A/CN.4/SR.2236

Summary record of the 2236th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:
the draft articles on jurisdictional immunities of States and their property and to draw up a convention on that topic. If he heard no objection, he would take it that the Commission wished to adopt a recommendation to that effect and to entrust the drafting of the recommendation to the secretariat, on the understanding that the Commission would take a decision on that text during its consideration of the chapter on that topic contained in its draft report to the General Assembly.

It was so agreed.

The meeting rose at 12.30 p.m.

2236th MEETING

Friday, 5 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beasley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivas Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (concluded)


[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (concluded)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 and

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 223 (concluded)

1 This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/452, which was not introduced or discussed at that session for lack of time, and is reproduced in Yearbook ...1991, vol. II (Part One).


3 For texts, see 2232nd meeting, para. 2.

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion on his fifth and sixth reports (A/CN.4/438 and A/CN.4/439), thanked members who had participated in the debate for their objective and helpful comments. He said that all those who had spoken had, by and large, agreed, both with the contents of the reports and with the draft articles proposed. Practically all the changes suggested were drafting improvements and would be referred to the Drafting Committee for any necessary action.

2. The idea had been advanced that communications facilities should also cover computers and electronic equipment. As he saw it, the reference to "and other communications" in article 14 covered the matter. Possibly the point might be made clearer by using the formula "and other means of communication". One member had commented on the use of the terms "secret" and "secrecy" in the fifth report. There was of course no intention of introducing any idea of mystery. The purpose was simply to refer to confidential matters, knowledge of which was confined to a very restricted circle. For example, a State secret, sometimes described in English as "top secret", was not known to the public in general.

3. Mr. Roucounas (2234th meeting) had suggested that the draft articles should refer to the use of a flag or emblem by an organization. It was doubtful whether all intergovernmental organizations required a flag. As to the use of an emblem, the cases that had arisen had been solved, curiously enough, by applying the Paris Convention for the Protection of Industrial Property. His own intention had been to deal with the subject along with the right to issue laissez-passer, at the end of the whole draft.

4. Two members had spoken on the content of the topic and on the future work on it. In that connection, he drew attention to the outline adopted by the Commission in its report to the General Assembly at its forty-second session. The outline established the content and thrust of the topic and was reproduced in a footnote to his sixth report.

5. One member had criticized the use of the words "in principle" in paragraph 1 of draft article 21. Actually, that restrictive wording ran counter to his own more liberal approach to the matter of the privileges and immunities of international organizations, but he had retained it because it was in conformity with State practice. A similar restriction was found, for example, in article II, section 8 of the Convention on the Privileges and Immunities of the United Nations and in article III, section 10, of the Convention on the Privileges and Immunities of the Specialized Agencies. The Drafting Committee could decide whether to retain the words "in principle".

6. Lastly, as all the other comments had concerned drafting points, he suggested that the best course would be to refer articles 12 to 22 to the Drafting Committee for consideration in the light of the discussion.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 12 to 22 to the Drafting Committee.

It was so agreed.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

8. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles in part one of the Draft Code of Crimes against the Peace and Security of Mankind as proposed by the Drafting Committee (A/CN.4/L.459 and Corr.1).

9. Mr. PAWLAK (Chairman of the Drafting Committee) expressed gratitude to all those who had contributed to the work of the Drafting Committee during the 22 meetings devoted to the topic, as well as to the Special Rapporteur, whose constructive spirit and flexibility had made it possible to arrive at another organized set of draft articles to be presented to the General Assembly at its forthcoming session. He also thanked the secretariat for its valuable cooperation.

10. The Drafting Committee's report consisted of two parts: the first (A/CN.4/L.459 and Corr.1) contained part one of the draft (articles 1 to 14); the second (A/CN.4/L.459/Add.1), devoted to part two of the draft (articles 15 to 26), would be distributed shortly.

11. Because a number of changes were being suggested for articles adopted at previous sessions, the Drafting Committee did not find it advisable to cover in separate documents the articles adopted at the present session and those adopted at previous sessions. It was, instead, presenting its work in the normal sequence of the articles and, in each case, he would indicate whether an article constituted a modified version of a previously adopted text or a new formulation worked out at the present session.

12. When the Committee had started its work on the topic at the present session, it had had before it various elements of the future Code, which had been painstakingly identified and agreed upon over the past four or five years. In that connection, he paid tribute to the valuable work of former Chairmen of the Drafting Committee. At the present session, the Committee, in addition to completing the catalogue of crimes to be covered, had organized the various existing elements into a coherent whole, and had worked out formulations concerning some questions relating to defences. It had tried to devise solutions for a number of basic outstanding issues which had hitherto made it difficult to visualize the final product. The draft now before the Commission still left a few questions unanswered, but it provided a complete picture on which all concerned would, it was to be hoped, find it easier to make useful comments.

13. The Committee considered that the Code should be divided into parts, rather than chapters, as had initially been envisaged. With regard to part one, it suggested that the title “Introduction” should be deleted and that the part should be subdivided into chapters. The headings “Definition and characterization” for chapter I and “General principles” for chapter II remained unchanged.

ARTICLE 1 (Definition)

ARTICLE 2 (Characterization)

14. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for the title of chapter I and for articles 1 and 2, which read:

PART ONE

CHAPTER I
DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under international law does not affect this characterization.

15. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee was not proposing any changes in those two articles.

16. The CHAIRMAN pointed out that no action was needed on articles 1 and 2 since the texts had been adopted previously in their present form.

ARTICLE 3 (Responsibility and punishment)

ARTICLE 4 (Motives)

ARTICLE 5 (Responsibility of States)

17. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for the title of chapter II and for articles 3, 4 and 5, which read:

CHAPTER II
GENERAL PRINCIPLES

Article 3. Responsibility and punishment

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

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in articles ...] is responsible therefor and is liable to punishment. “Attempt” means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator’s intention.

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* Resumed from the 2214th meeting.
That article entitled "Responsibility and punishment" prosecution of an individual for a crime against the peace and security of mankind was responsible and should be punished in its two paragraphs with three issues: (a) an individual who committed a crime against the peace and security of mankind was responsible and should be punished; (b) responsibility for the crime was not affected by any motive invoked by the accused and not covered by the definition of the crime; and (c) prosecution of an individual for a crime did not relieve a State of any responsibility under international law for an act or omission attributable to it.

18. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 3, 4 and 5 were being presented together in view of their interrelationship. At the previous session, the articles referred to the Drafting Committee had included three provisions, namely articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt. The Committee, after a long discussion, had felt that those three articles should be examined in the context of article 3 previously adopted by the Commission. That article entitled "Responsibility and punishment" dealt in its two paragraphs with three issues: (a) an individual who committed a crime against the peace and security of mankind was responsible and should be punished; (b) responsibility for the crime was not affected by any motive invoked by the accused and not covered by the definition of the crime; and (c) prosecution of an individual for a crime did not relieve a State of any responsibility under international law for an act or omission attributable to it.

19. The second and third issues, in the Committee's view, also applied to complicity, conspiracy and attempt, and it had therefore decided to restructure article 3 so as to limit article 3 proper to the various forms of participation in a crime under the Code, then to have a separate article (article 4) dealing specifically with the irrelevance of any motives invoked by the accused to the determination of responsibility and punishment, and finally, an article 5, on the responsibility of a State independent of that of the individual whom it prosecuted for a crime.

20. Article 3 dealt with responsibility and punishment. Paragraph 1 was a simplified version of paragraph 1 of the original article 3 and provided for the responsibility and punishment of an individual who committed a crime against the peace and security of mankind. Paragraph 2 was new; it dealt with complicity, conspiracy and incitement, and it incorporated the idea and some of the wording used in original articles 15 and 16 as proposed by the Special Rapporteur. There had been some discussion in the Drafting Committee as to whether complicity was a concept broad enough to include conspiracy and incitement. The issue had been raised more particularly in view of the fact that there seemed to be no clear legal term in French, for example, for "conspiracy". Some English terms which had their legal roots in common law jurisprudence did not appear to have precise equivalents in other languages and systems. However, by the end of the discussion, the Committee had decided to mention other forms of participation since they had been considered in the Nürnberg Principles and in some conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide, as being independent of complicity. In doing so, the Committee decided to define complicity, which was a legal term with equivalent meaning in most legal systems, but not to define conspiracy. It referred instead to conspiracy in the same way as it had been mentioned in article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.

21. Paragraph 2 began by defining complicity as aiding, abetting or providing the means for the commission of the crime. There had been some discussion as to whether complicity post facto was also included in that definition. Although the definition of complicity was not entirely clear in that respect, most members of the Committee had felt that post facto complicity should not be included, for the article and the whole Code dealt with the commission of a crime and not with what happened afterwards.

22. For the reasons already explained, conspiracy was not defined and was simply mentioned. Similarly, paragraph 2 referred only to incitement, which was also mentioned in the Convention on the Prevention and Punishment of the Crime of Genocide but was qualified by the words "public and direct". In the opinion of the Drafting Committee, incitement to commit a crime against the peace and security of mankind did not need to be limited to public incitement, since that would be too restrictive for the purposes of the Code. Incitement none the less had to be direct.

23. Paragraph 3 dealt with attempt, a separate form of participation. The Committee took the view that even an attempt to commit a crime under the Code was of sufficient gravity to justify responsibility and punishment. Paragraph 3 provided for that responsibility and for punishment of an individual who attempted to commit a crime and it also defined the term "attempt", which was well known in criminal law in all legal systems.

24. Square brackets had been placed around the words "as set out in articles . . .", in the first sentence of paragraph 3, the purpose being to bring to the attention of Governments an issue on which the Committee had not reached agreement, namely, whether an attempt to commit any of the crimes under the Code should be punishable. In further explanation, he pointed out that, under paragraphs 1 and 2 the commission of any of the crimes in the Code, as well as acts of complicity, conspiracy or incitement, would entail liability and were punishable. There was a general consensus in the Committee on that point, but not with respect to an attempt to commit every single one of those crimes. For example, some members did not agree that an attempt to commit the crime of threat of aggression should be punishable.

25. The Committee had felt that it would be appropriate to elicit the views of Governments and the best way to do so was to use square brackets for the phrase in question. In addition, the commentary would explain the matter and would indicate that the question would be reconsidered on second reading, in the light of Government comments.

26. Article 4 was taken from paragraph 1 of the original version of article 3. As he had explained earlier, the article had been restructured. The irrelevance of any motives invoked by the accused, which in the original ver-
tion of article 3, paragraph 1, applied to an individual who had committed a crime, now applied also to any person who aided, abetted, provided the means for or conspired in or directly incited or attempted the commission of any of the crimes listed in the Code.

27. Article 5 was paragraph 2 of the former article 3. It indicated the responsibility of a State under international law, independently of the responsibility of the accused, even when the latter was prosecuted for the crime.

28. Mr. ROUCOUNAS noted that the word Introduction appeared before the title of chapter I, in the French version of document A/CN.4/L.459, but not in the English version. It should be deleted. He did not understand why, in the French version of article 3, paragraph 3, the word tentative appeared in quotation marks. The meaning of “attempt” was already clear from the preceding sentence.

29. Mr. RAZAFINDRALAMBO, commenting on the French version, said that article 5 used the words un acte ou une omission whereas the term employed in article 2 was une action ou une omission. For the sake of consistency the same wording should be used. Moreover, the term acte covered both acts and omissions, and the reference to omissions could therefore be deleted.

30. Mr. SOLARI TUDELA said that the Spanish version of article 3, paragraph 4 contained serious mistakes and he suggested that it should be redrafted by the Spanish-speaking members of the Commission, in conjunction with the secretariat.

31. Mr. PAWLAK (Chairman of the Drafting Committee) said he agreed to the deletion, in the French version, of the word Introduction and the quotation marks appearing round the word tentative in article 3. The Spanish version should be checked with the secretariat by the Spanish-speaking members.

Articles 3 and 4 were adopted, subject to any drafting changes required in the Spanish version.

32. Mr. GRAEFRATH, referring to Mr. Razafindralambo’s suggestion to delete the words “or omission” from article 5, said that an act or omission as mentioned in that article related to the responsibility of States, not individuals. For the sake of clarity, the text of article 5 should be left unaltered.

33. Mr. BARSEGOV and Mr. JACOVIDES said that they agreed with Mr. Graefrath.

34. Mr. RAZAFINDRALAMBO said that, since the wording used in the English version of article 2 and article 5 was identical, the disparity in the wording of those two articles in the French version was inexplicable.

35. Mr. THIAM (Special Rapporteur) said that the reference to une omission in the French version of article 5 should not be deleted. Perhaps the French version should refer to actions ou omissions.

36. Mr. MAHIOUT asked the Special Rapporteur why the term action had been used in the French version of article 2, although the term used later in the draft articles in connection with the list of crimes (articles 15 to 26) was acte.

37. Mr. THIAM (Special Rapporteur) said the Drafting Committee had already discussed at length whether the term acte should be used throughout the draft to designate both acts and omissions, but the view was taken that the word was not sufficient in itself to cover the characterization of crimes.

38. Mr. TOMUSCHAT said the wording of article 5 should correspond with article 3 of part 1 of the topic of State responsibility, which read:

- (a) conduct consisting of an action or omission attributable to the State under international law;
- (b) that conduct constitutes a breach of an international obligation of the State.

Accordingly, the term “action” should be used in article 5.

39. Mr. PAWLAK (Chairman of the Drafting Committee) commented that the draft articles on State responsibility had not yet been adopted on second reading. The term “act” should be retained in the English version of article 5 on first reading. It was the term employed elsewhere in the draft, including article 2, and its use in the English version did not affect the French version.

40. Mr. TOMUSCHAT said that, although the draft articles on State responsibility had not yet been adopted on second reading, they were a carefully devised system in which an “act” was an overall concept, encompassing both acts and omissions. In the draft Code, article 5 alone referred to the conduct of a State; hence, in that article alone, the term “act” should be replaced by “action”, to reflect the specific situation of State conduct.

41. Mr. AL-BAHARNA said that article 5 should be left unchanged. The word “act” was the correct term to use in criminal law, in which the expression “actions or omissions” was unknown. The Commission was not concerned at present with the draft articles on State responsibility, and might in any case make changes to that draft.

42. Mr. CALERO RODRIGUES said that the term “act” could be used in both positive and negative contexts to refer to both actions and omissions, and it was therefore the correct term to use.

43. Mr. SEPÚLVEDA GUTIÉRREZ said that un acto o una omisión in the Spanish version, was correct from the viewpoint of Spanish terminology in criminal law. The term acción would have no meaning in that context.

44. Mr. BEESLEY said the question should be left to the Special Rapporteur and the Drafting Committee. He was inclined to agree with Mr. Al-Baharna that the wording of the draft should reflect customary legal usage as far as the English version was concerned.

45. Mr. EIRIKSSON said he did not accept the use of the term “action” in the draft articles on State responsibility. He preferred to leave the text of article 5 unaltered; it could usefully be accompanied by a commentary.
46. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that article 5 should be left unchanged.

Article 5 was adopted.

ARTICLE 6 (Obligation to try or extradite)
ARTICLE 7 (Non-applicability of statutory limitations)
ARTICLE 8 (Judicial guarantees)

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 6, 7 and 8, which read:

Article 6.* Obligation to try or extradite

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either 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 do not prejudice the establishment and the jurisdiction of an international criminal court.

* This article will be reviewed if an international criminal court is established.

Article 7. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

Article 8. Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular, he shall have the right to be presumed innocent until proved guilty and 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 established by law or by treaty;

(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 in any 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 in any such case 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.

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee was not suggesting any changes for articles 6 and 7, which had initially been adopted as articles 4 and 5. As to article 8, previously numbered 6, the Committee suggested incorporating in the opening paragraph a reference to the right to be presumed innocent, as well as the phrase introducing the enumeration of the rights of the accused. The resulting presentation of the article would be closer to usual practice.

49. The CHAIRMAN said that no action was required on articles 6 and 7, the texts of which had been adopted previously in their present form; only the numbering had been changed.

Article 8 was adopted.

ARTICLE 9 (Non bis in idem)
ARTICLE 10 (Non-retroactivity)

50. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 9 and 10, which read:

Article 9. Non bis in idem

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.*

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court or by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.

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

(a) if the act which was the subject of the previous judgement took place in the territory of that State; or

(b) if that State has been the main victim of the crime.

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

* The reference to an international criminal court does not prejudice the question of the establishment of such a court.

Article 10. Non-retroactivity

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

2. Nothing in this article shall preclude the trial and punishment of anyone for any act, which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

51. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee was suggesting two minor changes in article 9: the inclusion of the word "or" at the end of paragraph 4(a), and the substitution of the phrase "no one shall be tried or punished" for the phrase "no one shall be liable to be tried or punished". The latter change had inadvertently been omitted from document A/CN.4/L.459. More important, the Committee was suggesting the elimination of the square brackets which had initially been placed around paragraph 1 as well as around the phrase "by an international criminal court or" in paragraph 3. In its view, retaining the brackets would give the impression that the fundamental principle enunciated in paragraph 1 was being called in question. Although it was aware that the final wording of the article depended on the future decision on the establishment
of an international criminal court, the Committee preferred to append a footnote to that effect to article 9, rather than to give the impression that the non bis in idem principle was not generally acceptable. The Drafting Committee was not suggesting any change for article 10.

52. Mr. EIRIKSSON said that the comma after the word “act”, in paragraph 2 of article 10, should be deleted.

53. Mr. HAYES, supported by Mr. AL-KHASAW-NEH and Mr. BEESLEY, expressed a reservation regarding article 9. Regrettably, the draft articles did not contain an adequate reflection of the non bis in idem principle; indeed, it had been said that there was no such principle in international law. The principle must, however, be adequately reflected in the draft, since the Commission was in the process of creating an international code of criminal law.

54. Mr. MAHIOU pointed out a discrepancy in the French version of article 9, which referred to the international criminal court as a tribunal, although the term jurisdiction was used elsewhere.

55. The CHAIRMAN invited the Commission to adopt article 9 and said that no action was required on article 10, the text of which had been adopted previously in its present form; only the numbering had been changed.

Article 9 was adopted.

ARTICLE 11 (Order of a Government or a superior)

ARTICLE 12 (Responsibility of the superior)

ARTICLE 13 (Official position and responsibility)

56. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 11, 12 and 13, which read:

Article 11. Order of a Government or 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 superior does not relieve him of criminal responsibility, if they knew or had information enabling them to conclude, 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 feasible measures within their power to prevent or repress the crime.

Article 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 information enabling them to conclude, 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 feasible measures within their power to prevent or repress the crime.

Article 13. Official position and responsibility

The official position of the individual who commits a crime against the peace and security of mankind and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

57. Mr. PAWLAK (Chairman of the Drafting Committee) commenting on article 11, said that, in his fifth report, the Special Rapporteur had presented an article dealing with exceptions to the principle of responsibility (article 9), establishing, inter alia, that the order of a Government or of a superior created an exception to criminal responsibility, provided a moral choice was in fact not possible for the perpetrator. The Drafting Committee had deferred action on that article until the present session and its discussion had revealed many divergent views, as he would explain when the Commission came to consider article 14. However, there was general agreement on the principle, upheld both in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal, and in the 1954 draft Code, that the perpetrator of a crime against the peace and security of mankind was not, as a rule, relieved of criminal responsibility on the ground that he had acted on the order of a Government or of a superior. The Committee considered that that principle was of such importance in the context of the Code that it should be enunciated in the draft even at the present stage, although the question of defences had yet to be fully resolved. The text of article 11 closely followed article 4 of the 1954 draft Code, except for a few editorial changes. As for its place in the draft, it was thought that the articles dealing with the implications, in terms of criminal responsibility, of the hierarchical position of the perpetrator should be regrouped to form a sequence of articles 11, 12 and 13. Articles 12 and 13, formerly 10 and 11, had been left unchanged, except that the word “criminal”, before “responsibility”, in the title of article 13, had been deleted for consistency with the title of article 12.

58. Mr. AL-BAHARNA said that the indefinite article should be inserted before “superior”, in the title of article 11.

59. Mr. EIRIKSSON said that there was some linkage between articles 11 and 14, as the Chairman of the Drafting Committee had indicated. Neither article could be completed without the other, because together they formed a subgroup dealing with the defence of coercion, which had not yet been fully developed in article 14. Hence there might be a need to return to article 11. As to article 13, he thought it had been agreed that the text would refer to “an individual”, not “the individual”. Moreover, there should be a comma after “the peace and security of mankind”.

60. Mr. ROUCOUNAS said that, in view of the particularly important and complex nature of articles 9 and 11, he would like to receive the commentary to those articles as quickly as possible.

61. The CHAIRMAN said that due note had been taken of that request.

62. Mr. BEESLEY said that he attached such importance to article 11 and to the principle it enunciated that he was prepared to accept the article there and then, even if it was to be amplified later. In his view, the defence in question was so unacceptable that it was essential to limit it.

Article 11, as amended, was adopted.

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9 See 2207th meeting, footnote 5.
63. The CHAIRMAN said that no action was required on article 12, the text of which had been adopted previously in its present form; only the numbering had been changed.

        Article 13 was adopted.

64. Mr. BEESLEY said that he found it somewhat curious to speak of an individual who committed a crime and then to discuss possible defences. That issue could, however, be discussed on second reading.

ARTICLE 14 (Defences and extenuating circumstances)

65. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 14, which read:

        Article 14. Defences and extenuating circumstances

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

        2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

66. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as already indicated, the Drafting Committee's point of departure in working out article 14 had been article 9 as proposed by the Special Rapporteur in his fifth report.10

67. The Committee had discussed at some length a revised version of article 9 proposed by the Special Rapporteur. On most aspects of the text, however, opinions were divided. Self-defence, for example, was viewed by some members as having a place in the draft and by others as irrelevant. Of those who supported its inclusion, some wanted to confine it to the case of aggression, while others considered that it should apply to all crimes. Of those who viewed self-defence as irrelevant in that context, some had observed that use of force committed in accordance with the Charter of the United Nations did not qualify as aggression, whereas others maintained that the acts covered by the Code were of such a nature that they could not conceivably be committed in self-defence. A second aspect of the question of defences which had been discussed on the basis of the Special Rapporteur's revised text was whether coercion, state of necessity, force majeure and error should be available as defences to the perpetrators of war crimes provided specific conditions were met. In the Committee's opinion, state of necessity, force majeure and error were highly complex concepts that should be analysed in depth before any conclusion could be drawn as to their applicability in relation to crimes against the peace and security of mankind in general and to war crimes in particular. A third element of the Special Rapporteur's text related to the unavailability of defences to the perpetrators of specific crimes. As to the fourth element, the order of a superior, as he had already indicated, the Committee had dealt with it under a separate article, namely article 11, which the Commission had just adopted.

68. On all other aspects of the question of defences, however, the divergence of views could not be reconciled in the Drafting Committee. It had therefore felt that, because of the complexity of the issues involved, it should at that stage work out a general clause that would leave it to the court to determine the admissibility of defences under the general principles of law on defences, in the light of the character of each crime. Similarly, paragraph 2 of article 14 left it to the court to take account of extenuating circumstances, where appropriate, in passing sentence. That article was not intended to be exhaustive where the question of defences and extenuating circumstances were concerned, but rather to serve as a reminder that the question should be addressed again on second reading, when more specific rules could be formulated.

69. The Drafting Committee was aware that, although defences and extenuating circumstances both had implications regarding the extent of the criminal responsibility of the perpetrator, they were very different concepts. It had dealt with them tentatively in two separate paragraphs of the same article, which was itself provisional in nature.

70. Some members of the Committee had expressed reservations about paragraph 2 because they had considered that the question of extenuating circumstances should be dealt with later, rather than in the context of defences.

71. Mr. TOMUSCHAT said that it was essential to be clear about what was meant by the expression "general principles of law", in paragraph 1. Did it refer to the principles mentioned in Article 38 of the Statute of ICJ or to the general principles of law derived from a comparison of all criminal codes throughout the world?

72. Mr. SEPÚLVEDA GUTIÉRREZ said that he agreed with the content and scope of the article, but wished to enter a reservation regarding the expression causas de justificación, in the Spanish version. The expression was not appropriate, for a crime could never be justified. It would be preferable to use the technical term excluyentes o eximientes de responsabilidad.

73. Mr. EIRIKSSON said that, while he had agreed to the Drafting Committee's decisions, he had been opposed to the inclusion of paragraph 2 because it would be inadvisable to refer to the sentencing stage in an article initially designed to cover defences. Moreover, the question of defences had been dealt with in paragraph 1 on the understanding that it would have to be discussed in more detail later. Consequently, there was no need to refer to that stage to extenuating circumstances, which would be considered later within the whole context of sentencing.

74. Mr. MAHIOUT said that, rather than have two separate paragraphs in the same article, he would prefer to have two separate articles, because defences and extenuating circumstances were two entirely different things: the effect of a defence was to eliminate the offence, whereas extenuating circumstances intervened to mitigate the penalty only after it was found that there had been an offence. Also, there was some ambiguity about the wording of the article, for the words "In passing sentence", in paragraph 2, seemed to refer back to paragraph 1.

10 See footnote 8 above.
75. Mr. ROUCOUNAS said that he agreed entirely with Mr. Mahiou. Two groups of rules dealing with different aspects of criminal procedure were, of course, covered in the same article. He had, however, taken note in that connection of the explanation by the Chairman of the Drafting Committee to the effect that the article was meant to serve as a reminder and was of a preliminary nature.

76. When the two issues covered by article 14 were reconsidered, it would be necessary to understand what was meant by the words "general principles of law". They might, of course, be taken to refer to Article 38 of the Statute of ICJ, which did not exclude international criminal law or indeed any other law. A generous interpretation was therefore required not only because it was a matter of criminal law and of protecting the accused but also because the question of general principles of law had been the subject of considerable effort by legal writers and the courts. For some, those principles represented a cross-section of legal systems throughout the world which could be applied in a given case, whereas for others they already formed part of the international order.

77. Mr. BEESLEY said that he shared the position taken by Mr. Eiriksson and Mr. Mahiou. The distinction between defences, which were pleaded before conviction, and extenuating circumstances, which were taken into account in sentencing, was clear-cut in most systems of law. Though he had reservations about the article, therefore, he did not object to it.

78. Mr. HAYES said that he, too, did not object to adoption of the article as drafted. He had, however, reserved his position on paragraph 2 in the Drafting Committee because he considered that the paragraph related to penalties rather than to the conviction stage. Moreover, the Special Rapporteur, in his ninth report, had dealt with the question of extenuating circumstances in the draft article on sentencing; and that, in his own view, was the right place to do so.

79. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as he had explained in his introduction, the article was of a tentative nature and, on that understanding, he would suggest that it should be adopted. The separation of the article into two paragraphs, or articles, was of secondary importance; what mattered was to draw the attention of Governments and the Sixth Committee to the matter and thus prompt their comments. He would have no objection to two separate articles, however, if that would help to overcome the objections.

80. Mr. CALERO RODRIGUES, noting that the difference of views persisted despite the preliminary nature of the article, observed that one easy solution—which would also forestall any reference by Governments to that particular point—would be to have two separate articles.

81. Mr. RAZAFINDRALAMBO said he had always been of the view that the two concepts of defences and extenuating circumstances, which were quite distinct, should be dealt with in two separate articles. In a spirit of compromise, he had none the less agreed that they should be covered by two paragraphs in the same article. Should the Commission now favour the adoption of two separate articles, such a course would be perfectly acceptable.

82. Mr. DÍAZ GONZÁLEZ expressed a reservation with regard to the Spanish version of the article. In the first place, the wording of paragraph 1 was very strange, for it was difficult to see what principles of law could justify a crime. How, for instance, was it possible to justify the crime of genocide—or indeed, any other crime against the peace and security of mankind?

83. So far as paragraph 2 was concerned, he agreed entirely with Mr. Sepúlveda Gutiérrez that it would be preferable to use the word *eximientes*.

84. Mr. AL-BAHARNA said that defences and extenuating circumstances were interrelated inasmuch as counsel for the defence, when submitting his case for the accused, would in any event plead extenuating circumstances. For that reason he was opposed to two separate articles. The position would be just the same—counsel for the defence would still plead extenuating circumstances—even if the whole article was deleted from the Code.

85. Mr. BARSEGOV said that he was prepared to accept the draft article either as it stood or in the form of two separate articles. Some members of the Commission had argued that, because their own legal systems did not link them, the questions of responsibility and extenuating circumstances should be treated separately in the draft. It was clear that every legal system drew a distinction between responsibility for an act and extenuating circumstances. That did not mean, however, that there was no connection between the two concepts.

86. Mr. ERIKSSON said that he had not meant to imply that the entire article lacked substance. In fact, paragraph 1 could stand on its own. His earlier comment on lack of substance had been directed at paragraph 2. He would have strong reservations if it were to become a separate article, particularly since the matter it dealt with did not belong in that section of the draft Code.

87. Mr. Sreenivasa RAO said he shared Mr. Al-Baharna's view that there was an interrelationship between defence and extenuating circumstances. Article 14 was an accurate reflection of the sequence of events before a court of law. In his initial submissions, the counsel for the accused customarily presented the defence per se; he might, in addition, make reference to extenuating circumstances, which would then be taken into consideration at the time of sentencing. The article was therefore acceptable as it stood. In his view, what mattered was the manner in which the Commission presented the issues to the General Assembly. Rather than choosing a solution about which many members had strong reservations, it would be better to adopt the article as it was, on the understanding that it might eventually take a different form; mention of that reasoning could then be made in the Commission's report.

88. Mr. MAHIOU said that, in commenting earlier on the possibility of turning the two paragraphs into separate articles, he had stressed that the matter should be considered on second reading. He was not, therefore, ob-
jecting in any way to provisional adoption of article 14. The reservations members had expressed so far would be reflected in the commentary and would be taken into consideration on second reading.

89. The CHAIRMAN, speaking as a member of the Commission, said he had earlier held the view that extenuating circumstances belonged exclusively in the domain of penalties. However, as Mr. Al-Baharna and Mr. Sreenivasa Rao had observed, stressing the interrelationship between the defence and the extenuating circumstances did not diminish the force of article 14. He recalled that in the Corfu Channel case, ICJ had used the justification of extenuating circumstances as a defence. As international jurists, the members of the Commission were under an obligation to respect the jurisprudence of ICJ. The Commission should therefore adopt the article in its present form.

90. Mr. THIAM (Special Rapporteur) said that he shared the view of the Chairman. In treating the paragraphs separately, the Commission might well end up with two articles of very little substance. If the Commission took that course of action, the two articles would certainly have to be elaborated further. Any changes of that nature would have to be considered on second reading. In his opinion, article 14 should be adopted as it stood. The fact that the article contained two paragraphs would demonstrate that the Commission was fully aware of the distinction between responsibility and extenuating circumstances.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in view of the debate so far, he would appeal to members to withdraw or limit their reservations to article 14. Attaching a large number of reservations to an article of such importance could convey a misleading impression and give rise to doubts about the collective wisdom of the Commission. The article was being considered on first reading and was simply a "hook" on to which States could hang their views. Further elaboration was always possible on second reading.

92. With respect to the question raised by Mr. Tomuschat (para. 70 above), article 14 had been drafted on the understanding that the term "general principles of law" referred to the general principles of penal law rather than to the general principles under Article 38 of the Statute of ICJ. If appropriate, that clarification might be reflected in the commentary.

93. Mr. BEESLEY said that, as others had pointed out earlier, the reservations being expressed with respect to article 14 should be given due consideration at a later stage. In that connection, it was gratifying that the Chairman had mentioned the Corfu Channel case, the relevance of which could be considered on second reading of article 14. In his view, the Commission should move ahead and adopt the article.

94. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 14 as it stood.

Article 14 was adopted.

95. Mr. PELLET said that he had participated actively in the work of the Drafting Committee and had not opposed the necessary compromise solutions. At the same time, his enthusiasm for the draft as a whole was limited. In that connection, he wished to point out two major shortcomings with respect to chapter II, on General principles. The first and most serious concerned the problem of the responsibility of groups. Although frequently raised in the Commission's debates, the issue had not been taken up by the Drafting Committee and there was no mention of it in the draft Code. While it was true that article 3, paragraph 2, spoke about conspiracy, the article concerned only the individual conspirator, not the group as a whole. The issue was to determine whether legal persons could be held responsible for participating in or committing crimes. As long as the Commission refused to take a position on that complex issue, the draft Code would remain incomplete. The second shortcoming lay in the absence in the Code of any reference to the question of advocating crimes against the peace and security of mankind. Did the fact of advocating a crime constitute a crime in itself? If not, the Commission should have said as much in the Code and suggested that such advocacy should be considered as an offence. The Code also failed to address the related issue of the denial that certain crimes against the peace and security of mankind had even been committed, which was currently a very painful issue in his own country, France. For all those reasons, he wished to express a general reservation with regard to part one of the draft.

96. Mr. THIAM (Special Rapporteur) said that he had deliberately chosen not to introduce into the Code the question of assigning responsibility to groups. It was a difficult matter on which viewpoints differed widely. At the present stage, such a provision did not belong in the Code, which dealt exclusively with responsibility of the individual. Even in the case of domestic law, the concept of the responsibility of groups continued to be a matter of debate.

97. In his opinion, addressing the issue of advocating crimes would only be a further unnecessary complication to the already difficult task of arriving at precise definitions of the crimes under the draft Code.

98. Lastly, he did not think that the absence of references to the responsibility of groups and to the advocacy of crimes weakened the Code in any fundamental way.

99. Mr. MAHIQU said the Commission had discussed the issue of the criminal responsibility of legal persons at great length. The debate had given rise to serious divisions of opinion and the decision had thus been made to confine the Code to individuals. It was not appropriate to include advocacy of crimes. To his knowledge, even under domestic law, it was considered as an offence and not as a crime. Therefore, it would be difficult to include it in a code which related to crimes of the most serious nature.

100. Mr. PELLET said it should have been stated explicitly in part one that the provisions of the Code were entirely without prejudice to the attribution of responsibility to groups. Furthermore, the fact that an issue was difficult did not mean that it should not be addressed; for
that reason, he was not convinced by the Special Rapporteur's explanation.

101. The CHAIRMAN said that Mr. Pellet's concerns were shared by other members of the Commission. Perhaps the Commission should include in its final report a statement to the effect that a decision had been taken to limit the Code to the responsibility of the individual.

The meeting rose at 12.40 p.m.

2237th MEETING

Tuesday, 9 July 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Cooperation with other bodies (concluded)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN welcomed Mrs. Killerby, Observer for the European Committee on Legal Cooperation, and invited her to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) said that the European Committee on Legal Cooperation (CDCJ) had been kept regularly informed of the activities of the Commission and had had the privilege of hearing a statement in that regard by Mr. Pellet at its 54th meeting, in December 1990.

3. Since she had addressed the Commission at its previous session, two more States had become members of the Council of Europe—Hungary and Czechoslovakia—and other Central and Eastern European countries, with which the Council now had an extensive programme of cooperation in the legal field, were expected to become member States in the near future.

4. CDCJ had in particular the task of developing European cooperation between member States of the Council of Europe with a view to harmonizing and modernizing private and public law, examining the functioning and implementation of Council of Europe conventions and agreements in the legal field (except in the penal sector) with a view to adapting them and improving their practical application where necessary, and preparing, jointly with the European Committee on Crime Problems, the Conferences of European Ministers of Justice and ensuring the follow-up, having regard to the relevant decisions of the Committee of Ministers. An informal meeting of European Ministers of Justice had taken place in Ottawa in June 1991 to consider questions relating to sentencing and the rule of law and the citizen. The eighteenth Conference of European Ministers would take place in Nicosia (Cyprus) in June 1992.

5. The Committee of Experts on Public International Law, which followed the Commission's work very closely, and of which Mr. Eiriksson was a member, had referred in particular, at its meeting in September 1990, to the importance of the Valletta meeting on the peaceful settlement of disputes, organized by the Conference on Security and Cooperation in Europe, the desirability of contributing to the United Nations Decade of International Law and the need to enhance the role of the Sixth Committee of the General Assembly of the United Nations. The Committee of Experts had also made certain proposals concerning its own future role and had suggested in particular that it should meet at the level of chief legal advisers to Ministers of Foreign Affairs and report directly to the Committee of Ministers of the Council of Europe. The Committee of Ministers had accepted those proposals and the Committee of Experts, which was now an ad hoc committee—the Committee of Legal Advisers on Public International Law—was directly answerable to the Committee of Ministers. Its terms of reference were, in particular, to exchange views on and to examine questions of public international law at the request of the Committee of Ministers, the European Committee on Legal Cooperation and at its own initiative. At its first meeting, in Strasbourg in April 1991, the Committee had welcomed the positive results of the Valletta meeting and had held a preliminary exchange of views concerning the privileges and immunities of certain "experts on missions" for the United Nations. It had also stressed the value of the United Nations Decade of International Law as a means of strengthening international law and had expressed the hope that States and organizations, and in particular the Council of Europe, would contribute to the Decade. The Council of Europe had replied to the request for information made by the General Assembly in resolution 45/40 on the United Nations Decade of International Law. At its meeting in September 1991, the Committee would consider, for example, the work of the General Assembly and the International Law Commission, the United Nations Decade of International Law, and current problems of international law, including matters concerning the Conference on Security and Cooperation in Europe.

* Resumed from the 2233rd meeting.