with Mr. Calero Rodrigues that the two paragraphs were badly drafted. He suggested, by way of compromise, that the first sentence of paragraph (1) should be retained, that the remainder of paragraph (1) and the whole of paragraph (2) should be deleted and that a brief paragraph should be added at the end of the commentary to reflect the views of some members.

49. Mr. ARANGIO-RUIZ said that, despite the importance of the issue involved, the Commission was once again engaged in the game of converting a majority into a minority. It was an absurd situation when Mr. Bennouna, Mr. Pambou-Tchivounda, he and other members, too, found themselves in a minority when the Commission had originally accepted, almost universally, the views they espoused. A comparison of the summary records of the Commission's session two or three years ago with those of the current session left the impression that matters were now all topsy-turvy. One reason was that many members were not present at a time when the Commission was adopting, on first reading, one of the most important drafts to come before it for the past 45 years. He wished to voice a protest and would request that it appear clearly in the summary record.

50. The CHAIRMAN pointed out that the Commission was still at the stage of first reading, when a measure of flexibility, allowing for different points of view to be reflected, was permissible. Had it been at the stage of second reading, when firmer decisions were required, the position would have been different. He suggested that a small group of members should meet to consider the matter and draft a form of words that would take account of the various points of view.

51. Mr. THIAM said that he agreed with the views expressed by Mr. Bennouna and Mr. Pambou-Tchivounda.

52. Mr. LUKASHUK, expressing his support for the Chairman's suggestion, said the danger was that, even if a very good commentary were drafted, the draft as a whole would not be adopted.

53. Mr. EIRIKSSON said he would suggest, as a way out of the impasse, that there should be a general introduction to chapter III (Countermeasures) of part two, along the lines of the introduction to chapter IV (International crimes), consisting of the existing paragraphs (1) and (2) of the commentary and setting out the various views. Paragraph (3) of the commentary to article 47, which basically described what a countermeasure was, would then become the first paragraph in that commentary. That might bridge the gap between the different viewpoints.

54. Mr. BENNOUNA said that he could agree to Mr. Eiriksson's proposal, provided that it involved merely a question of placement and that it took account of all points of view.

55. Mr. ARANGIO-RUIZ said that, if the intention was that the two paragraphs in question should form the *chapeau* to the chapter on countermeasures, he would

have no objection. From the standpoint of procedure, however, it was somewhat odd that, simply because Mr. Rosenstock did not like paragraphs (1) and (2), Mr. Bennouna, Mr. Pambou-Tchivounda and he himself should be invited to draft something different. Those two paragraphs were what Mr. Bennouna, Mr. Pambou-Tchivounda and he himself wanted and, if Mr. Rosenstock disagreed, it was for him and those who supported him to do any further drafting. The paragraphs in question had been prepared by an able draftsman, Mr. Crawford, so why demolish them? It was all so strange that he no longer recognized the Commission.

56. The CHAIRMAN, appealing for calm, urged members not to personalize the debate. Mr. Rosenstock's proposal had in fact received the support of several members.

57. Mr. TOMUSCHAT and Mr. KABATSI supported Mr. Eiriksson's proposal.

58. Mr. FOMBA said that he agreed with Mr. Arangio-Ruiz and Mr. Bennouna as to substance but, to overcome the difficulties, would agree to Mr. Eiriksson's proposal.

59. Mr. AL-BAHARNA said that he supported the commentary as drafted.

60. Mr. EIRIKSSON said a reference to article 30 should perhaps also be included as a second sentence in the introductory paragraph.

61. The CHAIRMAN suggested that Mr. Eiriksson should be asked to hold consultations with a view to submitting a firm proposal for the Commission's final decision later.

It was so decided.

Mr. Kusuma-Atmadja took the Chair.

Paragraph (3)

62. Mr. FOMBA said that the words *à prendre* in the French version of the last sentence of paragraph (3) should be replaced by *prise*.

63. Mr. CALERO RODRIGUES recalled Mr. Bowett's proposal that, in the first line of the paragraph, the word "entitlement" should be replaced by "option".

64. Mr. BOWETT said that his suggestion had been made as an alternative to the amendment made earlier by Mr. Robinson.

65. Mr. ROSENSTOCK said that the use of euphemistic language was merely doing a disservice to the work of the Commission. If the members wished to use the word "option" instead of "entitlement", a choice he would go along with reluctantly, that did not change the fact that an injured State could with impunity choose not to comply with one or more of its obligations towards the wrongdoing State. It was that point that had to be highlighted in paragraph (3) and Mr. Robinson's proposed amendment failed to do that.

66. Mr. PAMBOU-TCHIVOUNDA said that the expression *État fautif* in the French text was not consistent with the wording used throughout the commentaries and should be changed accordingly. He endorsed paragraph (3) as it stood.

67. Mr. TOMUSCHAT said that he preferred to keep paragraph (3) as it stood. The version proposed by Mr. Robinson was not acceptable because it did not emphasize the legality of the action of the injured State in taking a countermeasure.

68. Mr. CALERO RODRIGUES said that he preferred the text in its current form, but it should be remembered that during the debate on article 47 many members had objected to the word "entitlement".

69. Mr. THIAM said that he was in favour of replacing "entitlement" by "option". In fact, the word "entitlement" should be replaced wherever it appeared in the articles on countermeasures.

70. Mr. ARANGIO-RUIZ said that he would go along with a consensus to use the word "option".

71. Mr. KABATSI said that Mr. Robinson's proposal obviated the need to use either "entitlement" or "option".

72. Mr. TOMUSCHAT said that he endorsed paragraph (3) as it stood. The word "entitlement" appropriately described the legal situation referred to in article 47.

73. The CHAIRMAN said that, since none of the proposed amendments had received much support, he would take it that the Commission agreed to adopt paragraph (3) as it stood.

Paragraph (3) was adopted.

Paragraph (4)

74. Mr. LUKASHUK said that the last sentence of paragraph (4) contradicted the first sentence of paragraph (8) of the commentary to article 54. The penultimate sentence of paragraph (4) should be deleted, along with the word "only", in the last sentence.

75. Mr. ROSENSTOCK said that he could accept Mr. Lukashuk's proposal, although he would prefer to keep the penultimate sentence and delete the last sentence of paragraph (4). The second sentence was confusing and parts of it were completely inaccurate with regard to article 47. It should read: "State practice indicates that in resorting to countermeasures the injured State may seek the cessation of the wrongful conduct as well as reparation in a broad sense."

76. Mr. TOMUSCHAT said that he agreed with the proposal made by Mr. Lukashuk. In addition, the word "punishment", in the last sentence, should appear in quotation marks. It was regrettable that the draft did not deal with the important practical issue of whether the injured State was entitled to take justice into its own hands and, as reparation, to take what it considered was due to it.

77. Mr. de SARAM said it had never been the Commission's intention to attribute a punitive purpose to countermeasures. Such measures were strictly coercive. For that reason, he would delete the last sentence of paragraph (4).

78. Mr. VILLAGRÁN KRAMER said that he agreed with Mr. Tomuschat. It was none the less important to distinguish between reprisals taken against a State and reprisals taken against a State's nationals. In the latter case, the persons involved would be better off combating the countermeasures to which they were subjected by using the legal remedies available in the injured State. It was one matter to freeze assets, which was a legal act, and another matter to seize assets, which was not legal.

79. Mr. ROSENSTOCK said that in his view, the right to take countermeasures extended to obtaining reparation. Article 48 strongly suggested that a State could take interim measures of protection pending the outcome of negotiations and could go further following the negotiation phase. Thus, the distinction between interim measures of protection and countermeasures was, in fact, the distinction between freezing assets and seizing assets. The implication was that a State taking countermeasures could do so not only to oblige the other State to comply with its obligations but also to award itself compensation.

80. Mr. BOWETT said that the draft articles did in fact deal with the issue referred to by Mr. Tomuschat: in the case where a State taking countermeasures did so by taking reparation into its own hands, the remedy of compulsory arbitration was available. He was in favour of deleting the last two sentences of paragraph (4).

81. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to delete the last two sentences.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraphs (6) to (8)

82. Mr. BENNOUNA suggested that paragraphs (6) to (8) of the commentary to article 47 should be merged into one paragraph.

83. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to adopt paragraphs (6) to (8) as a single paragraph.

Paragraphs (6) to (8), as amended, were adopted.

Paragraph (9)

Paragraph (9) was adopted.

The meeting rose at 1.05 p.m.

2468th MEETING

Tuesday, 23 July 1996, at 3.10 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer.

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

CHAPTER III. *State responsibility (continued)* (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

D. *Draft articles on State responsibility (continued)* (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

Commentary to article 47 (Countermeasures by an injured State) (concluded) (A/CN.4/L.528/Add.3 and Corr.1)

Paragraph (10)

1. Mr. ARANGIO-RUIZ suggested that the words "or maintaining" should be added before the word "countermeasures" in the fifth sentence.
2. Mr. BENNOUNA said that the addition of those words would give rise to problems in French and was not necessary.
3. Mr. ROSENSTOCK said that the words "to compel both cessation and reparation" at the end of the second sentence complicated matters unnecessarily and might create confusion. He therefore proposed that they should be deleted.
4. The CHAIRMAN said that, in that case, it would also be necessary to delete footnote 7, which referred to those words.

It was so agreed.

Paragraph (10), as amended, was adopted.

5. Mr. VILLAGRÁN KRAMER said that, before going on to the consideration of paragraph (11), he was of the opinion that the content of paragraph (10) of the commentary which had just been adopted was not applicable to crimes. He requested that that opinion should be reflected in the summary record.

Paragraphs (11) and (012)

Paragraphs (11) and (12) were adopted.

6. The CHAIRMAN reminded the Commission, before it went on to the consideration of the commentary to article 48, that paragraphs (1) and (2) of the commentary to article 47, that would form a general introduction to chapter III of part two, had been left pending until Mr. Eiriksson had drafted his proposed amendment in writing.

The commentary to article 47, as amended, was adopted on that understanding.

Commentary to article 48 (Conditions relating to resort to countermeasures)

Paragraph (1)

7. Mr. VILLAGRÁN KRAMER said that paragraph (1) suggested that conditions relating to resort to countermeasures were applicable in all cases, including the case of one of the crimes listed in article 19 of part one, such as the crime of genocide. It must, however, be noted that, in such a case, the obligation to negotiate or to suspend countermeasures as soon as the internationally wrongful act had ceased, as usually required of the injured State under article 48, was meaningless. In the case of aggression, moreover, it was not possible that the State which had been attacked should have to start negotiations before it reacted. When the Security Council authorized a State to take countermeasures, it did not ask it to negotiate first. By stating those new rules, the Commission was moving far away from United Nations practice and general international law. Before paragraph (1) was adopted, it should therefore give more thought to the question whether the conditions relating to resort to countermeasures which it stated should apply in the case of crimes.

8. Mr. ROSENSTOCK said that Mr. Villagrán Kramer's comment was relevant. Paragraph (1) said nothing about the specific consequences of crimes. It would probably be rather complicated to redraft it completely at the current stage, but, by way of an indication for the reader, a sentence could perhaps be added explaining, for example, that a State facing an emergency situation was not required to negotiate. He was thinking of the case of self-defence. Explanations to take care of Mr. Villagrán Kramer's concerns might also be included in the section on crimes.

9. The CHAIRMAN said that the case of self-defence was covered in article 34. He nevertheless suggested that Mr. Villagrán Kramer should submit a written proposed amendment to paragraph (1). Pending the distribution of that proposal to the members, he said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (1).

Paragraph (1) was adopted on that understanding.

Paragraph (2)

10. Mr. BENNOUNA suggested that, in the sixth sentence, the words "including negotiations", which added nothing to the commentary, should be deleted. To bring the French text into line with the English text, the word *intérêts* should be replaced by the word *droits* at the end of the last sentence.

It was so agreed.

11. Mr. ROSENSTOCK said that he supported Mr. Bennouna's proposals. He also suggested that, at the end of the second sentence, the words "whether these other remedies should be exhausted" should be replaced by the words "whether this needed to be". He also proposed that the words "any form of" before the word "countermeasures" in the sixth sentence should be deleted because they were unnecessary.

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

12. Mr. BENNOUNA, commenting on the form of paragraph (3), said that the words *droits juridiques* at the end of the second sentence were not a good translation of the words "legal rights". It was enough to refer to "rights". In the last sentence, the words "its legal position" should be replaced by the words "its rights".

13. As to substance, paragraph (3) referred to the obligation to negotiate without ever explaining why that obligation had been introduced and what the point of it was. That gap could be filled if the words "by negotiation" in the penultimate sentence were followed by an explanatory sentence, which might read:

"This obligation, which has been clearly explained by international legal decisions, has the advantage of crystallizing the dispute by enabling each State to explain its legal position and to settle the dispute in good faith by fulfilling their international obligations."

The sentence might, of course, be worded differently, but he thought that such an explanation was necessary.

14. Mr. ROSENSTOCK said that the obligation to negotiate, as provided for in article 48, paragraph 1, had not been unanimously agreed on by the members of the Commission and that that paragraph had even had to be voted on. The possibility of interim measures of protection had been provided for in order to solve the problem created by the introduction of that obligation. Paragraph (3) of the commentary, which was designed to reflect that compromise, was acceptable as it stood. However, if explanations on the grounds for the obligation to negotiate were to be added, the arguments of those who had been opposed to it would also have to be reflected.

15. He therefore proposed that paragraph (3) should be retained as it stood, except that, in the fourth sentence, the word "strikes" should be replaced by the words "tries to strike" and, in the fifth sentence, the word "amicably", which added nothing and could give rise to confusion, should be deleted.

16. The CHAIRMAN asked Mr. Bennouna whether, in the light of the arguments put forward by Mr. Rosenstock, he maintained his proposal.

17. Mr. BENNOUNA said he regretted that the Commission was adopting that position. His only intention had been to explain, by means of a neutral reference, what the obligation to negotiate meant. If the Commission preferred not to give any explanation and to bury its

head in the sand, it could even delete paragraph (3) as a whole because article 48 stood on its own. The interested persons simply had to refer to the text books and other writings on law. He would not press for his suggestion, but, as a trade-off, he would like Mr. Rosenstock to withdraw his proposal for the amendment of the beginning of the fourth sentence.

18. Mr. VILLAGRÁN KRAMER said that, in that particular area, the Commission had to have very clear ideas. At present, there was no obligation to negotiate in the event of reprisals and Mr. Bennouna would be unable to cite a single case of reprisals where an obligation to negotiate had been established or regarded as valid. The obligation to negotiate that the Commission thought should be introduced in the system it was proposing should, in his view, be substantially restricted if the Commission wanted to obtain the approval of the text by States which had been or continued to be in favour of the practice of countermeasures. They would agree to restrict their own right to resort to countermeasures only if they had a specific idea of the regime that would be applicable in the framework of the articles. It would therefore be better if the Commission left things as they were, while taking note of the statements that had been made.

19. The CHAIRMAN, replying to a comment by Mr. Lukashuk on the words "the Commission eventually concluded" in the third sentence, said that those words had to be retained because there had been a discussion and a vote had even been taken.

20. Since Mr. Rosenstock did not insist on his first proposal, he said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (3), deleting only the word "amicably" in the penultimate sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

21. Mr. BOWETT proposed that the word "analogous" in the first sentence should be deleted because it would be dangerous to suggest that the Commission was drawing an analogy with other procedures.

22. Mr. ARANGIO-RUIZ said that he supported that proposal and suggested that the beginning of the sentence should be simplified to read: "The term 'interim measures of protection' is drawn from procedures of international courts."

23. Mr. BENNOUNA said that the words "drawn from" should be replaced by the words "based on", but that was only a drafting problem. He had two other proposed amendments to submit to the Commission. In the third sentence, the words in brackets should be deleted because it was not necessary to explain that assets could be removed from the jurisdiction within a very short time. His second proposal was that the following new penultimate sentence should be added:

"Such measures would be designed to enable the injured State to prevent any deterioration of its position in its relations with the State which committed the wrongful act."

The purpose of that proposal was to explain interim measures of protection, but, if some members considered it too ideologically oriented, he would withdraw it.

24. Mr. ARANGIO-RUIZ said that he could agree to Mr. Bennouna's first proposal, but, with regard to the second, he thought that the injured State had to protect its rights, and not only its position in its relations with the wrongdoing State.

25. The CHAIRMAN pointed out that Mr. Bennouna was prepared to withdraw his second proposal. It was true that, since interim measures of protection had to be taken by the competent bodies, they should be allowed to decide what the purpose of such measures was.

26. Mr. BOWETT said that he objected to the deletion of the words in brackets in the third sentence of paragraph (4) because the commentary was designed to explain the purpose served by interim measures of protection and it was precisely because of the speed with which assets could be removed from a jurisdiction that the Commission had provided for the possibility of interim measures of protection.

27. Mr. AL-BAHARNA said that he was in favour of the retention of the words in brackets and suggested that, in order to make the text clearer, the brackets should be removed.

28. The CHAIRMAN said that, in a spirit of compromise, the Commission should leave that part of the sentence as it stood. In reply to a comment by Mr. VILLAGRÁN KRAMER, he said that there should be a provision to protect the rights of third States. He said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (4) with the amendments to the first sentence proposed by Mr. Bowett and Mr. Arangio-Ruiz.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

29. Mr. BENNOUNA said that the words "are unlikely to succeed" were too subjective and should be replaced by the words "are deadlocked".

30. Mr. ARANGIO-RUIZ said that, although both wordings involved some degree of subjectivity, the degree was not so great when determining whether or not a deadlock existed. That was a relatively more objective criterion that would be easier to evaluate.

31. Mr. ROSENSTOCK said it was precisely the appearance of objectivity that created a problem. Such wording would suggest that there were objective criteria for determining whether the countermeasures to which the injured State resorted at its own risk were lawful or wrongful. The evaluation by the injured State was always of a subjective nature and implying that it could be made more objective was misleading.

32. Mr. KABATSI, supported by Mr. THIAM, proposed that, as a compromise solution, the Commission might add the words "are deadlocked and" before the words "are unlikely to succeed".

33. Mr. AL-BAHARNA proposed that, in the first sentence, the words "which go beyond" should be replaced by the words "which might go beyond".

34. Mr. ROSENSTOCK said that the problem could be solved if the word "and" after the words "are at a standstill" were replaced by the word "or".

35. Mr. BENNOUNA said that only the word "and" would indicate clearly that negotiations were unlikely to succeed. Replacing it by the word "or" would be the same as leaving the text as it stood. He was, moreover, prepared, in a spirit of compromise, to agree to the original text, even though he regretted that the Commission could not be more flexible.

36. The CHAIRMAN said that, if he heard no objections, he would take it that the the Commission wished to adopt paragraph (6) as it stood.

Paragraph (6) was adopted.

37. Mr. VILLAGRÁN KRAMER said he wanted it to be placed on record that he could agree to the adoption of paragraph (6) only if it was understood that negotiations were regarded as "unlikely to succeed" if the wrongdoing State: (a) refused to cease its wrongful conduct; and (b) refused to recognize its duty of reparation.

Paragraph (7)

38. Mr. ROSENSTOCK said that the end of paragraph (7) as from the words "the allegedly wrongdoing State" in the second sentence suggested that there was a conventional regime such as the one the Commission was proposing. Such an affirmation was not correct from the point of view of general international law and the Commission would have to be more specific, for example, by adding the words "in the context of the regime defined by the Commission" after the words "where a State takes countermeasures" in the penultimate sentence.

39. Mr. BOWETT, replying to the comment by Mr. Rosenstock, proposed that the words "pursuant to article 48" should be added after the words "where a State takes countermeasures".

It was so agreed.

Paragraph (7), as amended, was adopted.

Paragraph (8)

40. Mr. ROSENSTOCK, referring to the third sentence, proposed that the words "will also have power" should be replaced by the words "must also have power". It was that power that gave rise to the obligation to suspend countermeasures; that obligation did not flow automatically from the institution of dispute settlement proceedings.

41. Mr. TOMUSCHAT said that paragraph (8) gave rise to a substantive problem in view of the doctrinal dispute on whether the interim measures of protection indi-

cated by ICJ under Article 41 of its Statute were binding or not on the parties to the dispute.

42. Mr. BOWETT said that ICJ could issue orders binding on the parties, provided that such orders were worded along those lines. Thus, if it so wished, it could indicate interim measures of protection having the effect of suspending a countermeasure.

43. Mr. ARANGIO-RUIZ said that, unlike paragraph (8) of the commentary, which referred to “power to order or indicate interim measures of protection”, Article 41 of the Statute of ICJ used only the word “indicate”. By using the words “issue orders binding on the parties”, article 48, paragraph 3, laid down a condition for the suspension of countermeasures and the words “or indicate” in the last sentence of paragraph (8) should therefore be deleted.

44. Mr. TOMUSCHAT said that, if those words were deleted, ICJ would no longer be a “tribunal” within the meaning of article 48. However, even if the indication of interim measures of protection by ICJ was not legally binding, it carried such political weight that it should be covered by article 48, paragraph 3. The text of that provision should therefore be amended and the necessary explanations given in the commentary.

45. Mr. ROSENSTOCK said that paragraph (8) did not rule out the possibility that ICJ might play a role. The solution might be to use the words in quotation marks in the first sentence in the third sentence. As the text of article 48, paragraph 3, now stood, if a tribunal was not authorized to issue orders binding on the parties, it could still settle the dispute, but having the dispute submitted to it did not make it an obligation for the State which had taken countermeasures to suspend them because ICJ did not have power to issue binding orders and could therefore not protect that State. He thought that the words “or indicate” should be deleted.

46. Mr. PELLET said that the text of article 48, paragraph 3, was not at all ambiguous because it stated that the tribunal must be able to issue “orders binding on the parties”. It was very rash to try, in a commentary on a draft article on State responsibility, to settle a dispute that had existed since the establishment of ICJ concerning the nature of the interim measures of protection it indicated. If the words “or indicate” were kept in the commentary, the text of article 48, paragraph 3, itself would have to be amended, as Mr. Tomuschat had proposed. He himself was opposed to such an amendment and to the entire system proposed. Moreover, the last sentence of paragraph (8) seemed to give the tribunal a power not given to it either by part three of the draft articles or by the annex. It should therefore be deleted.

47. Mr. FOMBA said it was clear that, as the text stood, action by the Court would not have a suspensive effect. He agreed with Mr. Pellet that the last sentence of paragraph (8) should be deleted.

48. The CHAIRMAN suggested that only the end of the third sentence of paragraph (8) should be deleted, as from the words “which may have the effect”. The Commission would thus not be taking a stand on the effect of

interim measures of protection taken by a particular body.

49. Mr. PELLET said that the last sentence suggested that the tribunal set up in part three of the draft articles had the power in question, but that was not stated anywhere in part three. He therefore proposed that the last sentence should begin with the words “The tribunal to which the dispute is submitted will also have power”.

50. Mr. ROSENSTOCK said that he could agree to Mr. Pellet’s proposal, but he preferred the one made by the Chairman. An analysis of article 48, paragraph 3, showed that the obligation to suspend countermeasures which it imposed on the injured State depended on the power of the tribunal to issue binding orders. The reason was that the State which had to suspend its countermeasures could benefit from the protection of a tribunal which had that power. If the tribunal to which the dispute had been submitted did not have that power to protect it, it was doubtful whether the injured State was required to lay itself wide open by lifting the countermeasures. The effect of interim measures of protection must therefore not be limited to the modification or suspension of the countermeasure taken, but must be to do away with the need for the injured State to maintain that countermeasure in order to protect itself.

51. Mr. PELLET said that his concern was to avoid appearing, in the commentary to article 48, to give powers to the tribunal referred to in part three of the draft articles. The solution might be to combine his proposal with that of the Chairman, so that the last sentence would read: “The tribunal to which the dispute is submitted must have power to order interim measures of protection.”

It was so agreed.

Paragraph (8), as amended, was adopted.

Paragraph (9)

52. Mr. ROSENSTOCK said that paragraph (9) belonged within the commentaries to part three of the draft articles.

53. Mr. BOWETT said that the last sentence was important because it related to countermeasures.

54. Mr. ARANGIO-RUIZ said it should be ensured that the questions dealt with at the beginning of paragraph (9), particularly that of the scope of the jurisdiction of the arbitral tribunal referred to in article 58, paragraph 2, were in fact covered in the commentaries to part three of the draft articles.

55. Mr. PELLET said that that question was considered in paragraphs (4) and (5) of the commentary to the former article 5 of part three.¹ In that connection, he pointed out that paragraph (5) of former article 5 said nearly the same thing as the footnote to the second sentence of paragraph (9) under consideration, but much more clearly.

¹ See *Yearbook* . . . 1995, vol. II (Part Two), chap. IV, sect. C.

56. The CHAIRMAN said that he took it that the Commission wished to request the secretariat to make the necessary comparisons and propose a new, shorter wording for paragraph (9).

It was so agreed.

Paragraph (10)

57. Mr. ROSENSTOCK said that the words "is suspended" in the third sentence should be replaced by the words "may be suspended" because the right of the injured State to continue to take countermeasures would not be suspended in all cases.

58. Mr. ARANGIO-RUIZ said that paragraph (10) could not be amended without affecting the interpretation of article 48, paragraph 3. It should therefore be left as it stood.

Paragraph (10) was adopted.

Paragraph (11)

59. Mr. ROSENSTOCK proposed that paragraph (11), which he thought was unnecessary, should be deleted.

60. Mr. TOMUSCHAT and Mr. CALERO RODRIGUES said they agreed that paragraph (11) was not absolutely necessary, but thought that it should be retained because it was very clear and explained a complex situation in few words.

Paragraph (11) was adopted.

Paragraph (12)

61. Mr. BOWETT said that paragraph (12) was too wordy and that he would have liked to retain only the part dealing specifically with article 48.

62. Mr. LUKASHUK and Mr. ROSENSTOCK said that the word "technically" in the fourth sentence should be deleted.

63. Mr. PELLET proposed that the words "technically non-binding" should be replaced by the words "legally binding".

It was so agreed.

Paragraph (12) was adopted.

Paragraph (13)

64. Mr. ROSENSTOCK said that the last part of the last sentence, which referred to *lex talionis* and "the law of the jungle", was quite out of place in a commentary and should be deleted.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

General commentary to chapter IV (International crimes) of part two

65. Mr. ARANGIO-RUIZ, referring to the commentary to chapter IV, said that he could not accept most of the paragraphs under consideration and, in particular, paragraphs (3), (5), (7), (8) and (10), because they

tended to solve explicitly in favour of the competence of the Security Council the problem raised by the implications of the very ambiguous provision contained in article 39, which had been adopted just barely, by 11 votes to 11, with 4 abstentions (2452nd meeting). A number of members of the Commission considered that that article did not make the law of State responsibility subject to the practice of collective security and that it was designed simply to protect the system of collective security from the effects of the articles on State responsibility relating to the consequences of internationally wrongful acts. In his view, however, article 39 did make the law of State responsibility subject to decisions by the Security Council. He had already explained that, he trusted, with sufficient clarity.

66. The paragraphs of the commentary to which he had referred would inevitably be read as an explicit interpretation of article 39 as subordinating the law of State responsibility to Security Council action. In other words, they would confirm the fears expressed by more than one half of the members of the Commission, who had voted against article 39.

67. Moreover, the paragraphs in question did not make adequate room for the decisive role that ICJ could play in the determination of the existence of a crime and its attribution to a State. They also ignored the role of the General Assembly, which was the most representative organ in the system and was referred to in Article 35 of the Charter of the United Nations as an organ not less competent than the Security Council for the purpose of that Article. Everyone knew that at least three categories of the crimes covered by article 19 of part one of the draft articles related to areas within the competence of the Assembly.

68. On the whole, the emphasis that the proposed commentary placed on the functions of the Security Council conveyed the idea that the Charter of the United Nations and, in particular, the "provisions and procedures" referred to in article 39 of the draft articles, dealt with State responsibility, and that was unacceptable. The Charter had nothing to do with the general law of State responsibility.

69. Lastly, he did not agree with the term "innovative" which was used in paragraphs (3) and (11) of the commentary to describe some of the proposals the Commission had studied. The solution adopted by the Commission in articles 39, 51, 52 and 53 was the most innovative because, for the first time, a body as specialized as the Commission was subordinating the law of State responsibility to the action of a political body which was not competent to decide issues of State responsibility.

70. He could also not share the view stated in the footnote to article 39 (A/CN.4/L.528/Add.2), according to which article 39 did not seek to resolve "one way or the other" the question of the scope of the Security Council's powers. Quite the contrary, the commentary under consideration appeared precisely, however different its authors' intention might have been, to seek to resolve the question of the Security Council's powers by implicitly or explicitly extending those powers to the area of State responsibility.

71. He would submit amendments in writing when the Commission discussed paragraphs (11) and (12) of the general commentary.

Paragraph (1)

72. Mr. ROSENSTOCK said that he would have liked a sentence expressing the idea that some members of the Commission continued to have doubts about the validity of the concept of an international crime of the State to be included at the end of paragraph (1).

73. Mr. PELLET, supported by Mr. ROSENSTOCK, proposed that the words “other international delicts” at the end of paragraph (1) should be replaced by the words “other internationally wrongful acts”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

74. Mr. LUKASHUK and Mr. TOMUSCHAT said that the last two sentences of paragraph (2) should be deleted.

75. The CHAIRMAN suggested that only the first two sentences of paragraph (2) should be retained and that they should be combined with paragraph (3), with the subsequent paragraphs to be renumbered accordingly.

It was so decided.

76. Mr. VILLAGRÁN KRAMER, referring to paragraph (3), said that it was inaccurate to say that the Commission should propose “a solution within the existing system of the Charter of the United Nations”. That phrase should be replaced by the following: “a solution compatible with the existing system of the Charter of the United Nations”.

77. Mr. ARANGIO-RUIZ said that he did not agree with the reference to the “existing system of the Charter of the United Nations”, which implied that the Charter dealt with questions of State responsibility.

78. The CHAIRMAN invited the Commission to take a decision on paragraph (3) at the following meeting.

The meeting rose at 6.10 p.m.

2469th MEETING

Wednesday, 24 July 1996, at 10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock,

Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer.

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

CHAPTER III. *State responsibility (continued)* (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

D. *Draft articles on State responsibility (continued)* (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter III, and in particular the commentaries to articles 51 to 53, including the general commentary to chapter IV of part two of the draft articles (A/CN.4/L.528/Add.3 and Corr.1).

General commentary to chapter IV (International crimes) of part two (continued)

2. At the previous meeting there had been some objections to the drafting of paragraph (3), namely, the phrase “within the existing system of the Charter of the United Nations”. He proposed that it should be replaced by “which takes into account the existing system of the Charter of the United Nations”.

3. Mr. ARANGIO-RUIZ said that, despite the fact he had proposed amendments to it, he was not satisfied with the general commentary which preceded draft articles 51 to 53 and their accompanying commentaries. Draft articles 51 to 53 dealt exclusively with the consequences of crimes. They made no reference whatsoever to procedures for determining the existence of a crime or for determining the consequences of a crime. Indeed, with the exception of article 39 (Relationship to the Charter of the United Nations), the Commission had come to no conclusion about the problem of the characterization of a crime. There was no reason, then, for the solutions proposed by various members of the Commission to be presented in the general commentary to chapter IV. The paragraphs in the general commentary bore no relation to the issues discussed in the draft articles that followed, and it made no sense to present alternative solutions in the commentary when no final solution was provided in the corresponding draft articles. If it chose to retain the general commentary, the Commission should place it in part three, on the settlement of disputes.

4. The CHAIRMAN said that it was true, logically speaking, that the procedure for determining the existence of a crime was dealt with in part three. At the same time, the question of who decided whether a wrongful act was a crime had also been discussed at length during the debate on the draft articles of part two. Since the Commission had already adopted the commentary to part three, it would be more practical to let the general commentary to chapter IV remain where it was. A comment might be added explaining that the general commentary was related to both part two and part three and that a decision could be taken on second reading as to the best place for those paragraphs.

5. Mr. BENNOUNA said that he agreed with the views expressed by Mr. Arangio-Ruiz. It was unwise for the Commission to give any impression of disorder, because that could jeopardize the entire draft.
6. The general commentary to chapter IV dealt exclusively with the question of the settlement of disputes, which fell under part three of the draft articles. Indeed, paragraphs (11) and the following of the general commentary referred specifically to the proposal made by Mr. Pellet and Mr. Eiriksson (2457th meeting) for a two-step procedural mechanism for determining whether a crime had been committed, and it had been designed to fill a gap in the articles on settlement of disputes. In the commentary to article 51, the first sentence stated that the article was essentially a *chapeau* to chapter IV and he failed to see the logic in placing the general commentary before that article. He proposed that the general commentary should be reviewed by a small working group with a view to incorporating it in part three of the draft.
7. Mr. LUKASHUK said that the Commission should provide commentaries which were as brief and succinct as possible. It was not appropriate to present a lengthy introductory discussion to chapter IV, for it was doubtful whether it would be read in full by the Sixth Committee.
8. Mr. PELLET said that the former Special Rapporteur, who was now proposing that the general commentary should be placed in part three, had earlier maintained that it was essential to provide in part two for a procedure for the characterization of a wrongful act as a crime. The general commentary might more appropriately be placed in part three, but he did not see why it could not remain where it was. He would, however, delete paragraphs (7) to (9).
9. Mr. ROSENSTOCK said that he had no objection to deleting the entire general commentary, which contained unnecessary solutions to an unnecessary and artificially created problem. At the same time, there was no compelling reason to deprive the Sixth Committee of the general commentary, which provided an explanation of how the Commission had arrived at its conclusions.
10. Mr. PAMBOU-TCHIVOUNDA said that the general commentary simply did not belong in part two.
11. Mr. VILLAGRÁN KRAMER recalled that most of the literature on the subject of international crimes referred to a 1948 decision which dated back some time and according to which every State was considered to be competent to judge whether harm had been done to it. The general commentary to chapter IV was an attempt to resolve the problems raised in both part two and part three of the draft articles. Deleting that commentary would leave the Commission in the position of proposing draft articles without commenting on them.
12. Mr. ARANGIO-RUIZ said that he saw no contradiction between the proposals he had made in his reports and his current proposal to transpose the general commentary. The general commentary was not relevant to the issues dealt with in articles 51, 52 and 53. If anything, it was related to article 39 (Relationship to the Charter of the United Nations). Yet, even in that article, the Commission had wished to leave unprejudiced the question of the relationship between the law of State responsibility and the law of collective security.
13. Mr. CALERO RODRIGUES said that the general commentary was useful, especially on first reading. It belonged equally well in part two or part three. There was no reason not to present a general review of the problem as an introduction to the chapter on international crimes even if the corresponding draft articles did not present any solutions. He would maintain the general commentary where it stood and, in addition, would incorporate in it the amendments proposed at the previous meeting by Mr. Arangio-Ruiz.
14. Mr. BOWETT said that the general commentary was an appropriate introduction to chapter IV. It served the essential purpose of explaining to the General Assembly the various alternatives the Commission had considered in its effort to resolve the problem of how to distinguish a crime from a delict.
15. Mr. ARANGIO-RUIZ said that, unfortunately, the general commentary to chapter IV did not just provide explanations. It implied that a solution to the problem of characterizing an act as a crime had been found and that that solution was recourse to the Security Council. In actual fact, the Commission had not adopted any particular solution. Furthermore, in a footnote to article 39 (see A/CN.4/L.528/Add.2), it had stated that article 39 did not seek to resolve the question of the relationship between the draft articles and the Charter of the United Nations.
16. Mr. TOMUSCHAT said that he agreed with Mr. Arangio-Ruiz. The general commentary to chapter IV, which provided a useful overview of the Commission's thinking about the issue of distinguishing between crimes and delicts, actually belonged in part three of the draft. Perhaps the substantive consequences of a crime could be discussed in the introduction to chapter IV.
17. Mr. BOWETT drew attention to paragraphs (2) and (10) of the general commentary. Paragraph (2) stated the problem: the Commission had had to decide how to make the distinction between crimes and other international delicts. Paragraph (10) provided the answer: the Commission had concluded that the problem could be handled within part three and by reference to the Charter of the United Nations. Those paragraphs helped to elucidate the draft articles which followed the general commentary.
18. Mr. BENNOUNA said that he was willing to let the secretariat decide about the proper placement of the general commentary. Nevertheless, he agreed with Mr. Arangio-Ruiz that some paragraphs in that commentary implied that the Commission had decided on a particular solution, namely reference to the Charter of the United Nations, something that did not accurately reflect the Commission's conclusions. For that reason, he endorsed the proposal by Mr. Pellet to delete paragraphs (7) to (9) from the general commentary.
19. Mr. PAMBOU-TCHIVOUNDA said the general commentary was not an appropriate introduction to chapter IV and the first sentence of paragraph (2) was

inaccurate: the Commission had never decided anything about how the distinction was to be drawn between crimes and delicts. Even if the Commission had reached some conclusion on that point, the account thereof should be in the commentary to article 19 of part one, not in the introduction to chapter IV.

20. Mr. VILLAGRÁN KRAMER said a few points should be made to clarify the debate. The general commentary furnished an answer to the question of what an international crime was by referring back to article 19. In response to the question of who decides that an act is an international crime, the general commentary outlined a number of alternatives, including the United Nations system. The text under consideration was a description: it pointed to various options, but did not come out in favour of any one of them. He was surprised to hear Mr. Arangio-Ruiz assert that the Commission had not resolved any problems, and his objection to any reference to the United Nations system was frankly preposterous. What could be the harm in such a reference? Lastly, if some members of the Commission wished to do away with the distinction between crimes and delicts, they were entirely free to do so—but he would not participate in the exercise.

21. Mr. ARANGIO-RUIZ said the proposal to delete paragraphs (7) to (9) was not entirely satisfactory. Paragraph (10) would have to be amended as a consequence of such a deletion, because it, too, referred to the Charter of the United Nations, and paragraphs (11) and the following would have to be deleted as well, for they covered other proposals regarding who should decide whether a wrongful act was a crime. Just as he believed it inaccurate to refer to a solution adopted by the Commission—for it had done no such thing—he could not condone the mention of a single solution, to the exclusion of others. Those solutions could all be outlined in the report to the General Assembly, but they had no place in the commentary.

22. The CHAIRMAN said there were clearly a number of problems with the general commentary to chapter IV: it might be advisable to transpose some of the material in it as an introduction to part three. Perhaps a small working group should look into the matter.

23. Mr. ROSENSTOCK said that using the material as an introduction to part three would create the impression that part three dealt only with crimes, which was not the case, and would distort the history of the Commission's discussions. On the other hand, he would have no objection to transposing the text to the end of chapter IV, so that it would serve as a bridge to part three.

24. As to paragraphs (7) to (9) and the discussion of dispute settlement machinery, the proposal by Mr. Arangio-Ruiz had been rejected, as had the one by Mr. Pellet and Mr. Eiriksson, so that the Commission was left with what was outlined in the general commentary. Either the whole text should be rejected, leaving readers uninformed about the Commission's efforts and reasoning, or the truth should be told. The truth was that the Commission had wrestled with whether an international crime could be distinguished from any other internationally wrongful act, and if so, who should so distinguish. During that exercise, the Commission had noticed that in

certain circumstances in which a determination must be made, the United Nations system had the necessary capacity to make that determination. Whether one approved of that capacity or not was irrelevant.

25. Mr. ARANGIO-RUIZ said it might be most appropriate to avoid having a general commentary altogether and to mention, in the commentary to article 51, on the consequences of an international crime, that a problem remained unresolved—that no solution had been envisaged by the Commission with regard to the question of who determined the existence of a crime. That would accurately reflect what had happened in the Commission and in the Drafting Committee. Certainly, United Nations organs would operate for the purposes for which they had been created under the Charter of the United Nations—but they had not been created to implement the law of State responsibility.

26. Mr. ROSENSTOCK said he had no objection to placing the text in the commentary to article 51, but did not want it suggested that the Commission had failed to come up with any ideas on how to solve the problem. The various proposals made had been rejected because of the reasoning set out in paragraphs (7) to (9), and also because of their internal inconsistencies and unworkability.

27. Mr. PELLET said he fully supported Mr. Arangio-Ruiz's proposal that the general commentary should be incorporated in the commentary to article 51. A logical sequence would thus be established: the Commission had struggled to define the consequences of the notion of crime, and part of that struggle had included trying to decide whether a special mechanism should be established to determine that an act was a crime. The Commission had not so far taken a position on that point.

28. He likewise endorsed Mr. Arangio-Ruiz's proposed changes to his own earlier proposals concerning paragraphs (11), (11) *bis* and (12), but did not concur with his view that a large portion of text at the end of the general commentary should be deleted. As for Mr. Rosenstock's position that paragraphs (7) to (9) should be retained, it seemed incompatible with the very substance of article 39.

29. Mr. PAMBOU-TCHIVOUNDA said he endorsed Mr. Arangio-Ruiz's proposal to transpose the text to the commentary to article 51 and welcomed Mr. Pellet's elucidation of the situation.

30. Mr. VILLAGRÁN KRAMER said he had no difficulty with the proposed deletion of paragraphs (7) to (9), and could go along with any decision the Commission wished to make on where the whole text of the general commentary would be inserted—to his way of thinking, it made very little difference. What did matter, however, was Mr. Arangio-Ruiz's contention that there was no link whatsoever between the law of State responsibility and the law on collective security. A number of Security Council resolutions disproved that thesis, including those on payment of compensation by Israel to Argentina for a wrongful act committed in Argentine territory; reparation of damage inflicted by Israel through its bombardment of Iraqi nuclear power plants; and Iraq's obligation to allocate 30 per cent of its income for compen-

sation to Kuwait. All of those resolutions went far beyond what would be decided by a court of justice.

31. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to incorporate the general commentary to chapter IV of part two in the commentary to article 51.

It was so agreed.

32. The CHAIRMAN invited the Commission to continue its consideration of the paragraphs in the general commentary with the understanding that they would be incorporated in the commentary to article 51. He reminded the Commission that paragraph (1) had been adopted at the preceding meeting.

Paragraphs (2) and (3) (*continued*)

33. The CHAIRMAN recalled his earlier suggestion that, in the French version of paragraph (3), the words *dans le cadre du* should be replaced by *compte tenu du*.

It was so agreed.

34. Mr. ARANGIO-RUIZ suggested inserting the following at the end of the first sentence of paragraph (2): "and by whom. The Commission considered a variety of possibilities, but did not embody any one of them in the articles it has adopted".

35. In response to a query by Mr. TOMUSCHAT, the CHAIRMAN read out a proposal he had made earlier to merge paragraphs (2) and (3). The first two sentences of paragraph (2) would be combined, with the words "In short" being replaced by "and". The third and fourth sentences of that paragraph would be deleted, and the whole of paragraph (3) appended.

36. Mr. BENNOUNA queried the phrase "it should propose a solution" in paragraph (3). As far as he was aware, the Commission was not proposing any solution at all.

37. Mr. CALERO RODRIGUES pointed out that the "solution" was set out in paragraphs (4) to (10), but agreed that the phrase mentioned by Mr. Bennouna might be better drafted.

38. Mr. LUKASHUK said he endorsed the Chairman's suggestion, but feared that the final sentence amounted to an admission of the Commission's poor standing.

39. Mr. ARANGIO-RUIZ said he welcomed Mr. Bennouna's remarks, which bore out his own contention that a solution had never been proposed. The last part of paragraph (3), beginning with the phrase flagged by Mr. Bennouna, should be replaced by something such as

"it could only refer to the procedures which generally States use for determining the existence of an internationally wrongful act, namely the unilateral decisions of one or more States plus all the means of negotiation and third-party settlement provided for in part three."

40. Mr. ROSENSTOCK said that not agreeing with a solution did not mean there was no solution. He entirely agreed with Mr. Calero Rodrigues and thought the

phrase "it should propose a solution within" could usefully be replaced by "it should resolve the matter within".

41. Mr. PELLET commented that the Commission could hardly be said to be proposing a solution; rather, the paragraph should indicate that the Commission had finally decided to confine itself to the mechanisms for dispute settlement in part three. As for the reference to the Charter of the United Nations which some members, and especially Mr. Rosenstock, appeared to have so much at heart, he would have no objection to the inclusion of a reference to the provisions of article 39 of the draft, but would be resolutely opposed to any attempt to push the Commission in the direction of the Charter.

42. Mr. ARANGIO-RUIZ said that he was happy to hear Mr. Pellet declare himself to be hostile to express acceptance of Charter provisions and procedures for purposes of the determination of State crimes.

43. He said that he was in the habit of addressing himself to fellow members by mentioning their names, and he said he had noted that he himself had recently been referred to as "an individual". He was very glad and proud to be an individual, in other words a human being under the protection of the rules on which Mr. Tomuschat was one of the best experts.

44. The Commission was at that moment engaged in drafting the commentary to article 51, and it was his impression that it was again being pushed by Mr. Rosenstock to admit expressly that, for the purposes of crimes, it had to rely on the decisions of the Security Council, because, according to Mr. Rosenstock, that was enough. If that was the exercise in which he was invited to participate, he wished to declare that he was opposed to any idea of that kind. He did not believe that the Charter of the United Nations governed State responsibility. It did govern many things, and did so pretty well, but it did not govern State responsibility, whether for delicts or for crimes. That was something that could not be endlessly maintained. At the previous session, the Commission had heard arguments to that effect advanced over and over again and had taken votes on the issue. He might have been prepared to accept the reference to part three, but would oppose paragraph (3) inasmuch as it referred in any way to the Charter, and wished his position to be reflected with complete clarity in the summary record of the meeting.

45. Mr. TOMUSCHAT said that he was very sorry to disagree with what had just been said. Of course, the Security Council did not have exclusive competence, but it was a fact of life that whenever an international crime was committed, there was some overlapping of two systems, that of the Charter of the United Nations—in other words, of the jurisdiction of the Council—and that of State responsibility. That was the crux of the matter. It could not be denied and it had to be mentioned. Failure to discuss the problem would rob the whole commentary of its value. The fact that the Council could intervene in such matters and had done so in the past could not be ignored. Council resolution 687 (1991) of 3 April 1991 on Iraq, referred to by Mr. Villagrán Kramer, was only one out of many possible examples. He was prepared to accept the compromise solution suggested by Mr. Pellet

with regard to paragraph (3), but would insist on maintaining paragraphs (7), (8) and (9) because, like it or not, they reflected the fundamental truth about the way in which positive international law was framed nowadays.

46. The CHAIRMAN read out the following revised version combining paragraphs (2) and (3), incorporating the changes suggested by Mr. Pellet:

“(2) An initial problem facing the Commission was to decide how this distinction should be made and by whom. The Commission considered a variety of innovative proposals to overcome this difficulty, but finally decided to confine itself to the mechanisms for dispute settlement in part three and to the provision of article 39, ‘Relationship to the Charter of the United Nations’.”

He said that, if he heard no objections, he would take it that the Commission agreed to adopt the revised text.

Paragraphs (2) and (3), as amended, were adopted.

47. Mr. ARANGIO-RUIZ said that he had nothing to say about the reference to part three but had strong reservations with regard to the reference to article 39 because he had been one of the 11 members of the Commission who had voted against that article.

48. Mr. BENNOUNA said that he, too, wanted to express reservations with regard to the reference to article 39. It would be remembered that the Commission had been very divided on that score and he had voted against the article in its present wording.

Paragraphs (4) and (5)

49. Mr. ROSENSTOCK said that the tenuous possibility of the text just adopted by the Commission having any meaning depended on acceptance of paragraphs (4) to (10).

50. Mr. ARANGIO-RUIZ said that paragraph (4) and the following paragraphs did not belong to article 51 or, indeed, to any other article, and should be deleted. The reference to part three and, for those who wanted it, to the Charter of the United Nations in the preceding paragraph were all that was needed to make the general commentary complete.

51. Mr. BOWETT said that, if the purpose of the commentary was to give the Sixth Committee the minimum of information on what the Commission was doing, Mr. Arangio-Ruiz was right.

52. Mr. ROSENSTOCK remarked that those whose views had not prevailed were apparently unwilling to have an adequate reflection of the views that had prevailed. When somebody objected to the presence of a particular paragraph, that paragraph should be put to the vote; otherwise, the Commission would find itself endlessly going round the same circle for the same rather unattractive reasons.

53. Mr. PELLET said that, if Mr. Arangio-Ruiz were an opposition member in a national parliament, he might be said to be filibustering.

54. The CHAIRMAN said that any member could propose the deletion of a paragraph; if the motion was not seconded, the paragraph would be adopted.

55. Mr. FOMBA questioned the use of the word “ordinary” in the second sentence of paragraph (4).

56. Mr. TOMUSCHAT said that the word “criminal” in the last sentence of the paragraph was awkward, because it suggested an act punishable under criminal law.

57. Mr. PELLET commented that, if the objection related to the use of the adjectival form, the word “criminal” could be replaced by the words “constituted a crime”.

58. The CHAIRMAN said that he noted that the suggestion just made appeared to be acceptable to all members. The reference to article 16 in the second sentence of paragraph (4) should be changed to “article 52” and the reference to article 17 in the first sentence of paragraph (5), to “article 53”.

Paragraphs (4) and (5), as amended, were adopted.

59. The CHAIRMAN said that the views expressed by Mr. Arangio-Ruiz on paragraphs (4) and (5) would be duly reflected in the summary record of the meeting.

Paragraph (6)

60. Mr. VILLAGRÁN KRAMER said the commentary should make it clear that certain crimes, such as genocide, were not susceptible to the option of negotiations. He was not sure whether that point should be made in paragraph (6), paragraph (10) or elsewhere, but would be glad to submit a proposal in writing for insertion in the appropriate place.

61. Mr. PAMBOU-TCHIVOUNDA proposed that paragraph (6) should end with the words “disputes in part three”, in the second sentence. The remainder of the paragraph and all subsequent paragraphs of the general commentary to chapter IV, up to and including paragraph (15), should be deleted. If the Commission decided to proceed with the consideration of paragraphs (7) to (15), he would refrain from taking part.

62. Mr. ROSENSTOCK said he agreed with Mr. Villagrán Kramer’s view that crimes such as genocide or aggression were not susceptible to negotiations and he looked forward to concrete suggestions for insertion in the commentary. The third sentence of paragraph (6) tended to suggest that, in the event of a crime being committed, the options of negotiations, conciliation or arbitration were necessarily available to States, whereas in reality arbitration was available only under certain circumstances. Accordingly, he wondered if there might not be some merit in deleting the sentence, as Mr. Pambou-Tchivounda had suggested, rather than trying to improve it, for example by inserting words such as “in certain specified circumstances” before the word “arbitration”.

63. Mr. FOMBA said that the drafting of the first sentence in the French version was faulty and should be revised. As to the last sentence, he failed to see any problem. The point being made was that the State accused of

the crime would have freedom of choice in respect of the means of settling the dispute.

64. Mr. CALERO RODRIGUES said that he agreed with Mr. Pambou-Tchivounda's proposal for the deletion of the last sentence of paragraph (6). That would also meet the point raised by Mr. Villagrán Kramer.

65. Mr. BENNOUNA said that, like Mr. Fomba, he failed to see the objection to the sentence in question, which merely repeated the gist of what the Commission had decided to adopt. Would deletion of the sentence mean that the State accused of the crime was to be denied freedom of choice between the options listed?

66. Mr. GÜNEY said that he was in favour of maintaining the last sentence of paragraph (6) with the exception of the word "existing", which was redundant.

67. Mr. CALERO RODRIGUES, responding to the comments by Mr. Bennouna, said that the reference to part three, in the second sentence, covered the contents of the third sentence and, therefore, nothing would be lost as a result of deleting the third sentence. As already stated, he was in favour of deleting it, in view of the doubts expressed by Mr. Villagrán Kramer.

68. Mr. ROSENSTOCK said the problem with the sentence in question was that it suggested that States had, as of right, the ability to opt for negotiations, conciliation, arbitration or reference to ICJ. States certainly had the right to prefer any one of those options, but they had no automatic right to arbitration, as opposed to negotiations and conciliation, which were obligatory. In the sentence as it stood, that distinction was blurred. If the Commission decided to maintain it, some modifier indicating the different status of arbitration would have to be added.

69. Mr. VILLAGRÁN KRAMER suggested that the last sentence should be deleted and replaced by something to the effect that negotiations, conciliation and arbitration were not mandatory in the case of certain crimes.

70. The CHAIRMAN pointed out that such a statement would not be in keeping with the contents of article 52.

71. Mr. VILLAGRÁN KRAMER said that he wondered whether article 52 ought not to be reviewed. In the particular case of the crime of genocide, he recalled the efforts made by Mr. Arangio-Ruiz in 1992 to stress the importance of the element of cessation. At the time, he had been greatly struck by the arguments advanced. Cessation of the crime of genocide could not be negotiated. Who was the injured State? Surely, the whole international community had to consider itself harmed by such a crime. Who represented the sector of the population that was being exterminated? Yet, according to the rule adopted by the Commission, prior negotiation was necessary in order to obtain cessation of genocide. In the criminal law of some countries, and particularly in the law of the United States of America, there was a practice known as "plea bargaining", but it related solely to reduction of the punishment, not to perpetration of the act. Bargaining could not enter into the matter in the case of major crimes and, specifically, of genocide. He was not sure whether the Commission should try to clarify the

issue in the commentary or whether, as a possible solution to the problem, it should review an article or articles already approved.

72. Mr. ARANGIO-RUIZ said that the concern about the little time available could perhaps be met if the Commission accepted the proposal, made in many quarters, that the last sentence of the paragraph should be deleted.

73. Mr. ROSENSTOCK said that Mr. Villagrán Kramer had drawn attention to a rather serious mistake which could, exceptionally, be corrected by making a small amendment to one or other of the articles. Failing that, it would be necessary to flag the point clearly by adding at some point wording along the following lines:

"However, some members pointed out that it seemed inappropriate in the case of a crime such as . . . to regard negotiation and conciliation as a mandatory prior step."

74. Mr. BENNOUNA expressed his agreement with Mr. Villagrán Kramer's point and with Mr. Rosenstock's proposed form of wording.

75. Mr. VARGAS CARREÑO proposed that Mr. Villagrán Kramer's point should be met by inserting the words "where appropriate", after the words "via the procedures" in the second sentence of paragraph (6), and adding at the end of the paragraph "except that, in the case of crimes such as genocide, the options of negotiation and conciliation would not be mandatory".

76. Mr. PELLET said that he had very serious reservations about Mr. Villagrán Kramer's proposal, all the more so as there was not enough time to enter into a detailed discussion of the matter. In particular, he was not at all sure that the distinctions Mr. Villagrán Kramer wanted to introduce should be made in the case of State responsibility. All the Commission could do at that stage was perhaps to accept Mr. Rosenstock's proposed form of wording, but prefaced by the words "Certain members considered . . .".

77. The CHAIRMAN suggested that Mr. Villagrán Kramer and Mr. Rosenstock should be asked to prepare a suitable form of wording to cover Mr. Villagrán Kramer's point, for the Commission's consideration later.

It was so agreed.

Paragraph (6) was adopted on that understanding.

Paragraphs (7) to (9)

78. Mr. BENNOUNA proposed that paragraphs (7) to (9) should be replaced by one sentence reading:

"The Commission recognizes that the State so accused might seek a speedier resolution of its dispute than the procedures in part three would allow, in particular within the framework of the relevant provisions of the Charter of the United Nations."

Paragraphs (7) to (9), as amended, were adopted.

Paragraph (10)

79. Mr. PELLET proposed that the paragraph, which was redundant having regard to the redrafted version of paragraph (2), should be deleted.

80. Mr. BENNOUNA and Mr. CALERO RODRIGUES supported that proposal.

Paragraph (10) was deleted.

Paragraph (11)

81. The CHAIRMAN said he wished to draw attention to a written proposal by Mr. Arangio-Ruiz to replace the paragraph by the following:

“Nevertheless, it should be pointed out that a considerable number of members of the Commission favoured different proposals. The Commission believes Member States should be aware of these proposals, and should be asked to comment on them specifically. In the event that either proposal received wide support, the Commission could return to it during the second reading.”

82. Mr. ROSENSTOCK said that he preferred paragraph (11) as originally drafted, but Mr. Arangio-Ruiz’s proposal would be acceptable provided, first, that the words “a considerable number of”, in the first sentence, were replaced by the word “some” and, secondly, the words “should be asked to comment on them specifically”, in the second sentence, were replaced by “and comment on them specifically should States so wish”. That would more accurately reflect the level of support the various proposals had received in the Commission. In particular, States should be allowed freedom of choice and should not be pushed into commenting on proposals that had not been supported in significant numbers in the Commission.

83. Mr. ARANGIO-RUIZ said that his recollection of what had occurred at the forty-seventh session was very clear, but he would not press the point. He had no objection to Mr. Rosenstock’s second proposal but would suggest that the words “a considerable number of members” should be replaced by “a number of members”.

84. Mr. ROSENSTOCK said he did not think that more than a tiny percentage of the Commission had supported either the old Arangio-Ruiz proposal or that of Mr. Pellet and Mr. Eiriksson. His main concern was to ensure that States were not misled, which they would be if any term stronger than “some” was used.

85. Mr. ARANGIO-RUIZ suggested that each member of the Commission should be invited to state his preference for the word or words proposed.

86. Mr. THIAM proposed that the words “a considerable number of” should be replaced by the word “certain”.

87. Mr. PELLET, agreeing to Mr. Thiam’s proposal, said that Mr. Rosenstock’s second proposal seemed to go beyond a matter of mere drafting.

88. The CHAIRMAN said he wished to assure Mr. Pellet that no change of substance was involved. He said that, if he heard no objections, he would take it that the Commission wished to adopt the new version of paragraph (11) as proposed by Mr. Arangio-Ruiz, as further amended by Mr. Rosenstock.

Paragraph (11), as amended, was adopted.

Paragraph (11) bis

89. Mr. LEE (Secretary to the Commission) read out the following new paragraph which was proposed by Mr. Arangio-Ruiz:

“One such proposal was that contained in the draft articles submitted by the Special Rapporteur in his seventh report and referred by the Commission to the Drafting Committee following the debate on that report.”

Paragraph (11) bis was adopted.

Paragraph (12)

90. Mr. LEE (Secretary to the Commission) read out the following text which Mr. Arangio-Ruiz proposed should replace the existing text:

“Another proposal, put before the Commission at the present session, envisaged two stages. In the first stage, either party could require the Conciliation Commission to state in its final report whether there was prima facie evidence that a crime had been committed. That would require an addition to article 57.”

91. Mr. ARANGIO-RUIZ pointed out that he had proposed only the first sentence of that text. The other two sentences were the same as those in the original version.

92. Mr. ROSENSTOCK suggested that the original and proposed new versions could be married by amending the opening words to read “Another such proposal envisaged”.

It was so agreed.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

93. Mr. BENNOUNA, referring to the last sentence, said that he was troubled by the word “uncertainty”. First, coming as it did after the reference to crimes, it did not make for sound legal policy. Secondly, it was not for the Commission to say that the concept of *ius cogens* was surrounded by uncertainty. The sentence should therefore be deleted.

It was so agreed.

94. Mr. TOMUSCHAT proposed that in the first sentence, the word “acts”, should be replaced by the words “would act”, and that the word “bears”, should be replaced by the words “would bear”.

It was so agreed.

Paragraph (14), as amended, was adopted.

Paragraph (15)

95. Mr. ARANGIO-RUIZ said that the purpose of his amendment was to make it clear that the proposal he had submitted as Special Rapporteur in his seventh report,¹ in 1995, had also envisaged a two-step procedural mechanism—and a far better one, in his view—for determining whether and by whom a crime had been committed, those two steps being, respectively, a political step before the General Assembly and Security Council and a judicial one before ICJ.

96. Mr. ROSENSTOCK said that Mr. Arangio-Ruiz and Mr. Pellet might perhaps wish to redraft the first sentence of the paragraph to refer to both proposals. He would, however, also propose that, in the second sentence, the words “in the view of those who supported those proposals” should be added after the words “it is therefore necessary”, to reflect the fact that certain members did not think that either of the proposals was very helpful. Further, if the reference to *jus cogens* were retained, he would propose that a sentence should be added at the end of the paragraph reading “Others considered the analogy to *jus cogens* misleading and unconvincing”.

97. Mr. ARANGIO-RUIZ suggested that, since paragraphs (12), (13) and (14) all dealt with the same subject, they should be combined in a single paragraph. Paragraph (15) could then start by referring to the proposals mentioned in the two preceding paragraphs, namely, the proposal he had submitted as Special Rapporteur and the proposal by Mr. Pellet and Mr. Eiriksson (2457th meeting).

98. Mr. PELLET said that he was somewhat sceptical about the benefits of such a forced marriage between his and Mr. Arangio-Ruiz’ proposals. He was willing for them both to be treated on an equal footing, but the idea of a merger between the two struck him as a little strange.

99. The CHAIRMAN invited Mr. Pellet to draft a suitable form of wording, taking account of the views expressed, for the Commission’s consideration at the next meeting.

The meeting rose at 1.10 p.m.

¹ See 2434th meeting, footnote 5.

2470th MEETING

Wednesday, 24 July 1996, at 3.15 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer.

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

CHAPTER III. State responsibility (continued) (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

D. Draft articles on State responsibility (continued) (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

Commentary to article 51 (Consequences of an international crime) (A/CN.4/L.528/Add.3 and Add.3/Corr.1)

Paragraph (1)

1. The CHAIRMAN pointed out that, at the previous meeting, the Commission had decided to place the 15 paragraphs of the general commentary on international crimes in the commentary to article 51. They would be inserted after the first sentence of paragraph (1) and slight changes in form would be required to make that change easier. The paragraphs would, of course, be renumbered accordingly.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to article 51, as amended, was adopted.

Commentary to article 52 (Specific consequences)

Paragraph (1)

2. The CHAIRMAN and Mr. BOWETT proposed that the word “specific”, in the first sentence should be deleted.

It was so agreed.

3. In response to a comment by Mr. CALERO RODRIGUES, who asked for clarification regarding the term “serious consequences”, used in the English version, Mr. BOWETT and Mr. ROSENSTOCK explained that the Drafting Committee had wanted to avoid the term “substantial”, used in another context. It had, how-

ever, wanted to highlight the differences between the consequences of a crime and the consequences of an international delict.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2), was adopted.

Paragraph (3)

4. Mr. PELLET said he had reservations about the last phrase in the first sentence, “which the Commission believes ought not to apply in the case of a ‘crime’”, for it implied that the Commission had been unanimous on that point.

5. Mr. TOMUSCHAT said he endorsed those reservations. It was regrettable that the last sentence of the paragraph gave the impression that restitution consisted simply in returning the “fruits of the crime”, as if stolen goods were involved. In actual fact, as defined in article 43, restitution was much broader.

6. The CHAIRMAN, referring to a comment by Mr. LUKASHUK, suggested that the words “a wrongdoing that is criminal”, in the last sentence, should be replaced by “a wrongdoing which is a crime”. Furthermore, the quotation marks around the word “crime” should be deleted from the whole of the commentary.

It was so agreed.

7. Mr. MIKULKA, supported by the CHAIRMAN, suggested with reference to the beginning of the last sentence that the word “legal” should be deleted and that the phrase should speak simply of “restoration of the situation as it existed prior to the unlawful act”.

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

8. Mr. PELLET said that he was completely opposed to that part of the commentary. The Commission started out by saying that it was not eliminating proportionality by removing the limitations set out in subparagraphs (c) and (d) of article 43, and then went on to add that reparation could hardly be said to be disproportionate in the majority of cases. It was an obvious contradiction and the second assertion implied that the Commission was reverting to *lex talionis*.

9. Mr. VILLAGRÁN KRAMER said that he too thought the paragraph did not convey exactly what the Commission had wanted to express, namely that the principle of the proportionality of reparation was maintained even in the case of crimes.

10. Mr. CALERO RODRIGUES pointed out that, by removing the limitations set out in subparagraphs (c) and (d) of article 43, the Commission was not eliminating the principle of proportionality. In fact, those two subparagraphs related to restitution in kind as compared with indemnification, and accordingly they related to very special cases of reparation. Generally speaking, reparation

should be proportionate to the consequences of the wrongful act.

11. Mr. BOWETT said that he endorsed Mr. Calero Rodrigues’ comments: the proportionality rule did not disappear simply because a particular limitation had been removed. Moreover, that was precisely what was said in the first sentence of the paragraph.

12. Mr. PELLET insisted that his strong reservations should be reflected in the summary record.

13. Mr. ARANGIO-RUIZ proposed that the word “legal” should be deleted from the second sentence, which should speak simply of “restoration of the original situation”.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

14. Mr. TOMUSCHAT proposed that a sentence reading:

“However, it should be remembered that paragraph 3 of article 42 places a limitation on the duty of reparation that applies even in the case of a crime.”

should be added at the end of the paragraph. It was important to point out too that the limitation was a counterpart to the limitation set out in subparagraph (d) of article 43.

15. Mr. PELLET and Mr. CALERO RODRIGUES endorsed that proposal.

16. Mr. ROSENSTOCK said he feared the amendment was not so innocuous as it seemed. It could well lead to confusion and make for an unbalanced text.

17. Mr. LUKASHUK and Mr. VILLAGRÁN KRAMER said that the proposal nearly wiped out the difference between delicts and crimes insofar as the seriousness of their consequences for the wrongdoing State was concerned.

18. The CHAIRMAN said that, in view of the differences of views, it might be better to maintain the text as it stood.

Paragraph (5) was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

19. Mr. PELLET said that he wished to make a general remark about the paragraph, which he disapproved of in its entirety. By wishing to engage at all costs in a general codification of the consequences of internationally wrongful acts without from the beginning drawing any clear distinction between crimes and delicts, the Commission had attributed to delicts consequences that should in fact have been confined to crimes. Such was the case in particular with article 45 (Satisfaction), which tried to cover all possible cases, when it was, in fact,

really acceptable only for crimes. That article had now been adopted and, since it could not be brought up again, the resulting type of situation was the one described in paragraph (8), something that was regrettable in the extreme.

20. Mr. TOMUSCHAT said the expression “punitive damages”, in the first sentence of the paragraph, did not relate to anything in the draft articles and, in addition, might convey the impression that some international crimes were penal in character, something the Commission had precisely sought to avoid. Accordingly, the word “punitive” should be deleted and the variant “exemplary damages” should be retained. As far as he recalled, the Commission had never studied the question of punitive damages, and so the formulation “The Commission believes”, at the beginning of the paragraph, was improperly used.

21. Mr. BOWETT said that the question of punitive damages had been taken up in the Drafting Committee, which had thought the idea could be reflected in the commentary.

22. Mr. VILLAGRÁN KRAMER said it was very important to distinguish clearly between wrongful acts and crimes in regard to the obligation of reparation and that one way to do so was to introduce the notion of punitive damages in the satisfaction mechanism. Admittedly, in the case of a crime, subparagraphs (a) and (b) of article 52 did broaden the conditions for access by the injured State to restitution in kind or satisfaction, but establishing a scale in the damages to the injured State was another way of recognizing the gravity of the crime in relation to the internationally wrongful act. Small States that were victims of international crimes attached quite special importance to those considerations. After all, sanctions were not prohibited by international law. Nevertheless, the term “exemplary damages”, which had an equivalent in Spanish, was perhaps preferable to “punitive damages” because of the latter expression’s penal connotation, as pointed out by Mr. Tomuschat.

23. Mr. PELLET said that, from a purely drafting standpoint, the problem seemed to relate not so much to the use of the expression “punitive damages” as to the statement that “this possibility”, namely punitive damages, was already allowed for in article 45. Article 45, which dealt with satisfaction, did not at any point introduce that notion and it only spoke of nominal damages or damages reflecting the gravity of the infringement. Accordingly, the beginning of the paragraph should be reformulated to read:

“The Commission wondered whether punitive damages or exemplary damages may be appropriate in the case of a crime. Some members considered that article 45, on satisfaction, already covered this eventuality ‘in cases of gross infringement of the rights of the injured State’ by providing for ‘damages reflecting the gravity of the infringement’.”

24. Mr. de SARAM said he had always been opposed to the idea of including crimes in the draft articles, but the proposal by Mr. Pellet did partly meet Mr. Tomuschat’s concerns.

25. Mr. ROSENSTOCK said he had no objections to Mr. Pellet’s suggestion, but he would like more emphasis on the fact that the members of the Commission were divided on the matter.

26. Mr. VILLAGRÁN KRAMER said that, in his view, it was not necessary to reformulate paragraph (8) and the Commission could keep to Mr. Tomuschat’s proposal.

27. Mr. BENNOUNA said he too was in favour of Mr. Tomuschat’s proposal. It was important to keep the idea of a continuum between delicts and crimes and not to introduce the idea of a punitive or exemplary aspect to the matter. The formulation “The Commission believes”, at the beginning of the paragraph, was too much. It should have read “Some members believe . . .”.

28. Mr. ROBINSON said that Mr. Pellet’s proposal was an acceptable solution. However, it did not entirely meet the concern to highlight the divergence of views between members. Moreover, the interpretations of the concepts of “punitive damages” and “exemplary damages” differed from one legal system to another.

29. Mr. PELLET, responding to the comments by Mr. Rosenstock and Mr. Robinson, reformulated his proposal to read:

“The Commission wondered whether punitive damages or exemplary damages may be appropriate in the case of a crime; according to some members, article 45, on satisfaction, already allowed for this possibility insofar as satisfaction may include ‘in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement’.”

30. Mr. ROSENSTOCK said it was indeed important to eliminate the introductory phrase “The Commission believes” and to replace it by a query.

31. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (8) as amended by Mr. Pellet.

Paragraph (8), as amended, was adopted.

The commentary to article 52, as amended, was adopted.

Commentary to article 53 (Obligations for all States)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

32. Mr. ROSENSTOCK said that, in the phrase contained in brackets in the penultimate sentence, the words “if the discussion is maintained” should be replaced by “if the distinction is maintained”—on the understanding that it was the distinction between internationally wrongful acts and crimes.

33. Mr. BOWETT added that the words “the resolution referred to above”, at the end of the fourth sentence, should be replaced by “the resolutions referred to above”.

34. Mr. ARANGIO-RUIZ pointed out in that connection that he did not agree to including a reference to those Security Council resolutions in the case of crimes.

35. Mr. PELLET, supported by Mr. TOMUSCHAT, said that the expression in brackets which Mr. Rosenstock wanted corrected seemed to be based on the problem of the distinction between crimes and internationally wrongful acts, when that distinction was already established. He therefore proposed that the phrase in question should simply be deleted.

36. Mr. BENNOUNA pointed out a typing error in the last sentence of the French version, where *en répondre* should read *en réponse*. Moreover, he saw no reason for the statement that article 53 was drafted so as to “reinforce” decisions taken through international organizations. Such organizations certainly acted for their own reasons.

37. The CHAIRMAN said he took note of Mr. Bennouna’s comment and said that, if he heard no objections, he would take it the Commission wished to adopt paragraph (3) with the deletion of the phrase contained in brackets in the penultimate sentence.

Paragraph (3), as amended, was adopted.

The commentary to article 53, as amended, was adopted.

General commentary to chapter III (Countermeasures) of part two

38. The CHAIRMAN pointed out that the Commission had left aside the first two paragraphs of the commentary to article 47 and had asked Mr. Eiriksson (2467th meeting) to look over the wording and produce a text to be placed in the general commentary to chapter III.

39. Mr. CALERO RODRIGUES explained in Mr. Eiriksson’s absence that Mr. Eiriksson had sought by consultations with most members to draft a text that would command consensus. The text now before the Commission (XLVIII)/INFORMAL/25)* did in fact form a basis for consensus.

40. Mr. ROSENSTOCK said that, as soon as he had seen the text, he had indeed found it an improvement over the previous one, but he could agree to it only with certain changes. They related to the last sentence of paragraph (1), where the word “Any” should be deleted; moreover, it would be advisable to replace the words “may be” by “is” and “must” by “should”. Lastly, the sentence should end with the word “restrictions”, the last phrase being deleted.

41. The first two sentences of paragraph (2) should also be deleted and inserted, along with the last phrase of paragraph (1) in a separate paragraph that would start with the words: “Other members stressed”.

Paragraph (1)

42. The CHAIRMAN proposed that the Commission should first consider paragraph (1) and the changes proposed by Mr. Rosenstock.

43. Mr. BENNOUNA said it was a consensus text and anything that might have bothered some members had been removed. Consequently, it should be adopted without further discussion.

44. Mr. LUKASHUK said it was regrettable that the text identified countermeasures with self-help, especially in view of the historical record of self-help. As he understood it, countermeasures were a legal response to a breach of the law, as measures limited by law.

45. Mr. PELLET said that the text was acceptable, by and large, although that should not prevent members from discussing it. The first of the proposed changes would not basically alter the meaning of the text and, at a pinch, the last phrase in paragraph (1) could be deleted. However, he could not agree to replacing the word “must”, in the present tense, by the word “should”, in the conditional, as that would mean a change in substance.

46. Mr. CALERO RODRIGUES said that what he regarded as a compromise formulation for the last sentence of paragraph (1) would read:

“Recognition in the draft articles of the possibility of taking countermeasures—warranted as such recognition may be in the light of long-standing practice—ought accordingly to be subjected to conditions and restrictions limiting countermeasures to those where they are necessary in response to any internationally wrongful act.”

47. Mr. ROSENSTOCK explained that, whatever the situation in the other languages, the verb “must” in English, in the context of that sentence, was incorrect. From a language standpoint, according to an authoritative view, the form “should” was somewhat weak and the idea should be rendered by “ought to”.

48. The CHAIRMAN noted that the change in the English version did not necessarily involve a change in the French version, where the word *doit* could be retained.

49. Mr. PELLET said that “ought to” was translated into French by *devrait* and it would therefore be a hybrid solution to keep *doit* in the French yet introduce “ought to” in the English. To settle the difficulty, it would be better to say *est soumise*, in other words, “is subjected”, in the English.

50. Mr. ARANGIO-RUIZ said he endorsed the use of the word “must”, even if it hurt the feelings of purists of the English language, for the form “ought to” translated the idea of the conditional *devrait*. Mr. Pellet’s proposal was not satisfactory for the simple reason that, in the case of countermeasures, the Commission had engaged not only in codification within the strict meaning of the term but also in some progressive development.

* This text was not issued as an official document.

51. Mr. BARBOZA said he was ready to accept the compromise text proposed by Mr. Calero Rodrigues, but saw no need to replace "must" in the English version by "ought to" or "should". If it was not possible to retain "must", he could agree to Mr. Pellet's proposal.

52. The CHAIRMAN suggested that members should adopt the compromise text submitted by Mr. Calero Rodrigues for the last sentence of paragraph (1), with the amendment proposed by Mr. Pellet.

It was so agreed.

53. Messrs. MIKULKA, BARBOZA and ARANGIO-RUIZ drew attention to an ambiguity in the third sentence of paragraph (1). A brief reading of the text might imply that the use or threat of force could be justified in certain situations.

54. Mr. ROSENSTOCK suggested that the ambiguity could be removed by placing commas before and after the phrase "not involving the use or threat of force".

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraph (2)

55. The CHAIRMAN pointed out that Mr. Rosenstock had proposed that the first two sentences of the paragraph should be deleted.

56. Mr. BENNOUNA urged Mr. Rosenstock to show some understanding and realism and not to press for such a deletion, which could well jeopardize the balance of the text.

57. Mr. LUKASHUK said he supported Mr. Rosenstock's proposal. Deletion of the first two sentences would make the text a genuine commentary and not simply a reminder of the debate.

58. Mr. PELLET said he was completely opposed to the proposal. If it was adopted, the text would only bring out the viewpoint in favour of the defence of countermeasures. The wording of paragraph (2) and of the passage in question was not entirely free from criticism. The reference to "counter-countermeasures", in brackets, was of no interest and should be deleted. Similarly, the expression "alleged wrongdoer" should be replaced by "State which has committed the internationally wrongful act".

59. Mr. CALERO RODRIGUES said that, like Mr. Bennouna, he thought an attempt should be made to propose a balanced text. Mr. Rosenstock's criticism of the two sentences he wanted to delete was that they did not express a unanimous view within the Commission. Perhaps the difficulty could be solved by inserting the words "According to one view" at the beginning of the paragraph.

60. Mr. ARANGIO-RUIZ said that that would emasculate the text of the paragraph, for the two sentences in question expressed undeniable facts.

61. Mr. BENNOUNA said that, if the two sentences were preceded by the words "According to one view",

the words "According to another view", should be inserted before "Two considerations". As Mr. Arangio-Ruiz had said, the first two sentences were purely objective statements of undeniable facts.

62. Mr. ROSENSTOCK, supported by Mr. PELLET, said he did not think that there were "basic flaws in countermeasures". The world was what it was, and sometimes it was cruel. Exercise of the right to self-defence produced victims, but it was the world in which it was necessary to exercise that right that was basically flawed, not the right to self-defence itself. Again, it was the legal system which necessitated resort to countermeasures that was basically flawed, not the countermeasures themselves. The opinions set out in the first two sentences were not unanimous and that was why it was justifiable to insert the words "According to one view" at the beginning of the paragraph. However, inserting the words "According to another view" before the words "Two considerations", as proposed by Mr. Bennouna, was not warranted, since the Commission had indeed decided, rightly or wrongly, to deal with countermeasures and no member, whatever his hesitations, had been opposed to it.

63. Mr. BARBOZA, supported by Mr. BOWETT, proposed that, in order to settle the difficulty, the words "suffer from a basic flaw, namely", in the first sentence, should be replaced by "involve a".

64. Mr. TOMUSCHAT said he could agree to the proposal by Mr. Barboza and Mr. Bowett. The words "suffer from a basic flaw" could also be replaced by the words "raise a basic problem". Moreover, more correctly and properly, the words "their inclusion" in the third sentence should be replaced by "the inclusion of countermeasures".

65. Mr. ARANGIO-RUIZ said he supported Mr. Tomuschat's proposal and added that, quite often, the expression "self-defence", gave him goose-flesh, for it was a notion that gave rise to abominable abuse. Countermeasures involving the use of military force were often presented under the pretence of self-defence.

66. Mr. PELLET said that he could accept the proposal by Mr. Calero Rodrigues, since the point of view expressed in the two sentences in question was his own, like that of a majority of the members. He could also agree to the proposal by Mr. Barboza and Mr. Bowett.

67. Mr. MIKULKA and Mr. de SARAM said they supported the proposal by Mr. Barboza and Mr. Bowett.

68. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the proposal by Mr. Barboza and Mr. Bowett to replace the words "suffer from a basic flaw, namely", by "involve a", in the first sentence.

It was so agreed.

69. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the proposal by Mr. Pellet to delete the words in brackets in

* Resumed from the 2468th meeting.

the first sentence, and replace the words “alleged wrongdoer” by “State which has committed the internationally wrongful act”.

It was so agreed.

Paragraph (2), as amended, was adopted.

The general commentary to chapter III of part two, as amended, was adopted.

*Commentary to article 48 (Conditions relating to resort to countermeasures) (continued)**

Paragraph (9) (continued)*

70. The CHAIRMAN reminded members that paragraph (9) of the commentary to article 48 had been left pending.

71. Mr. CALERO RODRIGUES said it had been proposed that the paragraph should be deleted, except for the last two sentences, and that it should be ascertained whether the questions discussed in the sentences proposed for deletion were dealt with in the commentary to part three of the draft. The secretariat had looked into the matter and they were not discussed. Paragraph (9) of the commentary to article 48 should therefore be retained as it stood.

72. Mr. ROSENSTOCK, supported by Mr. TOMUSCHAT, said his objection was simply that the sentences in question had no place in the commentary because they related to details of the dispute settlement mechanism referred to in paragraph 2 of article 58. Hence he was not opposed to retaining them, but thought that they should be transposed to the commentary to part three of the draft.

73. The CHAIRMAN invited Mr. Rosenstock and Mr. Tomuschat to consider the place where they thought the sentences in question should be inserted in the commentary to part three of the draft and to report back to the Commission at the next meeting.

It was so agreed.

The meeting rose at 6.10 p.m.

2471st MEETING

Thursday, 25 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo,

Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

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

CHAPTER III. *State responsibility (continued) (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)*

D. *Draft articles on State responsibility (concluded) (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)*

General commentary to chapter IV (International crimes) of part two (concluded) (A/CN.4/L.528/Add.3 and Corr.1)*

Paragraph (15) (concluded)*

1. The CHAIRMAN said that, as requested by the Commission, Mr. Pellet had drafted a new version of paragraph (15), which read:

“The proposals dealt with in the two preceding paragraphs envisaging a two-step procedural mechanism for determining disputes as to whether a crime has been committed are based on the idea that such disputes are too important to be left to the general procedures of part three. In order to avoid any possible abuse, these proposals provided that disputes to which the application of article 19 might give rise should be submitted to an impartial third party with decision-making power.”

He invited members’ comments on the new text.

2. Mr. BOWETT said that paragraph (15) as originally drafted dealt with the proposal made by Mr. Pellet and Mr. Eiriksson¹ and referred to that proposal as innovative since it had received a large measure of support in the Commission. The new version included the proposal made by the former Special Rapporteur in his seventh report² and treated it as equally innovative, although it had not received anything like the same degree of support in the Commission. As long as the Commission appreciated that point, he was prepared to go along with the new text.

3. In reply to a question by Mr. Rosenstock, the CHAIRMAN said that the first sentence of paragraph (11) of the commentary, as amended, read: “Nevertheless, it should be pointed out that a number of members of the Commission favoured a more innovative proposal”.

4. Mr. ROSENSTOCK said that the reference to a “number of members” was quite misleading, particularly since the paragraph served as an introduction to all

* Resumed from the 2469th meeting.

¹ See 2457th meeting, footnote 15.

² See 2434th meeting, footnote 5.

that followed, including paragraph (15). He was, however, prepared to let matters stand.

Paragraph (15), as amended, was adopted.

5. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt the general commentary to chapter IV, with the understanding that, as it had been decided (2469th meeting), the general commentary to chapter IV would be incorporated in the commentary to article 51.

The general commentary to chapter IV of part two, as amended, was adopted.

Commentary to article 48 (Conditions relating to resort to counter-measures) (concluded)

Paragraph (9) (concluded)

6. Mr. TOMUSCHAT suggested that the first three sentences should be deleted, that the word "Secondly", at the beginning of the fourth sentence, should also be deleted, and that the remainder of paragraph (9), starting with the words "The jurisdiction of the tribunal" should be moved to form part of the commentary to article 58 which had been adopted at the forty-seventh session.³

7. Mr. BOWETT said that he saw no harm in repeating a couple of sentences if it would save the reader from having to refer back to the report of the Commission to the General Assembly on the work of its forty-seventh session.

8. Mr. BENNOUNA asked whether it had been decided to reproduce the commentaries to parts two and three of the draft articles in the report of the Commission to the General Assembly.

9. Mr. LEE (Secretary to the Commission) said that inclusion in the report of the Commission of the commentaries to parts one, two and three of the draft on State responsibility would account for some 150 pages in the English text, while the inclusion of parts two and three would account for more than 105 pages. It had been the Commission's consistent practice not to reproduce the commentaries to articles adopted at previous sessions.

10. Mr. ROSENSTOCK suggested, to meet Mr. Tomuschat's point, that the first part of paragraph (9) of the commentary to article 48 should be deleted, as Mr. Tomuschat had suggested, that the second part should be placed between brackets and that a footnote should be added, reading: "This thought and other related situations concerned with article 58 can be found at".

Paragraph (9), as amended, was adopted.

11. Mr. TOMUSCHAT said that the inclusion in the report of the commentaries to parts two and three would be extremely useful and, by his estimate, would account for no more than 84 pages.

12. Mr. BENNOUNA said that either Mr. Tomuschat's proposal should be accepted or there should be a sepa-

rate printing of the commentaries for the benefit of the members of the Sixth Committee. He did not see how those members could be expected to take a decision on the topic of State responsibility without an overall view of the situation. Given the interrelationship between parts one, two and three of the draft articles, an appropriate technical solution must be found.

13. Mr. LEE (Secretary to the Commission) said one problem was that, by decision of the General Assembly, the secretariat was not allowed to reproduce documents that had already been reproduced. Should the Commission decide to include the commentaries to parts two and three in its report, however, the secretariat would do its best to persuade Documents Control Services to comply with its wishes. Even in the case of the forthcoming conference on international watercourses, the reproduction of documents had been refused on the ground that they had already been reproduced two years earlier.

14. The CHAIRMAN suggested that the Commission should express the wish that the commentaries to parts two and three of the articles on State responsibility should be reproduced in the report of the Commission to the General Assembly and its hope that the secretariat would do its best to comply with that wish.

It was so agreed.

The commentary to article 48, as a whole, as amended, was adopted.

15. The CHAIRMAN, noting that the Commission had concluded its adoption of the commentaries to the draft articles on State responsibility, suggested that, as was customary and in accordance with articles 16 and 21 of its statute, the Commission should decide to refer the draft articles on State responsibility to Governments for their comments. He further suggested that the deadline for the submission of such comments should be 1 January 1998.

16. Mr. ROSENSTOCK said that he would prefer the earlier date of 1 October 1997 to ensure that Governments' comments were available at the beginning of the first session in 1998, assuming that split sessions would be held in that year.

17. Mr. BENNOUNA said that the time limit suggested by the Chairman was rather short, particularly for developing countries which did not have all the facilities for analysing the draft and submitting comments.

18. Mr. THIAM, agreeing with Mr. Bennouna, said that the submission of his report as Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind had been somewhat hindered by the fact that very few Governments of developing countries had submitted comments on it. It would be better to set a time limit that would allow even countries that did not have the necessary facilities to submit their comments.

19. The CHAIRMAN suggested that the Commission should agree to the date he had originally suggested, while recognizing the inherent difficulties for some countries.

It was so agreed.

³ Provisionally adopted by the Commission as article 5 of part three. See 2468th meeting, footnote 1.

20. Mr. ROSENSTOCK suggested that the Rapporteur and the secretariat should be asked to compile a list of questions, pertaining to all topics on the Commission's agenda including State responsibility, which merited the Sixth Committee's special attention. That would considerably enhance the value of the Commission's debates.

21. Mr. CALERO RODRIGUES, agreeing with that proposal, said that the matter could perhaps first be considered in the Bureau.

22. The CHAIRMAN suggested that the Rapporteur and the secretariat should be asked to prepare a list of questions that could be submitted to the Sixth Committee, for discussion first in the Bureau and then in the Commission.

It was so decided.

Section D, as amended, was adopted.

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

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

23. The CHAIRMAN reminded the Commission that it still had to consider the commentaries to articles 14 (of which paragraph (1) was already adopted (2464th meeting)), 15, 16, 19 and 20. He invited the Chairman of the Drafting Committee to indicate any new elements that had been included.

*Commentary to article 14 (Defences) (concluded)** (A/CN.4/L.527/Add.6/Rev.1)*

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

24. Mr. TOMUSCHAT proposed that, for ease of reference, the relevant document setting forth the conclusions reached by the United Nations War Crimes Commission should be cited in a footnote.

Paragraph (6), as amended, was adopted.

Paragraph (7)

25. Mr. BENNOUNA said that the distinction drawn between self-defence under criminal law and self-defence under Article 51 of the Charter of the United Nations was bizarre and somewhat elementary.

26. Mr. THIAM (Special Rapporteur), supported by Mr. TOMUSCHAT, said that it would be better to maintain that distinction for those who were less enlightened in the law.

Paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

27. Mr. CALERO RODRIGUES said that the paragraph had been redrafted to make it clear that superior orders might be relevant in the case of duress or coercion, but could never be a defence in itself.

Paragraph (9) was adopted.

Paragraph (10)

28. Mr. THIAM (Special Rapporteur) said he took exception to the assertion in paragraph (10) of the French version that duress or coercion had been recognized as a *fait justificatif* in some of the war crimes trials conducted after the Second World War. Duress or coercion could be recognized as an extenuating circumstance with regard to responsibility. However, it could not be considered as a justification.

29. Mr. TOMUSCHAT said that the word "defence" had been translated as *un fait justificatif* in the French version, when in fact the translation should have been *un fait excusatoire*.

Paragraph (10) was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

30. Mr. CALERO RODRIGUES said that the first two sentences of paragraph (13) were new. The question of age as a possible defence had been discussed at length in the earlier commentary, which had been shortened. What remained were the essential points that had to be made.

Paragraph (13) was adopted.

The commentary to article 14, as amended, was adopted.

Commentary to article 15 (Extenuating circumstances)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 15 was adopted.

Commentary to article 16 (Crime of aggression) (A/CN.4/L.527/Add.7)

Paragraph (1)

31. Mr. ROSENSTOCK said that the Commission should consider whether paragraph (1), which was certainly correct, was the best way to present the extremely complex issues raised by article 16 or whether the longer commentary elaborated earlier and distributed on 12 July 1996 might not be more useful. A number of members had been seriously concerned about the possible reactions to article 16 and for that reason it would be best to explain in detail the reasoning behind the article. The longer commentary was better suited to that purpose.

* Resumed from the 2465th meeting.

** Resumed from the 2464th meeting.

32. Mr. THIAM (Special Rapporteur) said that paragraph (1) was brief but accurate. He could accept without difficulty the idea of making additions to the paragraph as it stood. What he found completely unacceptable was the idea of replacing it with an entirely different paragraph proposed by the secretariat: that was contrary to the working methods of the Commission.

33. Mr. CALERO RODRIGUES said that he could not agree with Mr. Rosenstock that the longer commentary would be a better choice. He himself had had serious reservations about the earlier version of paragraph (1). The purpose of the commentary was to explain the meaning of the relevant article. Article 16 focused on the criminal responsibility of the individual. There were no grounds for explaining in the commentary what was meant by aggression by a State, first because it was not the subject of article 16 and, secondly, because it would be a very difficult, if not impossible, task. Perhaps certain parts of the earlier version could be incorporated in the current paragraph (1).

34. Mr. SZEKELY said that it would be preferable to provide the General Assembly with more detail. He endorsed the suggestion of Mr. Calero Rodrigues to incorporate parts of the earlier version in the present text.

35. Mr. TOMUSCHAT said he agreed that the Special Rapporteur's version of paragraph (1) should clearly form the basis for the Commission's work. He would, however, go along with the idea of adding some elements from the earlier version. In the final analysis, the commentary represented the views of the entire Commission, not simply those of the Special Rapporteur.

36. Mr. THIAM (Special Rapporteur) said that certain assertions in the earlier version of paragraph (1) had been wrong, for example, the statement that aggression was defined under article 16. In fact, the Commission had decided that it would not define aggression.

37. Mr. ROSENSTOCK said that as it stood, paragraph (1) was fundamentally misleading because it misinterpreted what the Commission had done. The Commission had in fact produced a definition of the crime of aggression, although not the crime of aggression committed by a State, which was beyond the scope of the present Code. That explanation belonged in the commentary.

38. Mr. BENNOUNA said he agreed with the Special Rapporteur that the Commission should be considering paragraph (1) as it currently stood. Any other amendments should be submitted to the Commission under the usual procedure.

39. Mr. PAMBOU-TCHIVOUNDA said that the idea of an act of aggression was a precise one. Thus, in order to bring paragraph (1) more in line with the meaning of article 16, he proposed that the words "commission of" should be inserted before the words "an act of aggression". The act in itself did not constitute the crime of aggression.

40. Mr. ROSENSTOCK proposed that paragraph (1) should be replaced by the following formulation:

"(1) The definition of the crime of aggression contained in article 16 of the present Code is drawn from the relevant provision of the Charter of the Nürnberg Tribunal as interpreted and applied by the Tribunal. Article 16 addresses several important aspects of the definition of aggression for the purpose of individual criminal responsibility. The phrase 'An individual . . . shall be responsible for a crime of aggression' is used to indicate that the scope of the present article is limited to the definition of aggression for the purpose of individual criminal responsibility. Thus, the present article does not address the definition of aggression by a State which is beyond the scope of the present Code, as discussed below."

41. Mr. PAMBOU-TCHIVOUNDA, referring to the first sentence, said he was not convinced it was accurate to say that article 16 "defined" the crime of aggression. The purpose of the article was to establish the principle of individual responsibility when a crime of aggression attributable to a State was committed. Accordingly, he did not endorse the first sentence and thought the second sentence was unnecessary. The paragraph should begin with the third sentence and end after "the present Code", in the fourth sentence.

42. Mr. BENNOUNA said he agreed that article 16 did not define aggression. It simply indicated that the provisions of general international law applied to such situations. He preferred the original version of paragraph (1) proposed by the Special Rapporteur, which was both more concise and more clear.

43. Mr. CALERO RODRIGUES said he entirely approved of the new formulation proposed by Mr. Rosenstock, and thought the first sentence was historically correct. The problem was, however, that the term "definition" was being used, not in the legal sense of a "definition" of aggression, but to mean the characterization of an act as a crime. Perhaps the first sentence could be amended to begin: "The definition of aggression as a crime against the peace and security of mankind contained in article 16". That would make it clear that the subject was individual responsibility deriving from participation in a crime of aggression committed by a State.

44. Mr. FOMBA said he appreciated the concern expressed by Mr. Bennouna and Mr. Pambou-Tchivounda, but thought the proposal by Mr. Calero Rodrigues went a long way towards dispelling it. A distinction had to be drawn between classic State responsibility and responsibility relating to crimes against mankind, for which the law must describe an individual's behaviour with a view to establishing criminal responsibility.

45. Mr. BARBOZA said it was true that the use of the term "definition" was problematic. Article 16 did not define aggression, but simply invoked general international law. Although Mr. Calero Rodrigues' proposal was acceptable, he wished to suggest the following variation for the first part of the first sentence: "The crime of aggression as described in article 16 of the present Code". The word "definition", in the second and third sentences, should be replaced by "crime".

46. Mr. LUKASHUK said that his proposal was along the same lines, namely, the first sentence should begin: "The provisions of article 16 of the present Code . . .".

47. Mr. CALERO RODRIGUES suggested that the word "definition" should be replaced by "characterization" throughout the paragraph, because that better conveyed the sense that an act was being designated as criminal.

48. Mr. TOMUSCHAT said he did not entirely agree with Mr. Barboza that article 16 gave no definition of aggression: it provided at the least the elements of a definition, features which identified the crime of aggression. He would like to see the following phrase used at the beginning of paragraph (1): "The characterization of aggression as a crime against the peace and security of mankind, called crime of aggression as opposed to aggression as an internationally wrongful act committed by a State . . .". The purpose was to make clear the distinction between aggression as an internationally wrongful act committed by a State and the crime of aggression committed by an individual.

49. The CHAIRMAN pointed out that later sentences made that distinction clear and that the proposal made the text unwieldy.

50. Mr. BENNOUNA asked for the amended text of Mr. Rosenstock's proposal to be read out and noted that, in the original version of the proposal, the word "definition" occurred a total of four times.

51. Mr. CALERO RODRIGUES read out the amended proposal, as follows:

"The characterization of aggression as a crime against the peace and security of mankind contained in article 16 of the present Code is drawn from the relevant provision of the Charter of the Nürnberg Tribunal as interpreted and applied by the Tribunal. Article 16 addresses several important aspects of the crime of aggression for the purpose of individual responsibility. The phrase 'An individual . . . shall be responsible for a crime of aggression' is used to indicate that the scope of the present article is limited to aggression for the purpose of individual criminal responsibility. Thus, the present article does not address the definition of aggression by a State which is beyond the scope of the present Code, as discussed below."

52. Mr. ROSENSTOCK said that, in his view, the word "definition" could have been maintained in the third as well as the fourth sentence. However, he was prepared to accept the amendments proposed by Mr. Calero Rodrigues.

Paragraph (1), as amended, was adopted.

Paragraph (2)

53. Mr. LUKASHUK said that, the words "political parties" should be inserted in the third sentence, between "the diplomatic corps" and "and industry". That would better reflect the findings of the Nürnberg Tribunal.

54. Mr. CALERO RODRIGUES said there was no indication anywhere in the commentary that the expressions "leaders" and "organizers" had been taken from the Nürnberg proceedings. It would therefore be useful to add, after the words "leaders or organizers", the phrase "an expression that was taken from the Charter of the Nürnberg Tribunal".

Paragraph (2), as amended, was adopted.

Paragraph (3)

55. Mr. PELLET said that paragraph (3) was too long and anecdotal. He proposed that the paragraph should end with the phrase "if they knew what they were doing" and that a footnote should be added referring to the relevant pages of the Judgment of the Nürnberg Tribunal. If there was a strong feeling that the remaining material should be retained, he would place it in a footnote.

56. Mr. THIAM (Special Rapporteur) said his original intention had indeed been to include that material in a footnote, but he had ended up by following the approach used in the secretariat report referred to by Mr. Rosenstock.

57. Mr. LUKASHUK said he agreed with Mr. Pellet on the need to delete the last part of paragraph (3).

58. Mr. ROBINSON said he, too, could accept the proposed deletion. The quotations to be deleted illustrated the need for evidence that participation in an act of aggression was intentional, but the paragraph would still contain another quotation from the Nürnberg Tribunal that made the point perfectly well.

59. Mr. BARBOZA said he did not agree with the proposed deletion, because article 16 focused on the participation of individuals in an act that could only be committed by a State, namely aggression. Paragraph (3) introduced certain useful nuances regarding the participation of individuals: for example, that certain persons considered by the public at large to have been involved in Hitler's crimes had not been found by the Nürnberg Tribunal to be involved, owing to certain specific circumstances.

60. Mr. ROSENSTOCK said he thought the wording that would be deleted was important and useful, for the reasons given by Mr. Barboza, but he could accept a decision to put that material into a footnote.

61. Mr. TOMUSCHAT agreed that the text should be placed in a footnote.

62. Mr. RAZAFINDRALAMBO drew attention to a typographical error in the French text and said he favoured the solution of placing the material in a footnote, because the quotations from the Nürnberg Tribunal were needed to illustrate the participation of an individual in aggression.

63. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to incorporate the last part of paragraph (3) in a footnote.

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

64. Mr. ROSENSTOCK, supported by Mr. PELLET and Mr. THIAM (Special Rapporteur), said that, in line with the Commission's decision not to reflect in the commentary the diverging views of members, the footnote to the fourth sentence should be deleted.

It was so agreed.

65. Mr. CALERO RODRIGUES said that he had no objection to the first two sentences, but thought that the draft could be improved if they were replaced by: "The present article refers to 'aggression committed by a State'. An individual, as leader or organizer, participates in that aggression.'".

66. Mr. LUKASHUK said the fourth and fifth sentences were contradictory. The fifth sentence should be deleted.

67. Mr. ROSENSTOCK said that that sentence paraphrased a central theme emerging from the Nürnberg trials, but he could accept its deletion, since the quotation in the tenth sentence made the same point clear. He would nonetheless suggest that the tenth sentence should be amended as a consequence of deleting the fifth sentence: "this reality" to be replaced by "the reality of the role of States and individuals".

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

68. Mr. CALERO RODRIGUES proposed that the words "which is nothing more than the decision to commit it" should be deleted from the second sentence of the paragraph.

69. Mr. ROSENSTOCK proposed that the word "probably", near the beginning of the third sentence, should be deleted and that the sentence should end with the word "compartments", the remainder of the third sentence being deleted.

70. Mr. THIAM (Special Rapporteur) said that he was prepared to accept those amendments.

Paragraph (6), as amended, was adopted.

Paragraph (7)

71. Mr. BOWETT questioned the use of the words "Some persons" at the beginning of the penultimate sentence. Did they refer to members of the Commission?

72. Mr. ROSENSTOCK recalled that the Commission had agreed to avoid referring to individual views in the commentaries to articles adopted on second reading.

73. Mr. THIAM (Special Rapporteur) said that he would have no objection to deleting the sentence in question.

74. Mr. TOMUSCHAT said that the fourth sentence of the paragraph, dealing with compensation for the consequences of aggression, was out of place in the commentary to an article of the Code as distinct from the draft articles on State responsibility. The whole paragraph was, in his view, not very helpful.

75. Mr. PAMBOU-TCHIVOUNDA said he agreed that paragraph (7) was superfluous and confusing. It should be deleted.

76. Mr. THIAM (Special Rapporteur) said that he had hesitated before including the paragraph and would be prepared to omit it.

77. Mr. AL-BAHARNA remarked that it might be useful to mention compensation in cases where it took the place of punishment for aggression.

78. Mr. CALERO-RODRIGUES said that the point just raised related not only to aggression but also to other crimes covered by the Code. It should be remembered that the Code of Crimes against the Peace and Security of Mankind was a criminal, not a civil, code. The two might go together in domestic law, but the Code under consideration was not designed to deal with civil responsibility. To go into the question of compensation was therefore unnecessary.

Paragraph (7) was deleted.

The commentary to article 16, as amended, was adopted.

Commentary to article 19 (Crimes against United Nations and associated personnel) (concluded) (A/CN.4/L.527/Add.10 and Corr.1)

*Paragraph (5) (concluded)**

79. The CHAIRMAN invited the Commission to consider the two paragraphs (A/CN.4/L.527/Add.10/Corr.1) proposed to replace the old paragraph (5).

80. Mr. THIAM (Special Rapporteur) said that he had no objection to the proposed new text.

81. Mr. CALERO RODRIGUES, supported by Mr. BENNOUNA, proposed that the two paragraphs should be merged into a single new paragraph (5).

It was so agreed.

Paragraph (5), as amended, was adopted.

The commentary to article 19, as amended, was adopted.

Commentary to article 20 (War crimes) (A/CN.4/L.527/Add.11)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

82. Mr. THIAM (Special Rapporteur) proposed that the words "as well as the 1949 Geneva Conventions and

* Resumed from the 2465th meeting.

the Protocols Additional thereto” should be added at the end of the first sentence.

It was so agreed.

83. Mr. TOMUSCHAT proposed the words *inter alia* should be inserted between “provided for” and the words “by the”, in the first sentence.

84. Mr. ROSENSTOCK said that the words “general characteristics”, used in the second sentence of paragraph (4) and again in paragraph (5), were inappropriate and should be replaced by the word “criteria”.

85. Mr. THIAM (Special Rapporteur) said that he accepted the suggestion by Mr. Tomuschat, but would not be in favour of using the word “criteria” in the context of paragraphs (4) and (5). The characteristics in question were specified in the *chapeau* of the article and were that the crimes in question had to have been committed in a systematic manner or on a large scale.

86. Mr. PELLET recalled that the precise English rendering of the French word *caractère* had given rise to a good deal of discussion in connection with the consideration of article 3 of the draft Code.

87. Mr. ROSENSTOCK said that he was prepared to leave it to the secretariat to ensure that the language of paragraphs (4) and (5) was in line with that used elsewhere in the commentary in connection with the concept of crimes committed in a systematic manner or on a large scale.

88. Mr. CALERO RODRIGUES suggested that the secretariat should also see whether the word “listed”, in the second sentence, should not be replaced by the word “indicated”, inasmuch as the characteristics or, as the case might be, criteria in question were only two in number.

It was so agreed.

Paragraph (4), as amended, was adopted on that understanding.

The meeting rose at 1.05 p.m.

2472nd MEETING

Thursday, 25 July 1996, at 3.15 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Güney, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindrambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam,

Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

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

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

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

Commentary to article 20 (War crimes) (concluded) (A/CN.4/L.527/Add.11)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the commentary to article 20 of the draft Code of Crimes against the Peace and Security of Mankind, starting with paragraph (5).

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

2. Mr. ROSENSTOCK proposed that the last part of the second sentence starting with the words “causing extensive casualties” should be deleted because that statement did not apply in the case of attempt.

3. Mr. THIAM (Special Rapporteur) said that he supported that proposal.

It was so agreed.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

4. Mr. de SARAM said that the words “has not been made up out of nothing” were a bit colloquial.

5. Mr. PELLET proposed that those words should be replaced by the words “has not been drawn up *ex nihilo*”.

It was so agreed.

6. Mr. LUKASHUK, referring to the second sentence, said that the acts in question were primarily punishable by international humanitarian law and that the sentence should be amended to read: “Most of the acts listed are recognized by international humanitarian law and included in different instruments”.

It was so agreed.

Paragraph (9), as amended, was adopted.

Paragraph (10)

7. Mr. LUKASHUK said that, like paragraph (9) and for the same reason, the beginning of paragraph (10) needed to be amended. He therefore proposed that, in the first sentence, the words "grave breaches" should be followed by the words "of international humanitarian law as contained in the Geneva Conventions of 12 August 1949".

8. Mr. PELLET said that he fully supported that proposal because the breaches in question were punishable under customary international law even if those who committed them were not nationals of States parties to the Geneva Conventions of 12 August 1949.

9. Mr. ROSENSTOCK said that he supported Mr. Lukashuk's proposal, but pointed out that the same solution could not be adopted in the case of the Protocols Additional to the Geneva Conventions.

10. Mr. THIAM (Special Rapporteur) said that he also supported Mr. Lukashuk's proposal.

11. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph (10) as amended by Mr. Lukashuk.

Paragraph (10), as amended, was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

12. Mr. PELLET proposed that, since the comment he had made on the Geneva Conventions of 12 August 1949 was also applicable in the present case, the end of the first sentence should be amended to read: ". . . serious violations of the laws and customs of war on land, as referred to in the 1907 Hague Convention (IV) and the regulations annexed thereto".

It was so agreed.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

13. Mr. TOMUSCHAT proposed that, as in the first sentence of paragraph (13), the first sentence of paragraph (15) should be amended to read: ". . . namely, war crimes which have their basis in articles 35 and 55 of Additional Protocol I".

It was so agreed.

Paragraph (15), as amended, was adopted.

The commentary to article 20, as amended, was adopted.

Section D, as amended, was adopted.

B. Recommendation of the Commission

14. The CHAIRMAN said that, having adopted the commentaries to the articles, the Commission had to decide what recommendation it intended to make to the General Assembly on the form the draft Code of Crimes against the Peace and Security of Mankind should take.

15. Mr. PELLET said that it was better to let the General Assembly decide.

16. Mr. CALERO RODRIGUES said that a trend in favour of that solution had appeared to be taking shape during the discussion which had already taken place on the question.

17. Mr. THIAM (Special Rapporteur) said he did not think that it was wise to leave it to the General Assembly to decide because the draft Code might then have the same fate as the one submitted in 1954.¹

18. Mr. BENNOUNA said that, in its recommendation to the General Assembly, the Commission should indicate at least that it wanted the provisions of the Code to be binding and that it would like the Code to be acceded to by as many States as possible, leaving it to the General Assembly to decide on the most suitable way of complying with those two requests.

19. Mr. BARBOZA pointed out that, in any event, the General Assembly could decide which solution it thought best and that a recommendation leaving it to the Assembly to decide was therefore meaningless. The Commission had to assume its responsibilities and express its preference or, at least, give the General Assembly some indications.

20. Mr. ROSENSTOCK said that, if the Commission recommended a convention, he was afraid that it might be ratified only by a small number of States. If it was left up to the General Assembly to decide, it might be able to take account of the results of the meeting that was to be held in late August on the draft statute for an international criminal court and the course to be followed with regard to the draft Code might then be clearer. It would be too early to make a recommendation on the draft Code without knowing what was to happen to the draft statute of an international criminal court. For the sake of the work it had done, the Commission should therefore simply give the General Assembly some indication of the various possible options.

21. Mr. PELLET said that, unlike Mr. Bennouna, he did not want the provisions of the Code to be binding, for reasons relating to the draft Code itself and the fact that the statute of an international criminal court was in the process of being drawn up. There could thus be no consensus on that point. A consensus must nevertheless be sought and he proposed that the Commission's recommendation should be worded along the following lines:

"The Commission discussed the question of the action that the General Assembly might take on the draft Code of Crimes against the Peace and Security

¹ See 2445th meeting, footnote 5.

of Mankind. There were several possibilities, including the adoption of a convention, the inclusion of the Code in the statute of an international criminal court and a declaration (or any other idea that might be put forward).

“Following an exchange of views, the Commission recommends that the draft Code should be given the widest possible acceptance and considers that the General Assembly should decide on the most appropriate way of achieving this goal.”

22. Mr. AL-BAHARNA said that the Commission would be failing in its duty if it did not recommend a specific solution to the General Assembly. In his view, it should recommend that the General Assembly should adopt the draft Code, which was the result of many years of work and contained basic rules of international law, in the form of a convention. If the draft Code was adopted in the form of a declaration, the future international criminal court, whose statute referred to conventions in force, would not be able to apply its provisions.

23. Mr. RAZAFINDRALAMBO pointed out that the draft Code was a text of fundamental importance to the international community, as shown by events which had recently taken place in various parts of the world. It should therefore be adopted in the form of a binding convention which could be implemented by an international criminal court. It was, moreover, quite certain that the General Assembly would like to receive specific indications in that regard. He could therefore not accept Mr. Pellet's proposal unless the Commission let the General Assembly know what the majority opinion of its members was on that question.

24. Mr. LUKASHUK said that a convention would be the best solution in legal terms. However, if the Commission wanted its draft Code to take the form of an official instrument, it would probably be more realistic for the time being to propose only a declaration, which could later become a convention. A declaration would simply state rules of customary law and an international criminal court would therefore be able to apply it.

25. Mr. BARBOZA said that it would not be good for the Commission to present a divided front to the General Assembly. A consensus could probably be reached on Mr. Pellet's proposal.

26. Mr. PELLET said that, in his view, a convention might create a group of virtuous States because only States which regarded themselves as above reproach would ratify the text.

27. Mr. MIKULKA said that preference should be given to a declaration, not because a convention would not be appropriate, but for tactical reasons. It would be illusory to hope that a convention would be signed shortly. However, if the Commission opted for a declaration, it must be understood that the General Assembly would adopt the Code as proposed, without further consideration of matters on which the Commission had already decided. The Code was acceptable as a declaration only as a reflection of customary international law. If it was amended and its nature was thus changed, it would no longer have any authority.

28. Mr. SZEKELY said that he would very much like the draft Code to become a convention having at least as much authority as the Additional Protocols to the Geneva Conventions of 12 August 1949. They had such moral force that it was difficult for a State not to accede to them. He therefore regretted the lack of consensus, which would deprive the Code of its binding legal force.

29. The CHAIRMAN, speaking as a member of the Commission, said that he was also in favour of the solution of a convention. In his view, the Commission had engaged in codification by ruling out certain crimes and keeping only offences already dealt with by the conventions in force and customary international law.

30. Mr. AL-BAHARNA proposed that the beginning of the text proposed by Mr. Pellet should be amended so that it would be clearly stated that the Commission had not been able to agree on the form the draft Code should take and so that there would be a reference to the work of the Preparatory Committee on the Establishment of an International Criminal Court.

31. Mr. ROSENSTOCK said he thought that the text proposed by Mr. Pellet could be amended to take account of the concerns expressed by Mr. Al-Baharna.

32. Mr. PELLET said that the purpose of his proposal had been to avoid saying that the members of the Commission had not been able to agree on a specific proposal or suggesting that there was a minority or a majority in favour of a particular solution. He would like the text to be as discreet as possible on that point.

33. Mr. THIAM (Special Rapporteur) said that it was not possible to tell the General Assembly that it must find a solution itself because the Commission had been unable to agree. He recalled that the draft Code was the outcome of 15 years' work, which had involved restricting as much as possible a basis *ratione materiae* that had originally been very broad.

34. Mr. SZEKELY urged the Commission to reach a consensus. What was important, in his view, was that it had in fact agreed on the draft Code it had adopted. That was what it had to show, and not the fact that the members had not been able to agree on the recommendation to the General Assembly.

35. Mr. AL-BAHARNA said that he withdrew his proposal.

36. The CHAIRMAN suggested that, during the meeting, the secretariat should submit a text of a draft recommendation to the General Assembly based on the proposal by Mr. Pellet.

It was so agreed.

37. The CHAIRMAN said that the draft recommendation to the General Assembly which the secretariat had prepared on the basis of Mr. Pellet's proposal read as follows:

“The Commission considered various forms which the draft Code of Crimes against the Peace and Security of Mankind could take, including an international convention adopted by a plenipotentiary conference

or by the General Assembly itself, incorporating the Code in the statute of an international criminal court, or a declaration by the General Assembly.’’

‘‘Following an exchange of views, the Commission decided that the draft Code should be given the widest possible acceptance and recommended that the General Assembly should select the most appropriate form to achieve this goal.’’

38. Replying to comments made by Mr. ALBAHARNA, Mr. YANKOV and Mr. LUKASHUK on the list contained in the first paragraph of the draft recommendation, the CHAIRMAN, supported by Mr. CALERO RODRIGUES, said that the proposed text was the result of a compromise and that, by agreeing to the principle, the members of the Commission had also agreed not to reopen the substantive debate. Moreover, the list reflected the opinions expressed by the members of the Commission on the forms that the draft Code might take and nothing could therefore be added to it or taken away.

39. Mr. BOWETT said that, in the second paragraph, it was not accurate to say that ‘‘the Commission decided that the draft Code should be given the widest possible acceptance’’ because that was a decision to be taken by Governments. He therefore proposed that the paragraph should be amended to read: ‘‘the Commission expressed the hope that the draft Code would gain the widest possible acceptance’’.

40. Mr. YANKOV said that he supported that proposal.

41. Mr. LUKASHUK said that Mr. Bowett’s proposal was satisfactory. He also suggested that the words ‘‘Following an exchange of views’’ should be deleted because there was nothing exceptional in the fact that the Commission had taken a decision following an exchange of views.

42. Mr. THIAM (Special Rapporteur) said that he supported Mr. Lukashuk’s proposal because it was obvious that the Commission could not decide anything, particularly in view of the number of members it had, without holding an exchange of views. The sentence would be more readable if it were shortened in that way.

43. Mr. ROSENSTOCK said that he supported Mr. Bowett’s proposal and the amendments suggested by Mr. Lukashuk.

44. Mr. MIKULKA said that it was important to convey the idea that, as far as the Commission was concerned, the main objective was the broadest possible participation, the choice of form being secondary. He therefore proposed that the second paragraph should be amended to read: ‘‘The Commission recommends that the General Assembly should choose the most appropriate form to guarantee the broadest possible acceptance of the Code by States’’.

45. Mr. CALERO RODRIGUES said that he found that proposal very attractive because it did not change the substance of the paragraph and made the Commission’s intention very clear.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the draft recommendation as amended by Mr. Mikulka.

The draft recommendation, as amended, was adopted.

Section B, as amended, was adopted.

47. The CHAIRMAN said that the Commission would take up consideration of chapter II, section A, of its draft report on the draft Code of Crimes against the Peace and Security of Mankind at a later time.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/472/Add.1, sect. D, A/CN.4/475 and Add.1,² A/CN.4/L.533 and Add.1)

[Agenda item 4]

REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (concluded)*

48. The CHAIRMAN invited the members of the Commission who wished to do so to comment on the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.533 and Add.1), which could be annexed to the Commission’s report. The report contained the full text of the articles and commentaries thereto proposed by the Working Group.

49. Mr. BOWETT said that the Commission could not transmit a text to the General Assembly containing absurdities such as that in article 1, subparagraph (b), which stated that ‘‘activities which do not involve a risk’’ of causing significant transboundary harm ‘‘nonetheless cause such harm’’. Reference should be made to ‘‘activities which were originally believed not to involve a risk of causing significant transboundary harm’’.

50. Mr. PELLET said that the report would not be sent to the General Assembly under the Commission’s signature and contained only the conclusions of a working group. He regretted, moreover, that the Commission could not officially submit to the General Assembly chapter II (Prevention), a carefully thought out text that the Member States could now adopt. Chapters I (General provisions) and III (Compensation or other relief) were, however, very much open to criticism and he maintained the reservations he had already expressed about them.

51. Mr. ROSENSTOCK said that the wording proposed by Mr. Bowett for article 1, subparagraph (b), was not entirely appropriate because an activity might originally not involve a risk of transboundary harm, but begin to reveal one as it was carried out. It would therefore be better to refer to ‘‘activities not prohibited by interna-

* Resumed from the 2465th meeting.

² Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

tional law which do not involve a perceivable risk referred to in subparagraph (a)''.

52. In reply to Mr. Pellet, he said that it would not be appropriate to let the General Assembly know about differences of opinion among the members of the Commission, particularly as the Commission had no decision to take at present.

53. The study of the topic so far had been particularly useful because it enabled the General Assembly to have before it a complete text that was very broad in scope and dealt with all of the questions that the subject matter covered. Member States would thus be able to express their views on a number of problems that they would have an opportunity to focus on for the first time. The Special Rapporteur, the Rapporteur of the Commission and the secretariat should try to draw up a list of the points on which it would be helpful for the Commission to receive guidance from the General Assembly. For example, were Member States prepared to endorse a system of strict liability and to consider the case of ultrahazardous activities and substances? Did they want obligations of prevention to be particularly strict? Would they be prepared to accept other obligations and, if so, which ones? Those were problems that Governments should have begun to study as early as 1972, following the adoption of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), in particular, principle 21.³

54. Mr. SZEKELY said that he also regarded the report under consideration as the result of work that would be extremely beneficial to the international community. States which had common borders would certainly be happy to be able to use the guidelines provided by the proposed articles to solve their transboundary problems, which could arise on a daily basis.

55. The main merit of the draft articles was that they would enable Member States to have an idea of the scope of a convention that would govern the subject matter and thus give the Commission useful indications for the follow-up to its work.

56. The draft articles proposed a very clear-cut definition of transboundary harm caused by one State to another State. At present, the Commission had not yet dealt with the problem of international liability for harm to the global commons. That was a very interesting topic and one that the Commission had already included among the topics it might consider in future.

57. Mr. BENNOUNA said that, while he agreed with the comments by Mr. Bowett and Mr. Pellet, he did not think that it was possible to improve on the wording of article 1, subparagraph (b), because, if that provision was taken literally, its scope would include any activity carried out anywhere in the world. In fact, the entire approach of the draft articles was open to criticism. For the sake of consistency, only problems of risk and prevention should have been dealt with.

58. The introduction to the question of responsibility in chapter III was not clear. Did it refer to responsibility in the usual sense of the term or to "liability" in the English sense of the term?

59. He would not object if the report of the Working Group was referred to the Sixth Committee, but, when the topic came up on the Commission's agenda in future, he would like it to focus only on the questions of prevention and risk that lay at the heart of the problem.

60. Mr. de SARAM said that, as the Commission had already reached its decision at an earlier meeting on the procedural question of the submission of the report of the Working Group to the General Assembly before its consideration by the Commission in plenary, he would not be commenting on that aspect of the matter. He wished, moreover, to pay tribute to the quality of the report and to the work of the Special Rapporteur. However, he hoped that, whenever the report of the Working Group returned to the Commission for its consideration, the Commission would have the opportunity to determine whether the report of the Working Group and the draft articles it contained provided adequately for the type of transboundary damage with which he was most concerned that the Commission should deal, namely, the causing in one State of damage which was of considerable magnitude and might be catastrophic because of an activity in another State not prohibited by international law.

61. He was not at all certain that the report of the Working Group and its draft articles could now be regarded as providing adequately for damage of that nature and for the prompt and adequate reparation or compensation required. There were one or two provisions in the report and in the draft articles which appeared to set out the proper fundamental beginning and with which he could wholeheartedly concur: article 3, which seemed to reflect the correct perspective that the freedom of States to carry on or permit activities in their territory was not unlimited and was subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm; and the sentence in paragraph (3) of the commentary to article 21 which referred to the fundamental notion of humanity that individuals who had suffered harm or injury due to the activities of others should be granted relief, which found deep resonance in the modern principles of human rights. Yet, the many qualifications incorporated in the report and draft articles seemed to deprive those essential principles of their essence and objective.

62. As to the general approach or perspective adopted in the report of the Working Group and its draft articles, it seemed to him that there had been excessive reliance on procedures of consultation and private law remedies. While it was true that, in certain regions of the world, sophisticated consultation procedures and judicial and administrative infrastructures were already in place for the handling of transboundary damage of great or catastrophic proportions, that was certainly not globally true.

63. In the current quinquennium, the Commission had certainly never considered the fundamental legal questions to which the topic of liability for the injurious consequences of acts not prohibited by international law

³ See 2450th meeting, footnote 8.

gave rise. As he saw it, the questions were whether, as between States at the public international law level, a State in whose territory an activity not prohibited by international law was conducted (the State of origin) was: (a) under public international law legally obliged through the secondary rules of State responsibility to provide reparation to an injured State from resulting transboundary harm; and (b) whether the State of origin was under a primary legal obligation to provide the affected State with necessary compensation and relief. There had been occasions in present-day public international law, where a legal obligation to compensate had been found in cases of injurious consequences resulting from lawful activities, even where no treaty had governed.

64. Everyone did, of course, know about the rule of "due diligence", but the Commission had to consider whether there were not limits to that rule, as seemed to be the case in the internal law of many countries. The rule was, moreover, certainly not the only rule of international law that was applicable. He emphasized that he was not concerned with such low-level damage occurring in one State because of activities in neighbouring States that, in terms of good neighbourly relations between States, should be resolved through consultations. He was concerned, rather, with occurrences of transboundary damage of substantial and possibly catastrophic proportions.

65. The commentary to article 8 (Relationship to other rules of international law) reflected a legitimate concern with the operation and content of the prevailing obligations of States under public international law. Yet it seemed to him that paragraph (2) of the commentary was not entirely clear and that its second sentence stating that the reference in article 8 to any other rule of international law is intended to cover both treaty rules and rules of customary international law was troubling because of its omission of the general principles of law, which were, of course, a direct source of international law under Article 38 of the Statute of ICJ.

66. He hoped that the question of the current status of the law on the topic under consideration would be one of the first in the list of specific questions which Mr. Rosenstock wanted to ask the Governments of Member States.

67. Mr. VILLAGRÁN KRAMER said that the advantage of the report of the Working Group was that it gave Governments an overall view of a complex topic with which the Sixth Committee had been dealing for a long time. The idea of consulting Governments through the report was a good one. The study of the topic of liability for injurious consequences arising out of acts not prohibited by international law required good knowledge both of the Roman law and the common law systems, particularly the "law of torts", and the opinion of Governments on the principles of extra contractual liability according to those two types of system was bound to be helpful. The amendment by Mr. Rosenstock to Mr. Bowett's proposal on article 1, subparagraph (b) was very much to the point because the potential for risk and the element of foreseeability were very important aspects in that regard.

68. Mr. BARBOZA (Special Rapporteur) said that the coherent set of articles contained in the report of the Working Group would at least enable the General Assembly to improve its understanding of the topic. The text was probably not perfect, but all members of the Commission had had an opportunity to state their point of view in the Working Group.

69. He agreed with Mr. Bowett's comments: the provision he had criticized reflected the opinion of only some members of the Working Group and should have been placed in square brackets, but it was now too late to include alternatives in the text, which had to be referred to the General Assembly as it stood.

70. Mr. MIKULKA recalled that the report of the Working Group had never been discussed in detail in plenary, even if the Special Rapporteur seemed to be attributing responsibility for it to the Commission as a whole. He was therefore not sure whether the Commission had been right to decide to annex the report of the Working Group to its own report. The impression should not be given that Member States were being called on to formulate comments on what was still only a draft to which the Commission would necessarily have to give further consideration at a later stage.

71. Mr. BARBOZA (Special Rapporteur) said that his comments had been misinterpreted and Mr. Mikulka's reaction was based on a misunderstanding.

72. The CHAIRMAN said that that point could be cleared up during the consideration of paragraph 12 of chapter V of the Commission's draft report on that question (A/CN.4/L.529) and that the exchange of views on the report of the Working Group had been completed.

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

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.529)*

73. He invited the members of the Commission to consider chapter V of the draft report paragraph by paragraph.

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 11

Paragraphs 8 to 11 were adopted.

Paragraph 12

74. Mr. PELLET proposed that the following phrase should be added at the end of the paragraph: " , which it intended to take up again, if necessary, in accordance with its usual procedures".

75. Mr. BARBOZA (Special Rapporteur) said that the Commission was sovereign and that, when it took up the consideration of the articles again, it would do so on the basis of its own sovereignty.

76. Mr. CALERO RODRIGUES said that the words "as necessary" were inappropriate because they suggested that the Commission might conclude that it did not have to take up the consideration of the articles again. He therefore proposed that those words should be deleted.

77. Mr. LUKASHUK said that that was an internal matter of no interest to the General Assembly.

78. Mr. YANKOV said that he would like the text of paragraph 12 to be retained as it stood, but could also go along with the proposal by Mr. Calero Rodrigues.

79. Mr. SZEKELY said that he supported the view expressed by Mr. Calero Rodrigues and Mr. Yankov.

80. Mr. PELLET said that he was prepared to agree to the deletion of the words "as necessary", which reflected a personal position that the Commission did not have to go along with. He withdrew that part of his proposal. He would, however, find it very difficult to agree to the text of paragraph 12 if he did not have the guarantee, which he had, moreover, believed he had received from the Special Rapporteur during the earlier discussion, that, in any event, the Commission would follow the usual procedure when it took up the consideration of the topic again.

81. Mr. YANKOV said that he appreciated Mr. Pellet's spirit of compromise. He was of the opinion that the original wording of the last sentence expressed the same idea as the revised proposal by Mr. Pellet, but he would nevertheless support that proposal.

82. Mr. CALERO RODRIGUES proposed that, in the last sentence, the word "necessary" should be deleted because it might give the impression that, without the comments of the General Assembly and Governments, the Commission could not continue its work on the topic. He therefore proposed that the beginning of the sentence should read: "These comments will provide useful guidance . . .".

83. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the last sentence of paragraph 12, as amended by Mr. Pellet and Mr. Calero Rodrigues.

It was so agreed.

84. Mr. MIKULKA said that the first sentence of paragraph 12 was unacceptable. What the Commission was asking was that the General Assembly should make comments on the questions referred to in the commentary to article 1, on the approach to the issue of compensation or other relief as set out in chapter III and on the draft articles as a whole. There were, however, no draft articles for the time being. There were only the articles contained in the report of the Working Group, which had never been discussed by the Commission in plenary.

85. Mr. PELLET said he was also disturbed by the approach the Commission had taken in the present case. In order to remove the ambiguity of the text, he proposed

that the words "the draft articles as a whole" at the end of the first sentence should be replaced by the words "the report of the Working Group as a whole".

86. Mr. VILLAGRÁN KRAMER drew attention to the fact that the Working Group had simply put into shape articles that had been adopted by the Commission and submitted to the General Assembly two years previously as well as the year before.

87. The CHAIRMAN said he recognized that the articles in question in paragraph 12 were not draft articles in the usual sense which had been considered and discussed by the Commission on first reading before being submitted to the General Assembly. In order to remove the ambiguity at the end of the first sentence, he suggested that the wording that was being criticized should be replaced by the words "the articles and commentaries proposed by the Working Group", which were more in line with the title of the report of the Working Group.

88. Mr. MIKULKA said that he preferred the wording suggested by Mr. Pellet because, in the light of the statute of the Commission, the wording suggested by the Chairman might create confusion between commentaries by the Working Group and commentaries by the Commission. However, if the other members of the Commission were not bothered by that confusion, he would go along with the Chairman's proposal.

89. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to replace the words "the draft articles as a whole" at the end of the first sentence by the words "the articles and commentaries proposed by the Working Group".

Paragraph 12, as amended, was adopted.

90. Mr. CALERO RODRIGUES proposed that the following paragraph should be added to chapter V of the draft report of the Commission:

"Since Mr. Julio Barboza is leaving the Commission, not being a candidate for re-election, the Commission felt that it should express its deep appreciation for the zeal and competence which he demonstrated for 12 years as Special Rapporteur for this important and complex work."

The proposal was adopted by acclamation.

New paragraph 13 was adopted.

91. The CHAIRMAN, speaking on his own behalf and that of all members of the Commission, said that he also wished to thank Mr. Barboza for the work he had done on a complex topic in circumstances that had been complicated by time constraints and the priority given to other topics. Although the result achieved was not exactly what the Commission had originally wished, it would serve as a useful basis for the work of the new members of the Commission.

Chapter V, as amended, was adopted.

The meeting rose at 6.10 p.m.

2473rd MEETING

Friday, 26 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

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

1. The CHAIRMAN invited the Commission to continue its consideration of its draft report on the work of its forty-eighth session, starting with chapter II.

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

A. Introduction (A/CN.4/L.527 and Add.1 and Add.1/Corr.1)

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

Paragraph 16

2. The CHAIRMAN said that the figure “[19]” should be amended to read “[20]”.

Paragraph 16, as amended, was adopted.

Paragraph 17

3. Mr. PELLET proposed that the word “agreement” in the second line should be replaced by the word “consensus”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Section A, as amended, was adopted.

4. The CHAIRMAN suggested that the Commission should transmit the draft Code to the Preparatory Committee on the Establishment of an International Criminal Court, which was scheduled to meet in August 1996.

It was so decided.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam

5. The CHAIRMAN, recalling that the Commission had already adopted section C in the context of agenda item 3 (2454th meeting), invited the Commission to adopt it formally.

Section C was adopted.

Chapter II, as amended, was adopted.

6. The CHAIRMAN invited the Commission to continue its consideration of chapter III of the draft report.

CHAPTER III. State responsibility (concluded)* (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

A. Introduction (A/CN.4/L.528 and Corr.1)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.528/Add.1)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section B was adopted.

C. Tribute to the Special Rapporteurs

Paragraph 5

Paragraph 5 was adopted.

Section C was adopted.

7. The CHAIRMAN, recalling that the Commission had already adopted section D of chapter III in the context of agenda item 2 (2471st meeting), invited the Commission to adopt the chapter, as a whole.

Chapter III, as amended, was adopted.

CHAPTER IV. State succession and its impact on the nationality of natural and legal persons (A/CN.4/L.525 and Add.1)

A. Introduction (A/CN.4/L.525)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

1. CONSIDERATION OF THE SECOND REPORT OF THE SPECIAL RAPPOURTEUR

Paragraphs 3 to 8

Paragraphs 3 to 8 were adopted.

* Resumed from the 2471st meeting.

Paragraph 9

8. Mr. YANKOV proposed that the words “for the time being” should be added between the words “aside” and “and” in the second sentence.

9. Mr. MIKULKA (Special Rapporteur) said that, at the preceding session, he had been strongly in favour of setting the issue of the nationality of legal persons aside not only for the time being, but for good. In the meantime, however, he had changed his mind and now took the view that it might be possible to consider the issue at a later stage. Since the sentence in question was intended to reflect the views he had expressed at the preceding session, he suggested that it should be amended to read: “. . . his preference, at that point, for putting that issue aside and for focusing . . .”.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

10. Mr. BENNOUNA proposed that the first sentence should be amended to read: “As to the outcome of the work, the Special Rapporteur indicated that it might take the form of a declaration by the General Assembly consisting of articles accompanied by commentaries”.

It was so agreed.

11. Mr. MIKULKA (Special Rapporteur), replying to a question by Mr. Bennouna, confirmed that the second sentence correctly reflected his views.

Paragraph 11, as amended, was adopted.

Section B.1, as amended, was adopted.

2. CONSIDERATION OF THE TOPIC BY THE WORKING GROUP
(A/CN.4/L.525/Add.1)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

12. Mr. PAMBOU-TCHIVOUNDA suggested that the word “principle” in paragraph 9 (d) should be replaced by the word “obligation”, the subsequent wording being amended accordingly.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Section B.2, as amended, was adopted.

3. ACTION BY THE COMMISSION

Paragraph 11

13. Mr. BENNOUNA pointed out that paragraph 11 (b) would have to be redrafted to bring it into line with the new wording of paragraph 9 of section B.1.

It was so agreed.

14. Mr. CALERO RODRIGUES suggested that in paragraph 11 (d) after the word “submit”, the words “to it” should be deleted.

It was so agreed.

Paragraph 11, as amended, was adopted.

Section B.3, as amended, was adopted.

15. Mr. YANKOV, noting that the Commission was about to complete its consideration of chapter IV of the draft report, said that he had been unable to attend the meeting at which the topic of State succession and its impact on the nationality of natural and legal persons had been discussed and wished to take the last opportunity available to him to express the view that the method of work followed in connection with that topic should be considered a model of the way in which the Commission should structure its conclusions and recommendations in future and convey very precise questions, a statement of intentions and even a timetable to the General Assembly.

16. Mr. PAMBOU-TCHIVOUNDA said he trusted that the secretariat had taken note of Mr. Razafindralambo’s comment on the recommendation of the Working Group referred to in the first sentence of paragraph 11.

17. In paragraph 11 (d) of the French text, the words *la marche à suivre* were not very fortuitous; some other wording should perhaps be found.

18. The CHAIRMAN suggested that it should be left to the Special Rapporteur to find a more elegant turn of phrase.

It was so agreed.

Section B, as a whole, as amended, was adopted.

Chapter IV, as amended, was adopted.

CHAPTER VI. *Reservations to treaties* (A/CN.4/L.530)

A. Introduction

Paragraphs 1 to 6

19. Mr. PELLET (Special Rapporteur) said he was a little irritated to note that, once a certain form of wording had been adopted for the report, it remained for ever. In particular, the use of the imperfect tense in the French version of the report of the Commission was absurd and the excuse that it had always been used was exasperating.

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 7 to 14

Paragraphs 7 to 14 were adopted.

Paragraph 15

Paragraph 15 was adopted, with an editorial correction.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted, with some editorial corrections.

Paragraphs 20 to 33

Paragraphs 20 to 33 were adopted.

Paragraph 34

20. Mr. ROSENSTOCK proposed that a footnote should be added setting forth the text of the draft resolution to which the paragraph made reference.

It was so agreed.

21. Mr. BENNOUNA asked whether it was in fact correct to refer to a draft resolution of the Commission on reservations to multilateral normative treaties.

22. Mr. PELLET (Special Rapporteur), referring to Mr. Bennouna's point suggested that after the word "resolution", the words "he had proposed to" should replace the word "of".

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

23. Mr. de SARAM said he wondered whether it might not be preferable for the first sentence of the paragraph to come immediately after paragraph 36: that would round the matter off. He had not made any statement at the time, as he had thought there was not going to be a discussion on it.

24. Mr. TOMUSCHAT said that, although he agreed with the content of the statement in the third sentence of the paragraph, such fulsome praise was not in keeping with the Commission's usual style.

25. Mr. YANKOV said that it would be in the Special Rapporteur's own interest to avoid superlatives of that kind in the report. Any words of praise would in any event be duly reflected in the summary records. He therefore recommended that the third sentence of the paragraph should be replaced by an objective statement along the following lines: "However, several members congratulated the Special Rapporteur on the report he had prepared on a complex and sensitive issue".

26. Following an exchange of views in which Messrs. THIAM, KABATSI, PELLET (Special Rapporteur), BENNOUNA and ROSENSTOCK took part, the CHAIRMAN suggested that it should be left to the secretariat to find an appropriate form of wording.

Paragraph 35 was adopted on that understanding.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Section B, as amended, was adopted.

Chapter VI, as amended, was adopted.

27. Mr. SZEKELY proposed that the valuable report on the environment prepared by Mr. Tomuschat (ILC(XLVIII)/DC/CRD.3) should be incorporated in the *Yearbook of the International Law Commission*, so that it would form part of its work.

It was so agreed.

28. Mr. PELLET (Special Rapporteur) said he agreed entirely that substantial documents of that kind, including Mr. Rosenstock's proposal concerning crimes against United Nations and associated personnel (ILC(XLVIII)/CRD.2 and Corr.1), should be reproduced in the *Yearbook of the International Law Commission*.

CHAPTER VII. Other decisions and conclusions of the Commission (A/CN.4/L.531 and Corr.1 and 2, Add.1/Rev.1, Add.5 and Add.6)

A. Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.531 and Corr.1 and 2, Add.1/Rev.1 and Add.6)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. PROCEDURES AND WORKING METHODS (A/CN.4/L.531 and Corr.1 and 2)

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Paragraphs 5 to 102

29. The CHAIRMAN noted that paragraphs 5 to 102 contained the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1), which the Commission had already adopted (2459th to 2461st meetings).

30. Mr. ROSENSTOCK, replying to a question by Mr. de SARAM, said the part of the Planning Group's report described in the heading before paragraph 5 as an "Executive summary" was considered to contain the crux of the report. He suggested that the heading should be amended to read "Summary".

It was so agreed.

Paragraphs 5 to 102 were adopted.

Section A.1, as amended, was adopted.

2. LONG-TERM PROGRAMME OF WORK (A/CN.4/L.531/Add.6)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

Paragraph 5 was adopted with a drafting change in the Spanish version.

Section A.2, as amended, was adopted.

3. DURATION OF THE NEXT SESSION (A/CN.4/L.531/Add.1/Rev.1)

Section A.3 was adopted.

Section A, as a whole, as amended, was adopted.

B. Cooperation with other bodies

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section B was adopted.

C. Date and place of the forty-ninth session

31. The CHAIRMAN announced that the proposed dates were 20 May to 25 July 1997.

32. Mr. LEE (Secretary to the Commission), replying to a question by Mr. PELLET, said that the decision to reduce the length of the Commission's session from 12 to 10 weeks meant that the session could either start later than usual or end earlier. Because there were many other meetings scheduled for May, the secretariat would prefer the first option, and that was why the proposed starting date was later than usual.

33. Mr. CALERO RODRIGUES pointed out that there would be less of a rush to finalize the Commission's documentation for submission to the General Assembly if the second option was adopted.

34. Mr. TOMUSCHAT, supported by Mr. BENNOUNA, said that the teaching period in most law schools ended in May, and that made the first option much more attractive for law professors who wished to attend the Commission's session.

35. Mr. CALERO RODRIGUES said that the personal convenience of members should not be a deciding factor. The main consideration was the expeditious submission of documents to the General Assembly.

36. Mr. AL-BAHARNA said that the argument for ending the session two weeks early seemed strong, since that would facilitate the preparation of documents for the General Assembly. The Commission had always begun its work in early May, but that had not ever seemed to prevent law professors from participating.

37. Mr. ROSENSTOCK said that a compromise solution might be to have the session start a week later and end a week earlier than usual.

38. Mr. PAMBOU-TCHIVOUNDA, Mr. MIKULKA and Mr. KABATSI endorsed that suggestion.

39. Mr. BENNOUNA said that the suggestion was a bad one. The most important concern was to enable the members of the Commission who held teaching positions to perform their functions properly.

40. The CHAIRMAN, speaking as a member of the Commission, said that he shared Mr. Bennouna's viewpoint.

41. He said that, if he heard no objection, he would take it that the Commission agreed that its forty-ninth session would begin and end one week earlier than usual and that the dates would be from 12 May 1997 to 18 July 1997.

It was so agreed.

Section C, as amended, was adopted.

42. Mr. LEE (Secretary to the Commission), replying to a question by Mr. PELLET, said the calendar of meetings for 1997 would reflect the decision just taken by the Commission. It would have to be approved by the General Assembly, which would be guided by the overriding consideration of the availability of conference servicing facilities. The General Assembly would also have to endorse the proposal that the Commission's session should be shortened from 12 to 10 weeks.

D. Representation at the fifty-first session of the General Assembly

Section D was adopted.

E. Contribution to the United Nations Decade of International Law

43. Mr. PELLET said that the deadline for submission of essays for the bilingual collection to be issued as a contribution to the United Nations Decade of International Law was fast approaching. Only about half the essays had been received so far. He urged all members of the Commission to submit their essays as soon as possible.

44. The CHAIRMAN also appealed to all members to contribute to the collection.

45. Mr. THIAM asked whether the number of essays available justified the publication of a collection.

46. Mr. PELLET said that a volume could certainly be produced, but it was unfortunate that it would cover only a limited number of topics and reflect a small sector of the viewpoints represented in the Commission.

Section E was adopted.

F. International Law Seminar (A/CN.4/L.531/Add.5)

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

Section F was adopted.

G. Gilberto Amado Memorial Lecture

Paragraphs 13 to 15

Paragraphs 13 to 15 were adopted.

Section G was adopted.

Chapter VII, as amended, was adopted.

47. The CHAIRMAN recalled that, in accordance with earlier decisions, there would be two annexes to the Commission's report (2465th and 2467th meetings), the first containing the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.533 and Add.1) and the second, the report of the Working Group on the long-term programme of work (A/CN.4/L.534).¹

CHAPTER I. Organization of the session (A/CN.4/L.526)

- A. Membership**
- B. Officers and the Enlarged Bureau**
- C. Drafting Committee**
- D. Working groups**
- E. Secretariat**
- F. Agenda**
- G. Summary of the work of the Commission at its forty-eighth session**

Paragraphs 1 to 21

Paragraphs 1 to 21 were adopted.

Sections A to G were adopted.

Chapter I was adopted.

The draft report of the Commission on the work of its forty-eighth session, as a whole, as amended, was adopted.

¹ Initially adopted by the Commission at its 2467th meeting on the basis of document ILC(XLVIII)/WG/LTPW/2/Rev.1.

48. Mr. CALERO RODRIGUES said that it was the customary practice of the Commission to indicate in a separate section of the report the points on which the Commission would particularly like to hear the views of the Sixth Committee.

49. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to entrust the Rapporteur and the secretariat with the task of incorporating that information in the report.

It was so agreed.

50. Mr. BENNOUNA asked whether the report included a recommendation that the Special Rapporteur for the draft Code of Crimes against the Peace and Security of Mankind should be present when the Code was considered by the Sixth Committee.

51. The CHAIRMAN said that it was customary for the Commission to recommend that, upon the completion of the second reading of a topic, the special rapporteur concerned should be present when the Sixth Committee considered the draft articles. If he heard no objection, he would take it that the Commission recommended that Mr. Thiam should be present during the Sixth Committee's consideration of the draft Code.

It was so agreed.

Closure of the session

52. After the usual exchange of courtesies, the CHAIRMAN declared the forty-eighth session of the International Law Commission closed.

The meeting rose at noon.

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