

Document:-
A/CN.4/SR.2082

Summary record of the 2082nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

tion by the State itself (*ibid.*, paras. 77-84, especially paras. 80 and 82). On the other hand, the primacy of international law in relations between States meant that a State could not plead its own municipal law in order not to honour its international obligations.

The meeting rose at 1 p.m.

2082nd MEETING

Wednesday, 20 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

State responsibility (*concluded*) (A/CN.4/414,¹ A/CN.4/416 and Add.1,² A/CN.4/L.420, sect.F.1)

[Agenda item 2]

Parts 2 and 3 of the draft articles³

PRELIMINARY REPORT OF THE SPECIAL RAPPOREUR
(*concluded*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur), continuing his introduction of his preliminary report (A/CN.4/416 and Add.1), reminded members that, at the end of the previous meeting, he had begun to discuss obstacles to restitution, in particular the legal obstacles arising from rules of internal or international law.

2. With regard to obstacles arising from internal law, since all States lived under a legal system, no restitutive operation could be carried out within a State without

some legal act or provision being made within that system. A State spoke to its agents and officials through the law, so that restitution could not be carried out *de facto*; it would always require some legal steps.

3. At the same time, the relationship between internal law and international law was quite different from that between the federal law of a federal State and the law of one of its component units. In the first place, the primacy of international law did not go so far as to invalidate any rule of the internal law of a State which stood in the way of that State's compliance with its international obligations. The content of a State's legal system could be adapted—for the purposes of compliance with international legal obligations—only by some legislative, judicial, administrative or constitutional action by the State itself (*ibid.*, paras. 77-84). On that point, the European Community offered an interesting example: the enactments of the Community had the force of law in the member States, but some action by each member State was necessary to introduce them into its own legal system.

4. The primacy of international law in relations between States meant that a State could not validly invoke an obstacle arising from its internal law as an excuse for non-compliance with an international obligation. That was undoubtedly true of any national legal rule or ruling—legislative, administrative, judicial or constitutional—which might be invoked as an impediment to restitution in kind. The rule to that effect was set out in paragraph 3 of the new draft article 7⁴ he proposed. It was an obvious corollary of the principle embodied in article 4 of part 1 of the draft, which provided that "An act of a State may only be characterized as internationally wrongful by international law" and that "Such characterization cannot be affected by the characterization of the same act as lawful by internal law". That was tantamount to concluding that the obligation to make restitution could not be affected by any legal obstacle in the internal law of the author State. It was, indeed, incumbent on that State to remove any such legal obstacles, which were disregarded as such by international law. Any difficulty which the author State might have in removing internal legal obstacles should be assessed on its merits under international law, as a possible factual obstacle. His report accordingly dealt with internal legal obstacles under the rubric of excessive onerousness in a wide sense (*ibid.*, paras. 102 and 127).

5. In the case of international legal obstacles, the legal impediment was within the same legal system as that under which restitution was due, that was to say within international law itself. At first sight, that would seem to create a situation similar to that of an impediment to restitution arising under the private law of a country, from a rule of superior rank such as a constitutional rule. But the validity of the analogy was reduced very considerably by the high degree of relativity of international legal rules, situations and relationships.

6. As noted in the report (*ibid.*, para. 87) that analogy would apply in a situation in which restitution en-

¹ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook* . . . 1985, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 35-36, footnote 86.

⁴ See 2081st meeting, para. 36.

countered an obstacle in the rules of the Charter of the United Nations (Article 103) or in any conceivable peremptory norm of international law. Another example would be the obstacle represented by the contemporary doctrine which denied the right to restitution in the case of nationalization, a point also considered in the report (*ibid.*, para. 106). But the analogy would disappear where an obligation to provide restitution in favour of an injured State B was in conflict with a co-existing treaty obligation of the author State A towards a third State C. That was a typical example of the relativity of treaty rules and obligations in international law; the impossibility of complying with the international obligation could not be invoked by State A—at least not as a legal obstacle—against the injured State B. It would be for State A to choose whether to wrong State B or State C; and the choice to refuse restitution to the injured State B in order to comply with the obligation towards State C would obviously be a factual rather than a legal obstacle. That point was illustrated by the *Bryan-Chamorro Treaty* case (*ibid.*, paras. 76 and 83).

7. With regard to the real or alleged legal impossibility of restitution arising from international law, the previous Special Rapporteur, Mr. Riphagen, in his preliminary and second reports,⁵ had raised the question of the relationship between the general rule placing the author State under the obligation to make restitution and the other general rule of international law which, in his opinion, protected every State from the violation of its domestic jurisdiction by claims of other States. The result, according to Mr. Riphagen, would be to allow the author State to replace restitution by pecuniary compensation whenever restitution implied an obligation for it in a sphere in which its internal law was competent to perform a normative function.

8. For his part, he could not accept the view that any argument against the generality of the obligation to make *restitutio in integrum* could be derived from the concept of domestic jurisdiction. That concept could not call in question the international obligation to make restitution in kind, any more than any other obligation under international law. Indeed, the very existence of an international obligation meant that compliance with it by a State could not possibly constitute an assault against the domestic jurisdiction of that State. It should be borne in mind that there was hardly any international rule compliance with which did not entail some repercussion on the internal law of the State bound by the rule. A belief that domestic jurisdiction and the principle of non-intervention could in any way interfere with the obligation to make restitution in kind—or any other form of reparation, or the discontinuance of a wrongful conduct—could only derive from confusion of the right of the injured State to obtain restitution or any other form of redress as a matter of substantive law with the right of a wrongfully “unsatisfied” injured State to take measures aimed at securing cessation and/or reparation. Respect for domestic jurisdiction was a condition

of the lawfulness of an *action* by a State or an international body. It was not, *per la contradizion che nol consente*,⁶ a condition of the lawfulness of an international *legal rule* or *obligation* (*ibid.*, para. 89).

9. The inevitable conclusion seemed to be that an article on restitution in kind should exclude the possibility of any internal legal obstacle being considered *per se* (and as such) as a valid excuse for the author State to evade—wholly or in part—its obligation to make restitution. Any indications to the contrary in practice could easily be explained as the result of agreements between the parties which, while recognizing in a given case that obstacles deriving from the legal system of the author State constituted good reasons for converting restitution in kind into pecuniary compensation, did not contradict the general principle that restitution should be made. On the contrary, failure to recognize and codify that general principle would jeopardize not only the secondary obligation and the rule from which it was derived, but also the primary obligations and rules themselves. It was, of course, possible for the injured State to renounce restitution in kind and accept reparation by equivalent or referral of the decision to a third party. Impediments in internal law could come into consideration only as factual obstacles. As such, they could be taken into account, where appropriate, only under the exception of excessive onerousness, or perhaps of physical impossibility. It was clear, on the other hand, that not all internal legal obstacles would be such that their removal by the author State would amount to excessive onerousness or physical impossibility.

10. As to obstacles in international law, the only conceivable case in which they might represent a valid excuse for failure to make restitution was that in which the required measures of restitution would involve a breach of an obligation created by a higher norm of international law.

11. While failure to make restitution was thus rarely justifiable on legal grounds under national or international law, it could be justified—apart, of course, from the case of physical impossibility—by the excessive onerousness of the measures that would be required. As shown in the report (*ibid.*, paras. 99-103 and 126-127), the exception of excessive onerousness was an obvious corollary of the principle of proportionality between injury and reparation. The right of the injured State to obtain restitution was restricted in that it would not be entitled to refuse reparation by equivalent whenever the effort required of the author State to provide restitution would be disproportionate to the gravity of the violation or injury. That principle had some support in legal literature and should be adopted, in any case, as a matter of progressive development.

12. The main instance of excessive onerousness appeared to be that in which making restitution in kind would be incompatible with the political, economic and social system of the author State or with fundamental new choices concerning that system. It had to be clearly understood, however, that the obstacle would not be so

⁵ *Yearbook* . . . 1980, vol. II (Part One), p. 107, document A/CN.4/330; *Yearbook* . . . 1981, vol. II (Part One), p. 79, document A/CN.4/344.

⁶ “Nor to repent, and will, at once consist, by contradiction absolute forbid”, Dante, *Inferno*, XXVII, 119-120 (trans. H. F. Cary, 1910).

much a question of legal impossibility as of a factually excessive burden for the author State to bear, as compared with the sacrifice which the substitution of reparation by equivalent might represent for the injured State.

13. Thus *restitutio in integrum* did not seem to be subject to any limitation other than material impossibility, international legal impossibility or excessive onerousness. If other forms of redress, such as reparation by equivalent, happened to take the place of restitution in the absence of any such obstacles, that would be a consequence not of other exceptions, but rather of the attitudes actually taken by the parties in each case. Those attitudes could manifest themselves either in such modes and terms as to constitute an agreement between injured and author States, or simply as the exercise of a right or faculty of choice by the injured State. What mattered in either case appeared to be the right or faculty of choice of the injured State. Of course, the author State might well offer reparation by equivalent as a substitute for *restitutio in integrum*, even in a case in which the latter was neither impossible nor excessively onerous; and the substitution would be fully admissible, provided that it was accepted by the injured State.

14. A substantial part of legal doctrine favoured the right of the injured State to choose between restitution and pecuniary compensation. As to practice, elements supporting the doctrine seemed to be present in the *Chorzów Factory* case (*ibid.*, para. 110). Germany had started with a claim to restitution, but had later claimed pecuniary compensation, stating that the factory "in its present condition, no longer corresponded to the factory as it was before the taking over in 1922". Restitution would thus have been of no interest to the claimant. Further practice was cited in his report (*ibid.*, para. 111). It was also true (*ibid.*, para. 112) that fears had sometimes been expressed that recognition of a right of choice of the injured State might open the door to abuses. That misgiving, though not without justification, was lessened by the consideration that the right of choice should be set aside where restitution would be excessively onerous for the wrongdoing State. The opposite could also occur, with the injured State claiming pecuniary compensation even where *restitutio in integrum* was possible. In that case, however, any excessive claim by the injured State could be effectively resisted on the basis of proportionality, equity and excessive onerousness.

15. It should be stressed, however, that the right of choice of the injured State would not be unlimited. Whenever restitution was due for a breach of a peremptory rule or, more generally, of a rule stating an *erga omnes* obligation, it could not be renounced by the injured State, which could not opt for pecuniary compensation. In such a situation, the law should place upon the author State the obligation to provide full restitution in kind. That matter would be better developed in the context of the particular legal consequences of crimes.

16. It was self-evident that impossibility or excessive onerousness could prevent restitution either in whole or in part. In practice, partial exclusion of restitution was more frequent than total exclusion. The portion of in-

jury not covered by restitution would have to be remedied by one or more other forms of reparation, in particular by pecuniary compensation.

17. The new draft article 7 contained two references to "a peremptory norm of general international law". Notwithstanding the problematic nature of the concept, he was inclined to share the view that there were rules of *jus cogens* in international law; some of the rules in the Charter of the United Nations could be regarded as having that character. It was very difficult, however, to draw up a list of rules of *jus cogens*. It was quite common not only for one group of members of the international community to regard a rule of international law as *jus cogens* while another group took the contrary view, but also for the same State or States to take one view at one time and an opposite view at another. Indeed, views on the exact content of *jus cogens* varied not only in point of time, but also from case to case.

18. All things considered, he had thought it his duty to introduce in draft article 7 the provision in paragraph 1 (b), which set out an exception to restitution in kind where such restitution would "involve a breach of an obligation arising from a peremptory norm of general international law". Clearly, it would be difficult to give examples. The comments of members of the Commission during future discussions would no doubt be helpful. A second reference to *jus cogens* was made in paragraph 4, which set out the right of choice of the injured State to claim pecuniary compensation as a substitute for restitution in kind. An exception to that right was stipulated where such substitution would "involve a breach of an obligation arising from a peremptory norm of general international law." On that provision too, he looked forward to receiving guidance from the Commission. On the whole, it seemed to him that the new draft article 7 left too many loopholes for the author State. Further discussion would perhaps help him to tighten its provisions.

19. Chapter I of his report contained a few suggestions concerning the proposed programme of work on parts 2 and 3 of the draft articles and a tentative summary outline of those parts (*ibid.*, para. 20). In the treatment of the topic, he proposed to keep roughly to the order followed by the previous Special Rapporteur, guided by the general outline of 1963. That meant the order in which the subject-matter had been dealt with in draft articles 6 to 16 of part 2 and draft articles 1 to 5 of part 3, as submitted by his predecessor and referred to the Drafting Committee.⁷ He thought it essential, however, to depart from that order on three points, none of them revolutionary.

20. The first point was his proposal that there should be a more marked separation between wrongful acts characterized in part 1 as delicts, and wrongful acts characterized as crimes. The reasons for that change were purely methodological (*ibid.*, para. 12). Considering the relative novelty of the distinction, and the difficulty of identifying the features that should characterize the consequences of the international

⁷ See footnote 3 above.

crimes of States, it was advisable to deal separately with the two sets of consequences. The legal consequences of delicts and those of crimes would thus form the subject of separate chapters. Since a first chapter of general principles might comprise articles 1 to 5 of part 2 already provisionally adopted by the Commission,⁹ it should then be possible to envisage tentatively a chapter II of part 2 to deal with the consequences of delicts and a chapter III of part 2 to deal with the consequences of crimes.

21. The second point was his suggestion that, within each chapter, a distinction should be made between the substantive consequences of wrongful acts and what might be called the "procedural" or "instrumental" consequences. Cessation and the various forms of reparation fell within the substantive consequences, whereas the measures aimed at securing cessation and reparation, or at inflicting punishment, constituted procedural consequences. The work on the consequences of internationally wrongful acts would be less arduous if the two sets of consequences were dealt with separately for delicts as well as for crimes. The distinction was not, of course, an absolute one. It was not as clear-cut as the distinction in a national legal system between the substance of the law of tort and of criminal law, on the one hand, and the procedures of redress and punishment, on the other. The difference was nevertheless evident even in such an inorganic system as the law of nations. Both sets of consequences were, in any case, hard enough to determine and formulate, without mixing the intricacies of the one with those of the other. There again, he believed that it would be less difficult to deal with those two areas of the law in separate stages.

22. The third point related to the subject-matter covered by draft articles 1 to 5 of part 3. Those five draft articles covered two aspects of the "implementation" or *mise en œuvre* of international responsibility which appeared to him to be quite different. One was the conditions, in the form of obligations or *onera*, under which one or more injured States were lawfully entitled to resort to measures in order to secure cessation or reparation, or to inflict a penalty of any kind upon the wrongdoing State. The other aspect was the procedures that could, or should, be contemplated for the settlement of disputes relating, in the words of Article 36 of the Statute of the ICJ, to "the existence of any fact which, if established, would constitute a breach of an international obligation" (para. 2 (c)) or to "the nature or extent of the reparation to be made for the breach of an international obligation" (para. 2 (d)). It would be desirable for each of those aspects to be dealt with where it belonged *ratione materiae* or *ratione naturae*. Since the first aspect, namely the conditions to be complied with by an injured State for lawful resort to measures, fell within the realm of measures, it should be covered not in part 3 but in part 2 of the draft. Dispute-settlement procedures should instead be dealt with in part 3. Quite apart from any logical reason, such an arrangement was justified by the fact that at least some of the provisions on the settlement of disputes would presumably not be mandatory. On the other hand, the

conditions for lawfulness of measures were, in principle, mandatory *de lege lata*, or should be *de lege ferenda*.

23. According to the plan he had outlined, the new draft articles 6 and 7 of part 2 submitted in his preliminary report would be followed by provisions dealing with the consequences of internationally wrongful acts other than cessation and restitution in kind. For those provisions, and particularly for those relating to pecuniary compensation and satisfaction, he would draw on the materials on State practice and arbitral awards assembled at the University of Rome and by the Commission's secretariat, for whose assistance he was most grateful.

24. He trusted that the Commission would take up the topic of State responsibility early enough at the next session for a substantial debate to be held, so that he could benefit from the guidance of his colleagues.

25. The CHAIRMAN, thanking the Special Rapporteur for his introduction, said that, as had been agreed, there would be no debate on the preliminary report (A/CN.4/416 and Add.1) at the present session. He invited members to raise any questions on which they required clarification.

26. Mr. BARSEGOV, expressing his appreciation of the Special Rapporteur's comprehensive presentation of the topic, said that it would be extremely useful if his statement, as well as Mr. Ogiso's introduction of his preliminary report on jurisdictional immunities of States and their property, were reproduced in full, or at least as fully as possible, and circulated to members at the present session. It would also be helpful if all the materials relating to the preliminary report on State responsibility (A/CN.4/416 and Add.1) could be combined in a single document.

27. Mr. KALINKIN (Secretary to the Commission) said that it had been agreed, after discussion with the Rapporteur, that the introductory statements made by Mr. Arangio-Ruiz and Mr. Ogiso would be included in the Commission's report, but in an abridged form. The Commission's reports were an exception to the General Assembly rule that the reports of its subsidiary bodies should not exceed 32 pages, but it was not possible to include documents *in extenso*. The Secretariat would, however, have both statements typed and circulated to members in English before the end of the session.

28. The Secretariat was not permitted, under the rules in force, to reissue documents incorporating corrections. Corrected versions of the reports of special rapporteurs were published in the Commission's *Yearbook*.

29. Mr. BARSEGOV said he had not wished to suggest that the preliminary report as a whole should be reissued, although that would have been desirable. What he had in mind was a list of corrigenda in English, which could perhaps be prepared by the Secretariat. He appreciated that the Commission was bound by certain rules, but the two introductions in question were not just ordinary statements; they were more in the nature of documents of the Commission which members required for their work. That point should perhaps be taken into account in the future.

⁹ *Ibid.*

30. Mr. ARANGIO-RUIZ (Special Rapporteur) agreed that the best solution would be to circulate the texts of the two statements to all members. It had certainly not been his intention to suggest that his own statement should be included verbatim in the Commission's report.

31. He accepted responsibility for many of the errors in his preliminary report, which were possibly due to pressure of time. He would take the matter up with the Secretary to the Commission to determine how best to deal with it. A more serious defect was that the footnotes to his report were grouped together at the end of the document, which was why he had circulated to members a list of those notes he regarded as essential for an understanding of the report. He found it hard to understand why a machine for the placement of footnotes, of the kind in common use at universities, for instance, was beyond the means—albeit limited—of the United Nations.

32. Mr. FRANCIS said that, in the light of the explanations given by the Secretary, the Commission might wish to give some consideration, at the present session, to the question of the length of its reports.

33. The CHAIRMAN said that, while he agreed on the importance of that question, the best place to discuss it would perhaps be in the Secretariat or at the General Assembly. In any event, there was not enough time to do so at the present session.

Draft Code of Crimes against the Peace and Security of Mankind⁹ (continued)* (A/CN.4/404,¹⁰ A/CN.4/411,¹¹ A/CN.4/L.422)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 4, 7, 8, 10, 11 AND 12

34. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 4, 7, 8, 10, 11 and 12 as adopted by the Committee (A/CN.4/L.422).

35. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that, at its thirty-ninth session, in 1987, the Commission had provisionally adopted articles 1 and 2 of part I (Definition and characterization) and articles 3, 5 and 6 of part II (General principles) of chapter I (Introduction) of the draft code.¹² At the current session, the Drafting Committee had adopted the remaining articles of part II (arts. 4 and 7-11) referred to it by the Commission in 1987, with the exception of article 9 (Exceptions to the principle of responsibility).

* Resumed from the 2061st meeting.

⁹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

¹⁰ Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

¹¹ Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

¹² See *Yearbook . . . 1987*, vol. II (Part Two), chap. II, sect. C.

The Committee had also adopted article 12, the first provision in part I (Crimes against peace) of chapter II (Acts constituting crimes against the peace and security of mankind).

ARTICLE 4 (Obligation to try or extradite)

36. The text proposed by the Drafting Committee for article 4¹³ read:

Article 4. Obligation to try or extradite

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article shall not prejudice the establishment and the jurisdiction of an international criminal court.

37. The purpose of article 4, which touched upon delicate questions of jurisdiction and extradition, was to eliminate any safe haven for an alleged offender. The Drafting Committee had considered at length whether to draft a detailed provision dealing with questions of jurisdiction and extradition, or a short and general article stating only the basic principle. It had come to the conclusion that it would be impossible to draft a detailed article that would satisfy all members. Moreover, as it had not been decided whether or not the code should provide for an international criminal court, questions of jurisdiction and extradition would have to be discussed on a provisional basis. The Committee had therefore decided to state the basic principle, leaving those questions aside for the time being. Article 4 had thus been drafted on the understanding that it dealt, in broad terms, with the general principles of jurisdiction and extradition, and that specific rules for the application of those principles would be drafted later, for inclusion in an appropriate part of the code. That understanding should be reflected in the commentary, which would then also serve as a reminder of the need to revert to the specific rules governing priorities in jurisdiction and extradition. Article 4 would have to be reviewed after those rules had been drafted.

38. Paragraph 1 was almost identical to that proposed by the Special Rapporteur, with some drafting changes. For example, the words "perpetrator of an offence" in the previous text had been replaced by "an individual alleged to have committed a crime": the Drafting Committee had thought that the word "perpetrator" implied that the accused had already been convicted of the crime, whereas the new wording more objectively described a person who had been charged with a crime. The Committee also considered that the new wording should be defined in an article on the use of terms, as in other instruments, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic

¹³ For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, *ibid.*, pp. 9-10, footnote 19 and paras. 29-36.

Agents. Such a definition would indicate that the allegation should be supported by reasonable evidence and that it would not of itself suffice to bring the obligations under the article into play. The word “arrested” in the previous text had been replaced by “present”, which seemed preferable to the Drafting Committee, since arrest could not be deemed to be compulsory in all instances of a charge against a person that he had committed a crime against the peace and security of mankind.

39. Paragraph 2, which was new, provided for a plausible and not infrequent situation. The question that arose was which State in a series of States requesting extradition should have priority or, indeed, whether there should be any priority at all. One of the drawbacks of having a detailed list of categories of States setting out strict priorities for extradition was that there would have to be a measure of co-ordination between the priorities set in such a list and priorities in the matter of jurisdiction—a question that would have to be considered in the future. Pending a decision on the incorporation in the code of the principles of universal jurisdiction, of the jurisdiction of an international criminal court, or of a combination of both, such a list would be premature, since any one of those principles or a combination of them would affect the question of extradition. Besides, the question of priority in extradition would involve the Commission in an endless debate on whether the territoriality principle or the nationality principle should determine priority, or whether either of those principles should yield to the functional theory, whereby the State that could provide the best administration of justice for trial and punishment of the accused would have priority. An additional drawback to such a list was that many States would be reluctant to accept a strict rule on extradition which encroached on their discretion: for example, they would be reluctant to extradite an individual to a State where he might be subjected to torture.

40. Some members of the Drafting Committee had maintained that article 4 should express some preference for granting extradition to the State where the crime had been committed, in keeping with the Nürnberg Principles.¹⁴ Others had been disinclined to accept any unqualified preference, but believed that the State where the crime had been committed should have some discretion. Under the resultant compromise reflected in paragraph 2, a State receiving several extradition requests would be obliged to give “special consideration” to the request of the State where crime had been committed. That did not indicate any rule of strict priority, but meant that a State faced with multiple extradition requests should consider the request of the State where the crime had been committed very seriously and should incline to the view that that State might, in the circumstances, be the most appropriate place for trial and punishment of the alleged offender.

41. Paragraph 3, which corresponded to paragraph 2 of the previous text, dealt with the unresolved question of jurisdiction under the code and served to stress that the jurisdictional basis of article 4, as drafted, would

not prevent the Commission from deciding in the future to establish an international criminal court.

42. Lastly, the title of the article, “Obligation to try or extradite”, was a translation of the previous Latin title, *Aut dedere aut judicare*.

43. Mr. ARANGIO-RUIZ said that paragraph 3 was not entirely satisfactory. It stated that the provisions of paragraphs 1 and 2 “shall not prejudice the establishment and the jurisdiction of an international criminal court”, but that very statement did so: by addressing the issue in negative terms, it precluded a positive approach. The Chairman of the Drafting Committee had said the provision meant that paragraphs 1 and 2 would not prevent the Commission from taking up the question of an international criminal court; but the words “shall not prejudice” really signified that the problem would be excluded from the Commission’s immediate concern and programme of work. The establishment of an international criminal court would, of course, be difficult, but work had already been done, in 1951 and 1953, on elaborating its statute, and the Commission should pursue that effort.

44. For those reasons, he thought that paragraph 3 should be deleted. If that was not acceptable it should be rephrased, or an explanation should be included in the commentary to the effect that the drafting of the statute of an international criminal court was entirely within the Commission’s competence and that, as a technical body, it was entitled to recommend the establishment of such a court.

45. Mr. BARBOZA pointed out that there was a discrepancy in the wording of articles 4 and 7 that should be corrected. Article 4, paragraph 2, spoke of “the State in whose territory the *crime* was committed”; article 7, paragraph 4 (a), referred to “the *acts* which were the subject of the judgment”; and article 7, paragraph 5, referred to a “previous conviction for the same *act*”.

46. Mr. McCAFFREY explained that he had participated in the Drafting Committee’s work on the draft code only in regard to article 4, and had a number of reservations that he wished to place on record.

47. No one could disagree with the article’s purpose, which was to ensure that there was no safe haven for an individual alleged to have committed a crime against the peace and security of mankind. His reservations related rather to the manner in which such an individual was to be sought out and brought to justice. He did not believe that universal jurisdiction would be any more acceptable to States than an international criminal court—in fact, it might be less so. Consequently, he was not sure that the Commission would be well advised to proceed with the drafting of an article on universal jurisdiction before having at least attempted to draft the statute of an international criminal court or a tribunal like the one suggested by Mr. Beesley at the previous session.¹⁵

48. Referring to the text of article 4, he confessed to being worried by the word “alleged” in paragraph 1,

¹⁴ See 2053rd meeting, footnote 8.

¹⁵ See 2059th meeting, footnote 13.

because it was not clear by whom the allegation would be made. If State A made an allegation, for example, did State B have to try the individual in question? The Chairman of the Drafting Committee had indicated that the term "alleged" would be defined, perhaps along the lines of the definitions in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. He hoped that that would indeed be done, and that the commentary would record the Commission's intention of producing such a definition.

49. With regard to paragraph 2, he thought that a list of priorities on a crime-by-crime basis was needed; in other words, the matter of jurisdiction should be individualized. It was very difficult to generalize in that area: for example, how would paragraph 2 apply to cases of alleged genocide or *apartheid*, where it would be undesirable to remand an individual to the State in which the crime had been committed, since it was the authorities of that State that had committed the crime?

50. Paragraph 3 gave no indication whether the competence of an international court—should one be established—would overlap with the competence of national courts exercising universal jurisdiction. He believed it should not, in the interests of preventing the chaos that might follow the establishment of universal jurisdiction. He therefore had reservations on paragraph 3.

51. As to drafting points, paragraph 3 should read "paragraphs 1 and 2 of this article do not prejudice," rather than "shall not prejudice". He agreed with Mr. Barboza's comment on paragraph 2, and suggested that any reference to a "crime" should be phrased "the State in whose territory the crime is alleged to have been committed", in symmetry with paragraph 1, which contained the phrase "an individual alleged to have committed a crime".

52. He would reserve his position on article 4 until the extent to which individual crimes were to be detailed in the code had been decided.

53. Mr. BARSEGOV said that, as a member of the Drafting Committee, he would naturally not express opposition to the compromise texts that had been worked out, and he did not intend to dispute anything said by the Chairman of the Drafting Committee. It was important, however, to bring into the open the nuances of the process by which the texts had been developed, so that the Commission's report to the General Assembly could present as full and balanced a picture as possible of the considerations underlying the adoption of those texts.

54. He therefore wished to make a number of comments on paragraph 2 of article 4. That paragraph was derived from an earlier text that had clearly established a hierarchy, in which the principle of territoriality had occupied the first place. The Chairman of the Drafting Committee had informed the Commission that the Committee believed there were many obstacles to drawing up a detailed list of categories of States setting out strict priorities for extradition. That was not entirely true, however. The fact that the members of the Drafting Committee had all agreed to a compromise

solution did not mean they all believed that a detailed list of priorities could not be drawn up. Certainly, there were difficulties arising from differing approaches and points of view, but he did not agree that there was any fundamental, intrinsic obstacle.

55. The Chairman of the Drafting Committee had rightly noted that there had been a number of serious differences of opinion on a whole range of important issues: whether the territoriality principle or the nationality principle should determine priorities for extradition; whether a State in whose territory a criminal was located should have the right to select the country to which he would be remanded; and whether priority should be given to a State which could provide a better administration of justice. The opinions expressed on those issues should be accurately and faithfully reflected in the Commission's report to the General Assembly: compromise solutions could be understood properly only when all the views to be reconciled were clearly evident.

56. He had raised the question of the definition of a "better administration of justice" in the Drafting Committee. In his view, the best administration of justice was one which made punishment inescapable; but other members had expressed concern about ensuring that an alleged offender would not be handed over to a country that might subject him to torture, for example. Torture was covered by existing international instruments, which provided for machinery to prevent it. Moreover, no State was competent to decide in what country an alleged perpetrator of a crime against the peace and security of mankind would have his legal rights guaranteed; in the aftermath of the Second World War, that policy had resulted in many war criminals going unpunished. He was in favour of ensuring the best possible administration of justice for crimes against peace and security, and believed that the future code must reduce possibilities of arbitrary action to a minimum and establish the most comprehensive régime possible, to be adopted by all States; in other words, it must clearly state priorities for extradition.

57. He did not entirely agree with the interpretation by the Chairman of the Drafting Committee that the expression "special consideration" meant that a State faced with multiple extradition requests should "very seriously" consider the request of the State where the crime had been committed, or with his conclusion that the text of paragraph 2 "did not indicate any rule of strict priority" (see para. 40 above). If that was the sort of limited interpretation to be given to paragraph 2, it might well prove unacceptable to many States when the code was proposed for adoption. He understood the provision to mean merely that, if there were no other, weightier basis for determining where a better and fuller administration of justice could be ensured, preference should be given to the State in whose territory the crime had been committed. Mr. McCaffrey had cited the examples of genocide and *apartheid* committed by Governments on their own territory; but such crimes were exceptions, and in any case were covered by the relevant international instruments. As exceptions, they should not be allowed to detract from the primacy of

the principle of territoriality, which was reflected in the Nürnberg Principles.¹⁶

58. The views he had expressed were not merely his own; they were shared by many members of the Drafting Committee and should be fully reflected in the Commission's report to the General Assembly.

59. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he supported the text of article 4 introduced by its Chairman, whose balanced statement had highlighted the various considerations underlying the Committee's decisions.

60. One basic principle that should be kept in mind concerning the concept of territoriality was that, if a crime had been committed within the territory of a State, that State should have jurisdiction. But the concept of territoriality of jurisdiction was evolving in the direction of a more flexible interpretation. According to several different courts, the principle of territorial jurisdiction did not exclude all reference to the effect of the crimes committed. While it was important that no criminal should have a safe haven, and that all criminals should be tried on the basis of the best possible evidence, justice must be rendered in the most effective way possible. Accordingly, when the territory of one State had been used only notionally to escape the jurisdiction of another, in whose territory the criminal acts had had a detrimental effect on security and public order, the principle of priority, as posited in paragraph 2, was deemed to refer to the territory of the State that had actually been affected.

61. Most members of the Drafting Committee had acknowledged that point, but in order to promote consensus and to streamline the final formulation, it had been decided not to reflect it in the draft article. He urged the Special Rapporteur to mention it in the commentary.

62. Mr. EIRIKSSON said that the revised text of draft article 4 submitted by the Special Rapporteur to the Drafting Committee had contained a list of priorities to be followed in the event of multiple requests for extradition. He was sorry that no such list was provided in the text adopted by the Drafting Committee, and shared the concern expressed on that point by Mr. Barsegov. While he had no strong feelings about what the order of priority should be, he remained convinced that the priorities should be clearly specified. Paragraph 2 as drafted did not, in his view, represent a compromise, and he would prefer it if no paragraph of that nature were included.

63. As to paragraph 3, he agreed with Mr. Arangio-Ruiz that the text would be appropriate only if, at the end of its work, the Commission had not succeeded in drafting provisions on the establishment of an international criminal court. He shared the views of those members of the Commission who thought that the attempt should be made. Pending its outcome, it would be appropriate to place paragraph 3 in square brackets and to explain the position in the commentary. If the at-

tempt proved successful, the square brackets around paragraph 1 of article 7 would, of course, be removed.

64. Prince AJIBOLA said that the Drafting Committee was to be commended for the excellent work it had done on the draft articles, which were a considerable improvement on the previous texts.

65. The question of an international criminal court was a very serious difficulty, basic to the whole project of the code, and it was against that background that paragraph 1 of article 4 had to be considered. That paragraph required any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind was present to "try or extradite him". But how was any State to try an individual for a crime of such a nature and magnitude with its own judicial machinery? If the problem of an international criminal court were settled, there would be no need to deal with the trial of the alleged criminal in article 4 and extradition would be the only remaining issue.

66. There again, the difficulties were very great. In many cases, the crimes concerned were committed with some element of State participation: genocide and *apartheid* were cases in point. If a crime of that nature had been committed, say, in State X, some of those who had committed it going later to State Y, and if State X then asked for those persons to be extradited to it, the situation would surely be at odds with the fundamental principle of law that no one should be the judge in his own cause. The whole problem of extradition was an extremely thorny one, and he believed that the Drafting Committee had done the best that could be hoped for at the present stage. The insertion of the word "either" between "shall" and "try" in paragraph 1 would tighten the text by making it clear that no other course of action was permissible.

67. He agreed with previous speakers that the term "crime" should be used throughout the draft. The provision in paragraph 2 was acceptable in itself, but in view of what he had just said about paragraph 1, it might be advisable to amplify the wording so as to ensure that extradition would not benefit criminals seeking a safe haven.

68. Lastly, he would prefer the words "shall not prejudice", in paragraph 3, to be replaced by "shall be without prejudice to", in order to achieve a slight—but in his view desirable—shift of emphasis.

69. Mr. BEESLEY said that, in drafting article 4, the Drafting Committee had clearly intended not to prejudice any future development or decision relating to the establishment of an international criminal court or of universal jurisdiction. Paragraph 1, as drafted, was clear and easy to understand, but he feared that it might also prove easy to apply in a manner not intended by the Drafting Committee or the Commission.

70. He agreed with much of what Prince Ajibola had said about the obligation to try or extradite. In his view, the obligation to try should be replaced by an obligation to detain or initiate criminal proceedings against the individual concerned, or to ensure that criminal proceedings were initiated against him. As paragraph 1 now

¹⁶ See 2053rd meeting, footnote 8.

read, it seemed to be based on the presumption of the establishment of universal jurisdiction, which was not apparent from articles 1, 2 and 3; an intermediate step would seem to be necessary in order to close the hiatus. By giving further thought to the formulation of paragraph 1, the Commission would safeguard the whole process of drafting the code, which would be hopelessly compromised in the eyes of some Governments by the presumption that universal jurisdiction was to be established. The problem of extradition, too, though not insoluble in itself, would remain impossible to resolve so long as it was not known whether there was to be an international criminal court, universal jurisdiction, or a mixed tribunal.

71. The issue of territoriality did not appear to cause any major difficulty. It might, however, be preferable to use the term "jurisdiction" rather than "territory", so as to cover cases in which there was duality of jurisdiction, such as crimes committed on board ship in the territory of another State. He agreed with previous speakers that it was desirable to harmonize the terminology employed in the draft: the word "crime" should be used throughout the text or not at all. The question of priorities in the case of requests for extradition received from several States could be dealt with in the commentary.

72. He suggested that paragraph 3 be amended slightly to make it clear that the provisions of the preceding paragraphs were without prejudice not only to the establishment and jurisdiction of an international criminal court, but also to the whole question of jurisdiction or competence, including the question of venue.

73. He emphasized that the doubts he had expressed, which also applied to article 7, were not meant to imply any criticism of the Drafting Committee or its Chairman, who had done their best to reconcile deeply divided views.

74. Mr. OGISO said that the points he was about to make were intended mainly for the record; he had no intention of pressing them at the present stage.

75. First, while accepting the formulation of paragraph 2 of article 4 as adopted by the Drafting Committee, he would have preferred the word "due" to be used instead of "special" to qualify "consideration". That wording would, he thought, avoid a situation in which, for instance, a person alleged to have committed the crime of *apartheid* would be extradited to the State where *apartheid* was practised.

76. Secondly, he could accept the proposal made by several speakers that the words "was committed", in paragraph 2, should be replaced by "is alleged to have been committed".

77. Thirdly, he was prepared to accept article 4 in its present form if the Commission's report to the General Assembly included a recommendation that the Commission should be requested to study questions of jurisdiction in general, and the question of an international criminal jurisdiction in particular, at its next session.

78. Mr. PAWLAK said that, although he was a member of the Drafting Committee, he had unfortunately been unable to be present when article 4 had been adopted. He must therefore apologise to the Chairman of the Drafting Committee for the critical remarks he was about to make.

79. The general principles being drafted were intended to provide a basis on which the ideas set out could be developed in the future. Like Mr. Barsegov, Mr. Sreenivasa Rao and some other speakers, he thought the compromise formula adopted in paragraph 2 was very weak and failed to provide an adequate basis for preventing the criminal from finding a safe haven.

80. In considering that issue, it was essential to look back in history and recall that, as a result of inadequate provisions and practices, many war criminals had escaped to safe havens after the Second World War. Fortunately, at the beginning of the process of prosecution of war criminals, a number of them—including the infamous commandant of Auschwitz, Hans Frank—had been sent to the country where they had committed their crimes and had been adequately punished. For the sake of the peace and security of mankind, as well as of the progressive development of international law, the Commission should, at the very least, not depart from the principles accepted at Nürnberg and Tokyo. He therefore suggested that the word "special" in paragraph 2 be replaced by "priority".

The meeting rose at 1.05 p.m.

2083rd MEETING

Thursday, 21 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/404,² A/CN.4/411,³ A/CN.4/L.422)

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

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

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