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Summary record of the 2237th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.

6. Commenting on some of the international instruments prepared by CDCJ, she said that the European Convention on certain international aspects of bankruptcy had been opened for signature in 1990. The Convention provided for legal cooperation with respect to certain international aspects of bankruptcy such as the power of administrators and liquidators in bankruptcy to act outside national territory, the possibility of resorting to the opening of secondary bankruptcies in the territory of other Parties and the possibility for creditors to lodge their claims in the bankruptcies opened abroad.

7. A committee of experts of CDCJ was continuing its work on a draft convention on civil liability for damage resulting from activities dangerous to the environment, the object of which was to provide for means of prevention and reinstatement and to ensure adequate compensation. It was expected to complete its work in 1992 and, subject to the approval of the Committee of Ministers, would then begin to examine the question of compensation funds.

8. Another committee of experts had been instructed to prepare a draft European convention on the exercise of rights by a child, the aim being to ensure that children were given assistance and certain procedural rights in order to implement their rights, in keeping with article 4 of the United Nations Convention on the Rights of the Child, whereby States undertook to take all the legislative, administrative and other measures necessary to implement the rights recognized under the Convention. CDCJ had proposed that, when the committee of experts had completed that work, it should examine questions relating to transsexuals and, subsequently, to adults subject to a disability. A second European Conference on Family Law would be held in Budapest in 1992.

9. Another CDCJ committee of experts was preparing a second protocol to amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality in order to permit dual nationality. The draft protocol would in particular enable contracting States to allow persons to retain their nationality of origin in certain cases, namely, persons resident in the host country from an early age (second-generation migrants) who acquired the nationality of the host country; a spouse who acquired the nationality of the other spouse; and children who acquired the nationality of a parent. CDCJ had proposed that, when that work had been completed, the committee of experts should examine new problems connected with nationality.

10. CDCJ had also adopted a number of draft recommendations prepared by its subordinate committees, for instance, a draft recommendation on administrative sanctions, which had been adopted by the Committee of Ministers of the Council of Europe as Recommendation No. R (91) 1 and which set forth the principles concerning administrative acts that imposed a penalty on persons on account of conduct contrary to the applicable rules; a draft recommendation on family matters, which provided for emergency measures to be taken when the interests of children and other persons in need of special assistance and protection were in serious danger; a draft recommendation stipulating that communication to third parties, in particular by electronic means, of personal data held by public bodies should have its basis in law and be accompanied by safeguards for those concerned; and, lastly, a draft recommendation, adopted by the Committee of Ministers of the Council of Europe as Recommendation No. R (90) 19, which related to the protection of personal data used for payment or other related operations and which set forth principles to ensure respect for privacy in the collection, storage, use, communication and conservation of personal data.

11. As to its future work, in 1992 in particular, CDCJ had made proposals concerning: administrative law (privatization of public services and enterprises, and rules for an administrative and court system to guarantee legal security for citizens); data protection (examination of current data protection problems and preparation of appropriate legal instruments); civil justice (proposal to include in the existing work on criminal justice an aspect of civil justice entitled: "Efficiency and fairness of civil justice"); and legal data processing.

12. In addition to the European Convention on certain international aspects of bankruptcy, already mentioned, a number of instruments prepared by CDCJ had been opened for signature in 1990, namely, Protocol No. 9[1] to the Convention for the Protection of Human Rights and Fundamental Freedoms, which introduced further improvements to the procedure provided for under the Convention; the Fifth Protocol[2] to the General Agreement on Privileges and Immunities of the Council of Europe, which provided that the salaries, emoluments and allowances of members of the European Commission of Human Rights and the European Court of Human Rights should be exempt from taxation; the European Convention on the General Equivalence of Periods of University Study;[3] the European Social Security Code (revised);[4] and, lastly, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,[5] which sought to deprive criminals of the proceeds from crime and property used to commit a criminal offence and provided for measures to be taken at the national and international level in that connection.

13. In addition to the treaties being prepared by CDCJ, to which she had already referred, the Council of Europe had prepared certain international instruments: a draft European charter requiring States to comply with provisions concerning regional or minority languages spoken within their territories; a draft European convention on the protection of the rights of ethnic, linguistic and religious minorities; a draft framework convention setting forth general common rules for the protection of the human person in the context of biomedical sciences; a draft instrument on the mobility of young persons; a draft convention to improve participation by foreigners in public life at the local level, especially by enhancing the possibilities for them to participate in local public af-

[1] Council of Europe, *European Treaty Series*, No. 140 (Strasbourg), 1991.

[2] Ibid., No. 137 (Strasbourg), 1990.

[3] Ibid., No. 138 (Strasbourg), 1991.

[4] Ibid., No. 139 (Strasbourg), 1991.

[5] Ibid., No. 141 (Strasbourg), 1990.

fairs; a draft convention on copyright law and neighbouring rights in the framework of television by satellite; a revised draft European convention on the archaeological heritage, incorporating concepts and ideas that had become accepted practice.

14. In her statement she had summarized some of the work being carried out in the legal field by the Council of Europe, on which she would be happy to answer any questions members might wish to raise.

15. The CHAIRMAN thanked Mrs. Killerby for her very clear account of the impressive work of CDCJ, and wished the Committee every success. He expressed the hope, on behalf of the Commission, that the mutually beneficial cooperation between CDCJ and the International Law Commission would continue.

16. Mr. PELLET, speaking on behalf of members from the Group of Western European and other States, thanked Mrs. Killerby for an extremely comprehensive, meticulous and concise account of the work of CDCJ.

17. At the request of the Chairman at the forty-second session, he had represented the Commission at the 54th meeting of CDCJ and had given a brief account of the work of the Commission at that session. In the exchange of views that had followed, the participants had stressed the importance of the Commission's work and the special interest for CDCJ of the draft articles on jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and the draft Code of Crimes against the Peace and Security of Mankind. They had also welcomed the effective cooperation between the United Nations and the Council of Europe within the framework of the United Nations Decade of International Law, although some had expressed the hope that the two organizations would go further than mere coordination. The Chairman of CDCJ had suggested that the question should be included on the agenda for its future work.

18. He shared in the hope voiced by most members of CDCJ who trusted that the cooperation between that Committee and the Commission—and the United Nations in general—would be intensified. Personally, he did not altogether see what forms such strengthened cooperation could take but he considered that it was a useful subject for the Commission to consider in the context of consideration of its working methods. At all events, he was convinced that the two organizations would probably have much to gain by strengthening their cooperation, and the Commission might perhaps wish to establish direct links with the ad hoc Committee of Legal Advisers on Public International Law, in view of its new status.

19. Lastly, he asked Mrs. Killerby to convey his sincere thanks to the members of CDCJ and the members of the secretariat of the Council of Europe for the welcome they had given him.

20. Mr. JACOVIDES, speaking on behalf of the members from the Asian Group, thanked Mrs. Killerby for her comprehensive statement, which was particularly useful since the Commission could derive nothing but benefit from legal work carried out at the regional level.

21. He had noted the emphasis placed by CDCJ on the Valletta meeting on the peaceful settlement of disputes and its participation in the United Nations Decade of International Law. He would like to know whether CDCJ had taken up the question of the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court.

22. At the General Assembly's latest session, he had had an opportunity to participate in a meeting organized in New York, on the sidelines of the Sixth Committee, by Mr. Correl, Vice-Chairman of the ad hoc Committee of Legal Advisers on Public International Law. He urged all members of the Commission able to do so to attend a similar meeting which was planned for 28 October 1991, again in New York.

23. Mr. BARSEGOV, speaking also on behalf of Mr. Pawlak, thanked Mrs. Killerby for her extremely interesting statement on the legislative activities of CDCJ. Those activities opened up new perspectives, made possible by the far-reaching changes in the eastern European countries which had led to the removal of the political, legal and economic obstacles that had until then hampered relations between all European countries. Much remained to be done, of course, if the common European home was to be constructed and the foundation laid for effective cooperation and genuine economic integration. A European legal area would also have to be created—though, clearly, that was no easy matter in view of the gap that had opened up between European legal institutions—and against that background information with respect to the legal norms drawn up within the European framework would have to be mutually exchanged.

24. Mr. THIAM, speaking on behalf of members from the African Group, thanked Mrs. Killerby for her very informative statement which attested to the fruitful activities of CDCJ. Since the questions with which CDCJ was dealing were very similar to those on the Commission's agenda, it would be entirely fitting for the two organizations to develop and strengthen their cooperation.

25. Mrs. Killerby's statement offered Africa much food for thought in its quest for economic, social and legal integration, which was why it paid close attention to European experiences.

26. Mr. SEPÚLVEDA GUTIÉRREZ, speaking on behalf of members from the Latin American Group, expressed his sincere thanks to Mrs. Killerby for her erudite and eloquent statement. The work of CDCJ served as an example for the Organization of American States in that it attested to the part played by meaningful cooperation in strengthening the rule of, and respect for, international law.

27. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) thanked members for their kind words. She welcomed the proposal that the Commission should enter into direct cooperation with the ad hoc Committee of Legal Advisers on Public Inter-

national Law and would for her part suggest that the two organizations should explore ways of arranging such cooperation. The former Committee of Experts on Public International Law had been kept informed, both by Mr. Eiriksson and by Mr. Pellet, of the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind and, in particular, on the possible creation of an international criminal court. The Committee of Experts had held a brief exchange of views on the matter which made it quite clear that the idea of creating an international criminal court—which would of course have to be considered in depth—was extremely attractive.

28. She trusted that the cooperation between the Committee and the Commission would continue and prosper.

The law of the non-navigational uses of international watercourses (*concluded*)* A/CN.4/436,[6] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

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

29. The CHAIRMAN reminded members that the Commission still had to decide, pursuant to articles 16 and 21 of its Statute, to transmit to Governments, through the Secretary-General, the draft articles it had adopted on first reading, inviting them to submit their comments and observations to him by 1 January 1993.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind[7] (*continued*) (A/CN.4/435 and Add.1,[8] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the second part of the Committee's report, which contained the titles and texts of the articles in part two of the draft Code as adopted by the Drafting Committee (A/CN.4/L.459/Add.1).

31. Mr. PAWLAK (Chairman of the Drafting Committee), introducing part two of the draft Code, said the Committee had been of the view that the title already adopted by the Commission (''Crimes against the peace and security of mankind'') should be retained. The purpose of part two was to define the scope *ratione materiae* and *ratione personae* of the draft Code. In that connection, the Drafting Committee had had a twofold task, first, to complete the list of crimes by providing definitions of war crimes and a series of other crimes, such as genocide and apartheid, and, secondly, to provide answers to basic questions of general import, the consideration of which it had deferred until a clearer idea had emerged of the scope of the draft *ratione materiae*. The first of those questions was whether the distinction between crimes against peace, war crimes and crimes against humanity should be retained. On that point the Drafting Committee took the view that, although the distinction had proved useful in determining the approach to be adopted in relation to each crime, it had become unnecessary now that solutions had emerged with respect both to the constituent elements and to the attribution of each crime. Accordingly, Part Two was not subdivided into chapters but into twelve articles, with a preliminary clause which appeared, *mutatis mutandis*, in each article.

32. The second basic issue which had arisen concerned attribution, namely, the identification of the persons to whom responsibility for each of the crimes listed in the Code should be ascribed. The Commission had found a tentative solution to that issue in the case of aggression, by using the wording ''any individual to whom responsibility for acts constituting aggression is attributed under this Code''. That wording did not, however, have any substantive content and merely served as a reminder that, sooner or later, the question of attribution would have to be addressed. At the present session, the Committee had worked out three types of solution to the problem, depending on the nature of the crimes concerned. Some of the crimes defined in the Code, such as aggression, threat of aggression, intervention, colonial domination and apartheid, were always committed by, or at the order of, individuals occupying the highest decision-making positions in the political or military apparatus of the State; a second group of crimes—international terrorism and mercenarism—would come under the Code, in accordance with decisions already taken by the Commission, whenever agents or representatives of a State were involved. A third group of crimes—illicit traffic in narcotic drugs, war crimes, genocide, systematic or mass violations of human rights and wilful and severe damage to the environment—would be punishable under the Code by whomsoever they were committed, in other words, even in the absence of State involvement.

33. The last issue of general import considered by the Drafting Committee concerned penalties. Different trends had emerged in that connection during the Commission's debate. Some members had taken the view that the matter should be left to domestic law. Others had recalled that the absence of any provision in that respect in the 1954 draft Code had been regarded by many as one of the draft's major flaws, and hence their insistence that the question should be dealt with. Some had advocated the inclusion of a scale of penalties that would be applicable to all crimes, while others had been in favour of accompanying the definition of each crime by the corresponding penalty. The Committee had not attempted to

* Resumed from the 2231st meeting.

[6] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[7] 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.

[8] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

reconcile those divergent views. It had merely signalled the problem by including between square brackets, at the end of the introductory paragraph of each article, the word "to" followed by a blank space. In that way, all positions were safeguarded and on second reading the Commission would be able to revert to the issue, including the question of the penalties to be applied for complicity, conspiracy and attempt, in full knowledge of the various approaches identified thus far. The Committee might wish to indicate in its report to the General Assembly that the matter was one on which the views of Governments would be of particular interest.

PART TWO (Crimes against the peace and security of mankind)

ARTICLE 15 (Aggression)

34. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for the title of part two and for article 15, which read:

PART TWO

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15. Aggression

1. An individual who as leader or organizer plans, commits or orders the commission by another individual of an act of aggression shall, on conviction thereof, be sentenced [to ...].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35. The order in which the crimes were listed did not imply any value judgement as to the degree of seriousness of those crimes. Article 15, like the next three articles, defined a crime which presupposed decisions taken at the policy-making level and in which large segments of the population of a State might be regarded as being directly or indirectly involved. In order to keep the scope *ratione personae* of the provisions concerned within reasonable limits, the Drafting Committee had restricted the circle of potential perpetrators to leaders and organizers, a phrase borrowed from the Charters of the Tokyo[9] and Nürnberg[10] Tribunals and which should be read in conjunction with the provisions on complicity and conspiracy. Article 15 did not require that leaders or organizers should themselves have perpetrated the act of aggression: it made them liable for the mere ordering of such an act. The same remark applied to all subsequent articles in part two.

36. The Drafting Committee proposed that paragraph 1 as initially adopted should be replaced by the new text now before the Commission. The new provision made it a crime not only to commit but also to plan an act of aggression, having regard to the definition of a crime of aggression as laid down in the Charters of the Tokyo and Nürnberg Tribunals and Allied Control Council Law No. 10.[11] Paragraphs 2 to 7 remained unchanged. The bracketed portions signalled divergences of opinion which the debate in the Sixth Committee should help to reconcile.

37. Mr. PELLET said that, before dealing with the questions raised by article 15, he wished to make two comments of a general nature. The first, which was of lesser importance, concerned the structure of the draft. He noted, with respect to the French version, that a *première partie* of the draft had first been referred to the Commission but that it now had before it a *Titre II*. As the words *partie* and *titre* were not interchangeable, that, albeit minor, drafting problem had to be resolved. His second remark concerned the unduly summary introduc-

[9] See 2210th meeting, footnote 7.

[10] See 2207th meeting, footnote 5.

[11] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

tory phrase in each article, which the Drafting Committee had adopted in his absence. The crime of aggression, for instance, would as a general rule consist of orders given by an individual probably to groups of individuals or to institutions but not to individuals; that was why he had reservations about the words "the commission by another individual" which appeared in the articles in part two.

38. As for article 15 itself, he not only had reservations about it but was absolutely opposed to it, even though his views would have no effect since the Commission had already adopted the article in substance. The reason for his opposition was not that aggression did not amount to a crime against the peace and security of mankind—indeed, it was the very epitome of such a crime—but because he was against a procedure which consisted of simply lifting the Definition of Aggression from the annex to General Assembly resolution 3314 (XXIX), and for three reasons. First, the general view was that the Definition was poorly drafted and did not really show what was meant by "aggression"; proof of that could be seen in the use of the words "In particular" in paragraph 4 of article 15, which the Drafting Committee had rightly placed between square brackets. An illustrative list was never acceptable in a criminal law instrument and, generally speaking, the Definition had never been regarded as properly defining anything. When it had adopted the Definition, the General Assembly had known full well that the Security Council would remain free to characterize an act as aggression as it saw fit, and according to its own criteria. Accordingly, it was highly questionable to reproduce in a criminal code a text with no specific scope.

39. Secondly, the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) was not in any event meant to provide the basis for characterizing an act as a crime under criminal law. It was designed to enable the Security Council to decide, in a given situation, whether or not there had been aggression. In the case of the Gulf, the Security Council had not concerned itself with the Definition at all.

40. Thirdly, as a matter of principle, it was not a good idea to include in the Code excerpts from other texts. A definition of aggression would probably prove to be an insurmountable task for the Commission, should it decide to tackle the matter again. The only possible course, therefore, was to indicate that aggression constituted in itself a crime against the peace and security of mankind, with the consequences defined under the Code, and to leave it to the courts which had jurisdiction, in other words, to domestic courts or to a future international criminal court, to decide, in the light of the facts of the case and in accordance with general principles of international law, whether aggression had occurred and to draw the appropriate conclusions. That had not been the approach adopted by the Drafting Committee and the Commission, which had preferred to reproduce a General Assembly recommendation in a text destined to become a treaty that would be binding on States. That was asking a lot of the States which had voted for a recommendation in the knowledge that it did not, as such, have binding force.

41. Mr. BARSEGOV said that he shared some of Mr. Pellet's concerns. He therefore suggested that the words "by another individual of an act of aggression", in paragraph 1 of article 15, should be replaced by "an act constituting an aggression".

42. Prince AJIBOLA said that it was difficult to reconcile the use of the word "individual" in paragraph 1 with the references in the subsequent paragraphs to the use of armed force and to the armed forces of a State. In a State, could the same individual be vested with the power to order and to direct an act of aggression? In many States, decisions were taken in a wholly democratic way, which was why it was difficult to know whether an order to commit aggression should be attributed to the same individual. At present, the Code contained no provision to cover such a case, but it should be catered for, in one way or another. Either the Commission should define the word "individual" as including a "group of individuals" or it should add the words "or group of individuals" after "individual". The same applied to the words "another individual" although it was quite conceivable that those words, when used in the singular, encompassed the plural as well.

43. Mr. NJENGA paid a tribute to the vigour and determination shown by the Chairman and the other members of the Drafting Committee in arriving at a text the Commission would be able to adopt on first reading.

44. The word "individual" in paragraph 1 created no difficulty, since it had been agreed from the outset that the Code would be restricted to the criminal responsibility of individuals, but the words "by another individual" were far more problematic. Aggression was generally committed not by an individual but by armed forces or by a group of individuals and, on that point, the text could be improved. The deletion of the words "by another individual", proposed by Mr. Barsegov, would make paragraph 1 clearer, and the same applied to the first paragraph of the other articles.

45. Unlike Mr. Pellet, he considered that the use of the Definition of Aggression as adopted by the General Assembly in resolution 3314 (XXIX) was justified. It had taken over 40 years of effort to get that resolution adopted by consensus. Had the Commission attempted to draft its own definition of aggression, it would probably have required the same amount of time. The wording of article 15 could perhaps be improved on second reading so far as points of detail were concerned, but any radical departure from its terms would certainly not facilitate the drafting of an acceptable text, and it would be a futile exercise to try to do so.

46. Mr. CALERO RODRIGUES said that the criticisms voiced with regard to the wording of article 15 illustrated the difficulties inherent in the basic object of the draft Code, which was to deal with individual responsibility. Aggression, as that concept was defined, consisted of the use of armed force by a State and it therefore had to be decided which individuals would be held personally responsible for acts that could be carried out only by a State. In that context it seemed difficult to arrive at a formulation that was very different from the one under consideration.

47. He supported Mr. Barsegov's proposal to delete the words "by another individual", from paragraph 1 of article 15.

48. Mr. TOMUSCHAT said that he too supported Mr. Barsegov's proposal, as it would bring the wording of paragraph 1 into line with paragraph 2, which stipulated that aggression was the use of armed force "by a State". Also, there was no need to revert to the question whether the virtual word-for-word quotation of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) had been justified. It was not such a bad definition, and it defined correctly what amounted to aggression. The Commission should stick to what it had decided two years earlier.

49. Mr. ROUCOUNAS said that thus far the Drafting Committee had concentrated mainly on defining the crimes, and had left in abeyance to some extent the question of the perpetrator of the crimes. From the explanations given by the Chairman of the Drafting Committee, he understood that three categories of perpetrators were to be distinguished: an individual who acted as leader or organizer, for example, in the crime of aggression or apartheid; an individual who acted as the agent or representative of a State, for example, in the crime of international terrorism; and, lastly, any individual, (*tout individu*), for example, in the crime of illicit traffic in narcotic drugs or systematic or mass violations of human rights. The Commission should therefore specify in one way or another, possibly in the commentary, which of the crimes listed under part two of the Code were committed by leaders and thus gave rise to the special responsibility of certain agents of the State, which crimes could also be committed by other agents of the State, and which were punishable when committed by "any individual" without further qualification. In his view, the question of the perpetrator should be considered very carefully on second reading.

50. Mr. EIRIKSSON said that he also favoured deletion of the words "by another individual", from paragraph 1 of article 15. However, that deletion would not, of course, have the effect of criminalizing acts by groups. Persons who had acted as part of a group would none the less be prosecuted individually.

51. As to Mr. Pellet's general reservation, he too had made the same reservation when the Commission had adopted the draft article before referring it to the Drafting Committee, since it had seemed inadvisable to him to incorporate a resolution of a political nature into a code of crimes. At that time he had proposed a very simple definition, much like the one to be found in the United Nations Convention on the Law of the Sea, which had been confined to paragraph 2 of article 15. He would not, however, object to the adoption of article 15.

52. Mr. GRAEFRATH said that he supported Mr. Barsegov's proposed deletion but would remind members of the decision taken by the Commission at the outset to limit the scope of the Code to individuals, which was normal for a criminal code. He also believed that the concept of leader or organizer used in paragraph 1 had been taken from the Charters of the Nürnberg and Tokyo Tribunals: there was thus a legal precedent and the wording was not as indefinite as had been suggested.

53. Article 13[12] provided the answer to the question raised by Prince Ajibola since it stipulated that the official position of the individual who committed a crime, and in particular the fact that he had acted as head of State or Government, did not relieve him of criminal responsibility. That was one of the most important decisions the Commission had taken in the matter.

54. Mr. THIAM (Special Rapporteur) said that he endorsed Mr. Barsegov's proposal to delete the words "by another individual", from paragraph 1 of article 15.

55. With regard to Mr. Pellet's statement, he was shocked that a member of the Commission had voiced "absolute opposition" to a draft article. Any member could, of course, express his reservations or misgivings, but none had the right of veto. So far as substance was concerned, Mr. Pellet criticized the article for reproducing the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) which, he considered, had a purely political purpose and bore no relation to the Definition of Aggression under criminal law. The Definition of Aggression was, however, directly linked to the Code since work on the drafting of the 1954 Code had been suspended pursuant to General Assembly resolution 897 (IX) pending the adoption of the Definition of Aggression by the General Assembly. There was no denying that a few small difficulties remained. Some members had taken the view that the list of acts which appeared in the Definition of Aggression adopted by the General Assembly was not sufficiently exhaustive, which was why the words "in particular" had been added between square brackets in paragraph 4 of the article. It should be emphasized that the Drafting Committee had made considerable efforts to prepare a text on such a difficult question—a text which could, in any event, be improved, if necessary, on second reading, as far as points of detail were concerned.

56. Mr. PAWLAK (Chairman of the Drafting Committee) said that the drafting of article 15 had created the most obstacles during the Commission's work on the topic. The Committee had been faced with a choice either of accepting the Definition of Aggression drawn up by the General Assembly or of trying to draft its own definition. It had decided to use the definition that existed already, in the realization that it would be virtually impossible for it to draft a definition likely to enlist from the international community support as broad as that for the definition annexed to resolution 3314 (XXIX), which the General Assembly had adopted by consensus.

57. He was not opposed to deletion of the words "by another individual" from paragraph 1 of article 15 but was not in favour of any other change in that provision.

58. The whole concept underlying the draft Code was the responsibility of individuals. Care should be taken not to revert to the outdated concept, rejected by contemporary international criminal law, of the criminal responsibility of the group, even though, as Prince Ajibola and Mr. Roucounas seemed to suggest, in the case of certain crimes the individuals responsible could perhaps be more clearly specified.

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[12] For text and discussion, see 2236th meeting, paras. 56-63.

59. He had proposed in the Drafting Committee that the words "in particular", which appeared at the beginning of paragraph 4 between square brackets, should be deleted; some members had, however, been opposed to the idea, preferring to leave it to the Commission to decide the question. Those words did not appear in the definition adopted by the General Assembly, which article 15 otherwise reproduced virtually word for word. He would welcome members' views in that connection.

60. Mr. JACOVIDES said that he supported the proposal to delete the words "by another individual" from paragraph 1 of article 15. For the rest, he considered that, although the definition was certainly not perfect, it was the result of a compromise which had been worked out over a period of several years and it would be a mistake to start to tinker with it at that stage. On second reading of the draft, certain minor details could perhaps be revised in the light of the discussion that would be held in the Sixth Committee.

61. He reminded members that, when the Commission had started to draft the Code, several members had wanted to go beyond the responsibility of the individual and to deal with the responsibility of States as well as the responsibility of groups. A compromise had had to be reached so that the work could move ahead, but it would be advisable, as the Commission was completing its first reading of the draft articles, to record that fact in some appropriate form in the report to the General Assembly.

62. The CHAIRMAN said that the report to the General Assembly would refer to the Commission's decision to deal for the time being only with the responsibility of individuals.

63. Mr. EIRIKSSON said he wondered what precisely was the purpose of paragraph 4 (*h*); he believed that it must have some link with the words "In particular", which appeared between square brackets in the opening clause of paragraph 4 but not in the Definition of Aggression adopted by the General Assembly.

64. Mr. GRAEFRATH said that the words "In particular", which appeared between square brackets, in paragraph 4, like the whole of paragraph 5, had been introduced into the text to cover two eventualities: the Security Council might determine that there was an act of aggression on the basis of acts other than those listed in the definition in article 15, or it might find that, notwithstanding the presence of acts listed in the definition, there was no aggression. A delicate problem thus arose of the relationship between the Code, the decisions of a possible criminal court, and the decisions of the Security Council. As that was politically sensitive, the square brackets should be retained to allow States to decide during the discussion in the Sixth Committee on the way in which the relationship between a possible criminal court and the Security Council should be resolved.

65. Prince AJIBOLA said that he was grateful to the Chairman of the Drafting Committee and to other members for their explanations regarding the use of the word "individual" but would still like it to be made clear at some point that, so far as responsibility under the Code was concerned, it mattered little whether the individual had acted on his own behalf, on behalf of the State, or on behalf of a group, and that in the two latter instances the individual would also incur criminal responsibility.

66. Mr. McCAFFREY said that Prince Ajibola's concern was perhaps partly met by article 13. As to the drafting proposals which had just been made, he agreed with deletion of the words "by another individual", from paragraph 1 of article 15, and considered that the words "In particular" in square brackets in paragraph 4 were not really necessary, for two reasons. First, they did not appear in the definition of acts of aggression laid down in article 3 of the Definition annexed to General Assembly resolution 3314 (XXIX) and, secondly, subparagraph (*h*), which had been added to paragraph 4 of draft article 15 and was based directly on article 4 of that Definition, made it clear that the list of acts referred to in paragraph 4 was not exhaustive.

67. In his view, therefore, the words "In particular" could be deleted without difficulty.

68. Mr. THIAM (Special Rapporteur) said it had been suggested that the words "In particular" should be included in paragraph 4 to create a link between the jurisdiction of the Security Council and that of a possible international criminal court. The problem was that an international criminal court might never be able to treat a given act as an act of aggression if that act was not included in the draft Code.

69. Personally, however, he had no definite views on the matter. He would prefer the words "In particular" to be deleted but would not object to their being retained if that was the wish of the majority. His remarks could perhaps appear in the commentary.

70. Mr. PAWLAK (Chairman of the Drafting Committee) said that the question of the inclusion of the words "In particular" in paragraph 4 had not arisen in connection with paragraph 5 alone. In that connection, he would refer members to article 4 of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) which read:

> The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the Charter.

It was that provision that lay behind the introduction of the words "In particular" in paragraph 4. In the circumstances, if the Sixth Committee decided to keep paragraph 5, which appeared between square brackets, the words "In particular" would not be necessary and could be deleted. That was the solution he personally favoured.

71. With regard to the points raised by Prince Ajibola, he would refer him to articles 4 and 5,[13] concerning the motives and responsibility of States, and to article 13,[14] which provided that "The official position of the individual who commits a crime . . . does not relieve him of criminal responsibility". Those articles should partly meet his concern.

[13] Ibid., paras. 17-31.

[14] See footnote 12 above.

72. Prince AJIBOLA said that he was satisfied with those explanations.

73. The CHAIRMAN, summing up the discussion, said that the Commission had to take a decision on two proposals with respect to article 15. In the first place, it was suggested that the words "by another individual", in paragraph 1 of the article, should be deleted. The proposed new text would then read:

"1. An individual who as leader or organizer plans, commits or orders the commission of an act constituting aggression shall, on conviction thereof, be sentenced [to . . .]."

74. Mr. TOMUSCHAT said he did not think it was necessary to replace the former expression "an act of aggression", in paragraph 1, by "an act constituting aggression", since "act of aggression" appeared at several points in the article.

75. Mr. PAWLAK (Chairman of the Drafting Committee), endorsing Mr. Tomuschat's remarks, said that he could agree to deletion of the words "by another individual" only if no other change was made to paragraph 1, which should read:

"1. Any individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to . . .]."

It was so agreed.

76. The CHAIRMAN invited members of the Commission to take a decision on the proposal to delete the words "[In particular]", from paragraph 4 of article 15. If he heard no objection, he would take it that the proposal was adopted.

It was so agreed.

77. The CHAIRMAN said that no action was required on the title of part two as there had been no amendment to the wording previously adopted. If he heard no objection, he would take it that the Commission wished to adopt article 15, as amended.

Article 15, as amended, was adopted.

ARTICLE 16 (Threat of aggression)

ARTICLE 17 (Intervention)

ARTICLE 18 (Colonial domination and other forms of alien domination)

78. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 16, 17 and 18 which read:

Article 16. Threat of aggression

1. An individual who as leader or organizer commits or orders the commission by another individual of threat of aggression shall, on conviction thereof, be sentenced [to . . .].

2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

Article 17. Intervention

1. An individual who as leader or organizer commits or orders the commission by another individual of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .].

2. Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 18. Colonial domination and other forms of alien domination

An individual who as leader or organizer establishes or maintains by force, or orders another individual to establish or maintain by force, colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .].

79. Mr. PAWLAK (Chairman of the Drafting Committee) said that it had been decided to introduce articles 16, 17 and 18 together, since the changes made to those articles, which corresponded in turn to former draft articles 13, 14 and 15 provisionally adopted by the Commission,[15] were the direct result of the basic approach he had already explained.

80. With regard to article 16 (Threat of aggression), the text of former article 13 had become paragraph 2, and the beginning of the article included the standard paragraph that now preceded the definition of each crime: "An individual who as leader or organizer . . .". The only change the Drafting Committee had made to paragraph 2 was to replace the opening clause, "Threat of aggression consisting of declarations", by "Threat of aggression consists of declarations".

81. Similarly, in article 17 (Intervention), paragraphs 1 and 2 of former article 14 had become paragraphs 2 and 3; and, in new paragraph 2, the Committee had made the grammatical adjustments required by the restructuring of that provision.

82. In the course of the review of article 17, it had been pointed out that it was conceivable that the leaders or organizers of a State which had intervened in the internal or external affairs of another State might have relied on the collaboration of their counterparts in the victim State, which raised the question whether both groups of individuals should be treated as criminals under the Code. The Drafting Committee had answered that question in the negative, being of the view that the leaders and organizers of the State against which the intervention was directed should be treated in accordance with the domestic law of that State.

83. Some members of the Committee had also reiterated their objections to the article, pointing out in particular that intervention was too vague a concept to form the basis for making an act a crime under the Code and that it was difficult to conceive of individuals committing acts of intervention.

[15] See *Yearbook . . . 1989*, vol. II (Part Two), para. 217.

84. With regard to article 18 (Colonial domination and other forms of alien domination), the definition adopted in former article 15 had been incorporated into the new preliminary clause worked out by the Drafting Committee at the present session.

85. Mr. EIRIKSSON pointed out that the decision to delete the words "by another individual", from paragraph 1 of article 15, had an effect on the wording of articles 16, 17 and 18, where the same words appeared. Deleting them from articles 16 and 17 created a drafting problem which could be solved by replacing the words "by another individual of", in paragraph 1 of both articles, by the words "of an act constituting . . .", as had been proposed for article 15.

86. Mr. PELLET said that he had no objection to Mr. Eiriksson's proposal regarding paragraph 1 of article 16. He wondered, however, whether the word "act" was well chosen and whether it could apply, for instance, to a communication. It would in any event be superfluous to add it to paragraph 2. The wording of paragraph 2 seemed to be quite well drafted but, since he was firmly opposed to article 15, he could not agree to article 16 either.

87. Mr. BEESLEY said that, while he agreed with Mr. Eiriksson on the need to harmonize the draft articles, he too would prefer not to introduce the word "act" in paragraph 2 of article 16. He had no definite opinions on the matter, however, and would abide by the majority view. He also noted that, in article 18, deletion of the words "another individual" would make it necessary to replace the words "to establish or maintain" by "the establishment or maintenance".

88. Mr. BARSEGOV said he considered that Mr. Eiriksson's proposal should, on the contrary, apply to all the articles. The words "an act constituting . . ." seemed particularly appropriate in the legal context and could be used everywhere. That drafting problem could perhaps be solved on second reading of the draft.

89. Mr. McCAFFREY said that he supported Mr. Eiriksson's proposal but only with respect to the opening clause of each of the two draft articles. The expression "an act constituting . . ." seemed to him to be entirely appropriate, at least in English, where a declaration and a communication were also "acts".

90. He wondered, however, whether, for the sake of proper grammar, the indefinite article "a" should not be added before the word "threat", in paragraph 1 of article 16.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in view of the amendment the Commission had decided to make to paragraph 1 of article 15, he would have no objection to the proposed changes to paragraph 1 of article 16, which would then read:

> "1. An individual who as leader or organizer commits or orders the commission of an act constituting a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

92. With the deletion of the words "by another individual", paragraph 1 of article 17 would read:

> "1. An individual who as leader or organizer commits or orders the commission of an act constituting intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .]."

93. In article 18, the words "to establish or to maintain" would be replaced by "the establishment or maintenance".

94. Those three changes were the logical consequence of the changes made to article 15 and seemed perfectly acceptable to him.

95. Mr. AL-BAHARNA said that he agreed with Mr. Eiriksson's suggestion regarding article 17. If the words "by another individual" were deleted, the paragraph did not read well. It was therefore preferable to add the words "of an act constituting" after "the commission". On the other hand, it was necessary to add those words to paragraph 1 of article 16.

96. Mr. PAWLAK (Chairman of the Drafting Committee) said that such matters were, after all, a question of style, but for his own part he would prefer to add the words "an act constituting . . ." both in article 16 and in article 17 since the text would be clearer. If there was no major objection, he would therefore support Mr. Eiriksson's proposal.

97. Mr. PELLET said he did not think that an act constituting a threat of aggression could be "committed". A threat was not of itself an act. It would be more logical to say "An individual who as leader or organizer threatens to commit an act of aggression . . .". It was there that the problem arose. Admittedly, it would be difficult to change the rest of the article but an awkward turn of phrase at the outset would be unfortunate. He therefore proposed that paragraph 1 should be worded to read:

> "1. An individual who as leader or organizer threatens to commit an act of aggression or orders the commission of an act constituting a threat of aggression shall, on conviction thereof, be sentenced [to . . .]".

98. Mr. BEESLEY said that, while he understood Mr. Pellet's point of view, he appealed to him not to press his proposal. A threat of aggression should be treated as a serious matter, with grave implications, which in itself already constituted an act of aggression. He was not shocked, therefore, by the proposed wording.

99. Mr. GRAEFRATH said he too felt that Mr. Pellet's proposed changes might alter the substance of the article. He would prefer to retain the present wording.

100. Mr. RAZAFINDRALAMBO likewise urged Mr. Pellet to withdraw his proposal, which could disrupt the harmony established between article 16 and the other articles in the Code. Threat of aggression was a concept that amounted to the characterization of a crime in itself. Furthermore, paragraph 2 of the article spoke of "threat of aggression" and those words formed a whole. He would, however, prefer to retain the original wording of article 16 and not introduce the words "of an act constituting . . .", either in paragraph 1 or in paragraph 2. That would place undue emphasis on the word "act", in the

French version, which already appeared at the end of paragraph 1. Neither declarations nor communications, however, were acts.

101. Mr. EIRIKSSON said that, although he was not really in a position to analyse the precise tone of Mr. Pellet's proposal, he realized that it did pose a problem. He would remind members of the difficulties that had arisen when it had been necessary, in the provision that now formed the subject of paragraph 3 of article 3, to make a choice between the noun "attempt" and the verb "attempts". In any event, in proposing the addition of the words "of an act constituting" it was not his intention to modify the substance of the articles in question.

102. Mr. PELLET said he continued to think that a threat was not an act in itself, but since he objected in principle to article 16, in any event, he did not feel he had the right to impose his views as to the way in which it should be worded.

103. The CHAIRMAN, speaking as a member of the Commission, said that the declarations, communications and demonstrations referred to in paragraph 2 of article 16, could be regarded equally as acts of aggression and as threats of aggression.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said he considered, in the light of the discussion, that it would be best to make the fewest possible changes to article 16. He therefore proposed that the Commission should adopt the following wording for paragraph 1:

> "1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

Paragraph 2 would remain unchanged.

105. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 16 as amended by the Chairman of the Drafting Committee.

Article 16, as amended, was adopted.

106. The CHAIRMAN invited the Commission to adopt articles 17 and 18.

107. Mr. PELLET said that he was absolutely opposed to those articles.

108. Mr. CALERO RODRIGUES pointed out that the question of the words which appeared between square brackets in paragraph 2 of article 17 had still not been dealt with.

109. The CHAIRMAN suggested, in the light of those comments, that the Commission should revert to articles 17 and 18 at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2238th MEETING

Wednesday, 10 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, 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.

State responsibility (A/CN.4/440 and Add.1,[1] A/CN.4/L.456, sect. E, A/CN.4/L.467, ILC(XLIII)/Conf.Room Doc.5)

[Agenda item 2]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on State responsibility (A/CN.4/440 and Add.1).

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the chapter dealing with the regime of countermeasures was the most difficult one in the whole topic of State responsibility, even if confined to delicts. It also formed the very core of part 2 of the draft articles, which was itself central to the topic. The codification of the regime of countermeasures was characterized by two features, the first being the drastic reduction in, if not total absence of, any analogies with municipal law. Whereas it had been possible in the case of substantive consequences to draw on municipal law, when it came to instrumental consequences it was necessary to contend with an entirely different structure. The second feature was that in no other area was the lack of an adequate institutional framework for present or conceivable future regulation of State conduct so keenly felt. He was thinking, in particular, of two aspects of the sovereign equality of States—the propensity of any State to refuse to accept any higher authority, and the contrast between the equality of States in law and their inequality in fact. The self-evident nature of that remark in no way detracted from its importance.

3. Practice in the matter was abundant, but often the recourse to unilateral measures did not conform to the existing rules, still less to what was desirable in the matter of the progressive development of international law, and it was difficult at times to identify the precise content of some of the general rules. Uncertainty was manifest in the doctrine of the so-called "self-contained" regimes,

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[1] Reproduced in *Yearbook . . . 1991*, vol. II (Part One).