

Document:-
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Summary record of the 2346th meeting

Topic:
**Draft code of crimes against the peace and security of mankind (Part II)- including the
draft statute for an international criminal court**

Extract from the Yearbook of the International Law Commission:-
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63. He endorsed the idea of limiting the list of crimes covered in the draft Code to particularly serious crimes, including aggression, genocide and crimes against humanity, and he looked forward with interest to the proposals that the Special Rapporteur might make on that subject in his next report.

The meeting rose at 1 p.m

2346th MEETING

Wednesday, 1 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,² A/CN.4/460,³ A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN invited members of the Commission to consider the articles of the draft Code of Crimes against the Peace and Security of Mankind.

ARTICLES 1 TO 4

2. Mr. FOMBA said that article 1 involved a choice between an enumerative approach and a general approach to the definition. As noted in paragraph 11 of the Special Rapporteur's twelfth report (A/CN.4/460), the solution adopted in many criminal codes was to have no general definition of the concept of crime; that, however, would not be justified in the case of the draft Code of Crimes against the Peace and Security of Mankind. He therefore supported the compromise proposal put forward by Bulgaria, subject to improvements in the wording. So far as deletion of the expression "under interna-

tional law" was concerned, the question was whether the expression "crime under international law" and the expression "crime under national law" reflected two different legal realities. If so, retention of the expression "under international law" would be justified. A distinction should, however, be made between the various cases, depending on whether the same facts were treated as crimes under international law and under national law. In that connection, he would refer members to principle II of the Principles of International Law recognized in the Charter of the Tribunal and in the Judgment of the Tribunal,⁴ as well as to article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which stipulated that crimes against humanity, eviction by armed attack or occupation, inhuman acts resulting from the policy of apartheid and the crime of genocide were not subject to any statutory limitation even if such acts did not constitute a violation of the domestic law of the country in which they were committed. The new French Penal Code, which also dealt with crimes against humanity, laid down a definition that covered not only genocide but a series of other crimes, thus providing an example of a case in which a national criminal code treated as criminal the same category of acts as did international law.

3. The discussion on the relationship between international law and national law could be implicitly perceived from the standpoint of the classical debate on monism and dualism. "Crimes under international law" was a hallowed term. It appeared in principle VI of the Nürnberg Principles. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity stated in the fourth preambular paragraph that war crimes and crimes against humanity were "among the gravest crimes in international law". The Convention on the Prevention and Punishment of the Crime of Genocide spoke of "a crime under international law" and the International Convention on the Suppression and Punishment of the Crime of Apartheid spoke, in the preamble and in article 1 (1), of a "crime under international law" and of "crimes violating the principles of international law". Again, Security Council resolution 918 (1994) of 17 May 1994, concerning Rwanda, referred in the preamble to a "crime punishable under international law".

4. He agreed with the Special Rapporteur—who stated in his report that he had no objection to deletion of the words "under international law"—that the debate was purely theoretical and that once the code becomes an international instrument, the crimes defined therein would automatically come under international criminal law derived from treaties. On the whole, however, and having regard to the fact that the Special Rapporteur intended to cover only the most serious crimes—the "crimes of crimes"—and that the title of the draft should be amplified by including the humanitarian dimension, the two approaches—the general and the enumerative—were both conceivable, in his view.

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

² Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

³ *Ibid.*

⁴ Hereinafter referred to as the "Nürnberg Principles". *Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45.

5. With regard to article 2, like the Special Rapporteur, he would have no objection to deletion of the second sentence, which in substance stated no more than did principle II of the Nürnberg Principles. The first sentence of article 27 of the Vienna Convention on the Law of Treaties also contained a proposition that was equivalent to stating that legal characterizations under national law had no repercussions on legal characterizations under international law.

6. The Brazilian Government considered that there was an apparent contradiction between articles 2 and 3, since the former envisaged an act or omission whereas the latter referred only to the commission of an act. If one accepted the proposition that the commission of a crime could consist of an act or of an omission, the concern expressed by Brazil seemed to be justified. He wondered, however, whether the expression used in article 3 could not be taken to embrace the general definition of the expression "commission of a crime". It should not be forgotten, too, that an act could be active or passive.

7. The concept of attempt, in article 3, paragraph 3, was not applicable to all crimes against the peace and security of mankind. The example of a threat of aggression was based on the assumption that such a threat was itself a crime. Some members took the view that the crimes to which the concept was applicable should be determined in each individual case, but the Special Rapporteur stated in paragraph 27 of the report that such a task would be impossible and pointless. His proposed solution, therefore, was to replace the expression "crimes against the peace and security of mankind" by the words "one of the acts defined in the Code". Once those acts became *ipso facto* part of the category of crimes, however, the Special Rapporteur's solution would no longer be relevant. His own suggestion would be to make it quite clear in of article 3, paragraph 3, that criminal responsibility for an attempt to commit a crime would be established in each individual case and at the discretion of the court. The principle of criminal responsibility and punishment was a general principle that had already been laid down in such provisions as principle I of the Nürnberg Principles and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

8. The Government of the Netherlands rightly noted that the subject-matter of article 4 was already covered by article 14 and he agreed with the Special Rapporteur that, for the reasons stated in the report, the article should be deleted. The matter might be taken up again when article 14 was considered.

9. Mr. PELLET said that article 1 should lay down a general definition. In that regard the Bulgarian proposal merited serious consideration. It was apparent from the twelfth report that the Special Rapporteur also favoured that proposal subject to drafting improvements. He wondered whether the Special Rapporteur had any specific wording in mind. There should, of course, be a brief list of what were unquestionably the "crimes of crimes", but that list would vary and have to be brought up to date from time to time. His concern was that, should the Commission not set out a general definition and simply establish a list, the Code would be closed to crimes that

are at present unforeseeable, something which would be most unfortunate. A general definition was therefore virtually indispensable. In that connection, the Commission might wish to consider article 26, paragraph 2 (a), of the draft statute for an international criminal court as adopted by the Working Group at the forty-fifth session⁵ and also to reflect on the question of the link with international crimes under article 19 of part one of the draft on State responsibility.⁶

10. The observations by Costa Rica and Norway with respect to article 2 seemed to relate more to article 9, and those by Brazil more to article 3. The first and second sentences of article 2 dealt with two different concepts—the characterization of the crime, on the one hand, and the fact that it was or was not punishable, on the other. The second sentence, therefore, was not redundant, and he was not sure the Special Rapporteur had been right to be so flexible as to state that he saw no drawback in deleting that sentence.

11. The title of article 3, in the French text, should be brought into line with paragraph 1. Whereas the former used the word *sanction*, the latter spoke of *châtiment*, which to his mind had a moral rather than a legal connotation. Article 3 should also be read in conjunction with article 7, paragraph 1, of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.⁷ What article 3 lacked above all, however, was another paragraph providing that failure to prevent the commission of a crime could itself be a crime. Such a provision would meet the concern of Brazil, as expressed in its comments on article 2, and also of Norway with regard to article 12.

12. The Special Rapporteur was right that there could be no attempt to commit a threat of aggression, but it was the only example given and his remark should therefore lead to deletion of threat of aggression as a separate crime, rather than to tampering with article 3 as now drafted. For the purposes of criminal sanctions, a threat of aggression was not a separate crime from aggression proper, but that did not mean there should be no talk of attempt.

13. With regard to article 4, he thought the draft Code should indeed include an article on motives, subject to a further study of precedents. Once again, the Special Rapporteur had displayed too much flexibility. The problem involved was the very difficult one of political motives. One could not dismiss it simply by saying that it could be dealt with in the context of extenuating and aggravating circumstances, subject merely to some improvements in drafting.

14. Following a general discussion further to a proposal by Mr. PELLET, the CHAIRMAN said that, as it seemed to be the wish of the Commission he would ask

⁵ *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

⁶ *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

⁷ Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

Mr. Crawford, the Chairman of the Working Group on a draft statute for an international criminal tribunal, to give a progress report to the plenary on the work being done in the Working Group.

15. Mr. ROSENSTOCK said that it was important to establish international law as the source of the rules. Whether that was done in some form in article 1, which was more an article on scope than a definition, or in article 2, was immaterial. What did matter was to set forth the role of international law *vis-à-vis* national law and to proclaim the direct applicability of international law to individuals. The fact that the characterization of particular conduct as criminal by virtue of international law was independent of national law was also a point that seemed worth making in the text. While there were many ways in which those elements of articles 1 and 2 could be expressed, he would not wish to see the issues dealt with in those articles simply deleted. However, he did not believe that the inclusion of those elements in themselves called for a definition as such, and the Bulgarian proposal referred to in the twelfth report was not the right answer. Mr. Pellet's comments on the utility of a definition were, he thought, worth pondering.

16. Article 3 as amended by the Special Rapporteur did not give rise to any fundamental substantive problems. The question whether it was best to deal in one place and in general terms with the recognition of the various ways in which individuals could incur criminal responsibility, depending on the degree or form of their participation, was debatable. The approach adopted in the statute of the International Tribunal was a general one not unlike that used in article 3. If the Commission decided to maintain the general approach, it might consider bringing the text of article 3 into line with that of the statute of the International Tribunal. It was worth considering whether a code of crimes which was intended to be broader in scope and to apply for a far longer period should follow such an approach or whether it should strike out on the more ambitious course of defining the separate crimes. The latter approach was more typical of developed national criminal law. The caveats voiced by Mr. Tomuschat (2344th meeting) deserved very careful consideration for the reasons given and in the manner suggested by Mr. Tomuschat. Actually, it might be advisable to shelve consideration of article 3 and the related questions until a clearer idea emerged of the conduct that would eventually be defined as criminal—an idea which, he was pleased to learn, was likely to be somewhat different from that embodied in the draft adopted on first reading. Lastly, article 4 seemed unnecessary even if the drafting were improved, and he agreed with the Special Rapporteur that it should be deleted.

17. Mr. KUSUMA-ATMADJA, referring to article 1, said that he saw the usefulness of a conceptual definition, if only because it would provide the criteria for the list of crimes still to be drawn up. Article 2 should be maintained precisely because the process of establishment of an international criminal court was still at an initial stage. The first sentence of the article was quite clear, and the second sentence, which was an amplification of the first, could be further elucidated in the com-

mentary. He did not share the view that the second sentence should be deleted.

18. On balance, article 3 provided a good basis for further consideration, although, like other members, he looked forward to the new text promised by the Special Rapporteur in the twelfth report. Lastly, he endorsed the Special Rapporteur's view that article 4 should be deleted. He would add that, in many penal systems, the court did not inquire into motives, criminal law being usually concerned with intent and the implementation of intent.

19. Mr. de SARAM, after thanking the Special Rapporteur for his excellent work in an extraordinarily difficult field, stressed the fundamental importance of the group of articles under consideration. As to article 1, establishing the scope of the Code, it was important that nothing in the Code should adversely affect the network of multilateral and bilateral treaties in the field of State responsibility. As Mr. Pellet had said (2345th meeting), the distinction was not so much between crimes under international law and under national law as between crimes whose scale was such that it affected the conscience of mankind and other, less serious crimes. Without carrying the analogy too far, he wondered whether the Commission might not adopt an approach similar to that of the *jus cogens* provisions of the Vienna Convention on the Law of Treaties. In any event, he did not think that the scope of the Code could be adequately defined by a simple enumeration of crimes.

20. He did not share the view that the second sentence of article 2 was redundant, and was opposed to deleting it. The question of individual criminal responsibility, which formed the subject of articles 3 and 4, was also touched upon in articles 11 to 13, and possibly in articles 14 and 15, and he would wish to see those articles grouped together and their subject-matter dealt with somewhat along the lines of article 7 of the statute of the International Tribunal. He was not in favour of deletion of article 4, although in his view it failed to bring out sufficiently the element of underlying intent. Article 5 of the Definition of Aggression⁸ could serve as a useful model in that connection.

21. Reverting to the question of the scope of the Code, he tended to agree with the view expressed by Mr. Sreenivasa Rao (*ibid.*) that the Commission should seek to register what it regarded as the furthest point of general consensus within the United Nations on what constituted crimes against the peace and security of mankind. For his part, he hoped that in establishing a list of such crimes the Commission would go beyond the crimes of aggression and genocide and would also include the crime of reckless, deliberate devastation of the environment. A pragmatic formula somewhat along the lines of article 7 of the statute of the International Tribunal might prove helpful in that connection.

22. Mr. VILLAGRÁN KRAMER said that the compromise formula proposed by Bulgaria for article 1 and recommended by the Special Rapporteur in the twelfth report might be helpful if the Commission decided to

⁸ General Assembly resolution 3314 (XXIX), annex.

keep a conceptual definition of the crimes, but would be of little use otherwise. It was essential to accentuate the concept of gravity as one of the main parameters in defining the crimes. He agreed with the view that the distinction was not so much between crimes under international law and those under national law as between international crimes in general and international crimes of special gravity. He also associated himself with the hope expressed by Mr. de Saram that the list of crimes would be expanded, and for his own part would like it to include systematic violations of human rights as well as serious crimes against the environment.

23. The Special Rapporteur's proposals for the deletion of article 4 and of the second sentence of article 2 were acceptable, but an explanation along the lines of the second sentence of article 2 should be included in the commentary to that article. As for article 3, paragraph 3, it was extremely difficult for the court to determine whether an act did or did not constitute an attempt. The wording suggested by the Special Rapporteur in paragraph 28 of the report should certainly be taken into consideration by the Working Group. He associated himself with members who had referred to article 7 of the statute of the International Tribunal, and wondered whether elements of that statute might not be incorporated to good purpose in the draft articles under consideration.

24. Mr. GÜNEY said that he endorsed two points made by Mr. Pellet (*ibid.*), namely, that members should confine themselves as far as possible to general comments and eschew making detailed proposals that would more appropriately be discussed in the Working Group or the Drafting Committee, and that the division of the articles into groups for the purposes of the discussion had been made too hastily and was somewhat unfortunate.

25. In the case of article 1, there were two separate schools of thought, one advocating a definition by enumeration and the other a general conceptual definition. Actually, the solution should lie between the two extremes, an enumeration being followed by a conceptual definition of a general character. He shared the Special Rapporteur's view that nothing would be lost by omitting the words "under international law" from the article.

26. He agreed to the proposed deletion of the second sentence of article 2, which was redundant. With regard to article 3, paragraph 3, he noted the reservations expressed by several members and recommended that special attention be given to the comment by the Government of Belarus referred to in the report. The question as to whether an act constituted an attempt should be left to the competent court. Lastly, article 4 should be incorporated in article 14, on defences and extenuating circumstances.

27. Mr. MIKULKA said that he had no fixed opinion on whether the Commission should draft a conceptual definition in article 1, but before deciding on that question, it should clarify whether the purpose of the article was simply to define the scope or whether it was to serve as a basis for possible prosecution of a given act committed by an individual, irrespective of the exact definition in part two of the draft. If article 1 was merely to

deal with scope, it could be left as it stood, but if, as some members of the Commission felt, it was to provide for an evolutive concept, a much more detailed definition would be required. He was prepared to examine the Special Rapporteur's proposal to embark upon the drafting of a general conceptual definition. The words "under international law" must, however, be retained. The Special Rapporteur favoured a conventional basis for the draft Code, but if a reference was made to crimes under international law, certain acts of individuals could still be interpreted as being punishable under international law even if the conventional basis was not retained. He agreed with the Special Rapporteur that the crimes in part two of the draft should be confined to those that could hardly be challenged, namely crimes under customary international law. The last part of the article, "crimes against the peace and security of mankind", should be retained, pending a final decision on the title of the draft.

28. He agreed with the comment made by the Government of Austria that the second sentence of article 2 was redundant, but the first sentence must be kept, because it contained an important message. He concurred with the Special Rapporteur as far as article 3 was concerned and endorsed Mr. Pellet's (2345th meeting) position that the function of article 4 could not be reduced to aggravating and extenuating circumstances and that its subject, namely motives, was in the right place in the draft.

29. Mr. Sreenivasa RAO, referring to Mr. Pellet's suggestion that it would be useful to have a general definition in article 1, said that any such definition was bound to create difficulties with States. He had in mind, for example, the concepts of aggression and terrorism. The various treaties that existed on extradition and conventions to combat terrorism always clearly stated which offences were punishable. In the interest of achieving a consensus, he would not oppose the inclusion of the words "under international law", but an enumeration of the crimes concerned should not imply that crimes not included in the list were not to be regarded as crimes under international law.

30. Some of the basic issues in the draft statute for an international criminal court were also addressed in article 2. The fact that a characterization under internal law might be different did not affect the characterization in article 2. Perhaps that could be said more directly and simply. The Commission should avoid suggesting that there was a conflict between international and internal law. Extradition was an enlightening example in that regard: it was possible for similar conduct, irrespective of the characterization to be treated as an extraditable offence. For instance when a State requesting extradition punished a given crime by 10 years' imprisonment but the State from which extradition was requested only stipulated 5 years' imprisonment, that fact did not affect the extradition itself, as long as the components of the crime were the same. The Special Rapporteur was trying to cope with that kind of situation in article 2, but perhaps the provision required more careful treatment. On the other hand, if a given act was not punishable in one State, that State would still refuse extradition. The views of the United Kingdom of Great Britain and Northern

Ireland and Norway in that connection were very useful and might be reflected in the commentary.

31. Brazil had pointed out that the concept of omission had not been included in article 3, but the absence of such a reference was not important. Article 2 already defined the crime as an act or omission, and article 3 only spoke of the consequences of the crime, in other words, of a crime under article 2, which was necessarily an act or an omission. Hence, he disagreed with Mr. Pellet's suggestion to insert a reference to "omission" in article 3.

32. The idea in article 3, paragraph 3, could readily be incorporated in paragraph 1, because it only concerned the idea of "attempt", which could be covered in paragraph 1 by the formulation: "An individual who commits, or attempts to commit, a crime . . ." He was against trying to define the concept of attempt, and the second sentence of paragraph 3 could best be placed in the commentary. It should be left to the courts to decide whether an attempt had occurred, because there was general agreement on what attempted acts encompassed.

33. Article 4 was important, and deleting it would not solve the problem. Persons who committed crimes should not be able to argue that they had done so for political reasons and therefore should not be punished, or that their crime was political in nature. That idea must be covered by the draft. Unfortunately, article 4 missed the point. A distinction could understandably be drawn between motive and intent, but he did not understand the reference in the commentary to racism and, in particular, national hatred, as examples of motives. They were not generally cited as exceptions in other instruments. Such a reference made it likely that article 4 would be rejected. He very much disagreed that motive and extenuating circumstances were synonymous, and could therefore be dealt with under the relevant article. Extenuating circumstances were not exceptions to treating a particular course of conduct as a crime. Motive was similar to exception, but it was not the same thing. It must be made clear that the motive, especially in connection with a political offence, would be disregarded when responsibility and punishment were determined. Exception also raised another problem. Persons often cited race, religion, political opinion, sex or creed to justify their demand for special consideration when a decision was being taken on prosecution or punishment. A clear difference needed to be made between exception, motive and extenuating circumstance before those concepts could be incorporated in the draft Code.

34. Mr. RAZAFINDRALAMBO said he endorsed the draft articles as they stood, but remained open to all suggestions made since their adoption on first reading, and especially to the comments of Governments.

35. He favoured a conceptual definition, but one that was fuller than the present formulation of article 1. Such a definition was necessitated by the fact that the list of crimes would not be exhaustive. The compromise proposal by Bulgaria deserved consideration in that regard. Article 2 proclaimed the autonomy of international criminal law *vis-à-vis* internal law. The characterization of a wrongful act was essential in criminal cases. While

the second sentence elaborated on the first, it was not indispensable and he would not oppose its deletion.

36. Article 3, paragraph 3, appeared to be necessary, for it related to a classic concept of general criminal law. The Special Rapporteur proposed replacing the expression "crime against the peace and security of mankind" with the phrase "one of the acts defined in this Code", but he did not see how the change could allay the concerns of those who deemed the paragraph to be too broad in scope. Examples of "attempted" crimes had yet to be provided. He agreed with Mr. Pellet that the example given, namely, "attempted" threat of aggression, did not work because threat of aggression was not truly a crime.

37. As to article 4, on motives, a distinction was usually drawn between motive and intent, or *mens rea*, with motive not forming part of the elements making up the offence. Thus, the characterization of motive was not very useful, for it came into play only in determining the penalty applicable. Political motives normally worked to reduce the penalty normally assigned: to prevent the imposition of the death penalty, for example, in criminal justice systems where that penalty still existed. He would therefore favour the Special Rapporteur's proposal to delete article 4 and the suggestion made by some Governments that its contents be incorporated in article 14, on extenuating circumstances.

38. Mr. PAMBOU-TCHIVOUNDA said that if the purpose of article 1 was to give a definition of crimes, to set forth the objective of the Code or to define its scope, then it failed to do any of those things clearly. As now worded, it was hard to see what the article defined—as some Governments had noted in their observations. If a definition of crimes had to be included in the article, it must be general and properly buttressed. Such a definition would justify the existence of part two and might refer to the international community as the ultimate victim of an international crime.

39. Greater concordance should be established between articles 2 and 3 whereby they would both refer to crimes as being either acts or omissions and deal more clearly with attempts to commit a crime. He did not support the proposal for deletion of the second sentence of article 2, which established a norm for application of the Code and, as such, provided an additional characterization of a criminal act. Clearly, a domestic body would not make such a characterization in the same way as would an international body. The purpose of characterization in both instances was to compare an act with an established system of reference. For the purposes of the Code, however, that system had to be specified, differentiated from any others. The "act" was not a criminal act in itself, but an act rebaptized, transformed, by a certain system of law.

40. He did not favour deletion of article 4, but thought the title should be changed to "Inoperative motives". In the French version of the paragraph, the words *mobiles étrangers* should be replaced by *mobiles inopérants*. Again, the term "definition" of the crime should be replaced by "characterization". Any confusion between inoperative motives and the establishment of motives for sentencing purposes must be avoided.

41. Mr. HE said the original version of article 1 should be retained, with the words “under international law” deleted, for the reasons explained by the Special Rapporteur. He did not support the compromise formula proposed by the Government of Bulgaria for a conceptual definition, followed by a listing of international crimes. That approach did not conform to the principle of precision in criminal law. He agreed with Mr. Güney that the second sentence of article 2 should be deleted because it was redundant. Lastly, he concurred with the Special Rapporteur that article 4 could be omitted.

42. Mr. MIKULKA recalled that he had requested an answer to a specific question. He had asked those who advocated including a general conceptualized definition whether, under such a definition, an individual could be prosecuted in a criminal court. There was little use in incorporating a general definition if prosecution was to take place on the basis of the definition in part two.

43. Mr. VILLAGRÁN KRAMER said the advantage of introducing a general definition, referring specifically to the interests of the international community as the entity affected by an international crime, would be to characterize all the offences to be mentioned in the Code as international crimes. In national courts, judges examined a given act to see if it qualified as a crime under the conceptual framework established by the law. In the Latin American system, they could characterize as crimes only those that were expressly defined in the criminal code and for which penalties were expressly stipulated. The general definition of a crime therefore served the purpose, in domestic criminal codes, of guiding the court in determining whether a given, isolated act constituted a crime. That was why he favoured a broad definition outlining the characteristics of a criminal act.

44. Mr. PELLET said the question raised by Mr. Mikulka went to the heart of the Commission’s task: to determine whether international crimes could be conceptualized, imputed to individuals and penalized at the international level. He considered part one, on the legal status of particularly serious crimes, to be fundamental to the whole draft, and thought it would be senseless not to define the subject of that part. The question whether courts could use such a definition for prosecution purposes would depend on the evolution of the law—and not just of the law of treaties, for it was not solely in treaties that international crimes could be defined. It would also depend on how the draft statute for an international criminal court developed. If such a court was set up and assigned jurisdiction over crimes against the peace and security of mankind, or over other international crimes, the answer to Mr. Mikulka’s question would of course be in the affirmative.

45. The CHAIRMAN invited members’ comments on articles 5 to 7.

ARTICLES 5 TO 7

46. Mr. PELLET drew attention to an omission in the French text of article 5, where the word *pas* should be inserted between *n’excluent* and *la responsabilité*. The wording of the article in general should be recast. He did not agree with the Special Rapporteur’s view, reflected

in paragraph 46 of his report. An individual could indeed bear international responsibility, whether or not the State did so. The example of the Shining Path in Peru was often cited. Individuals were responsible for that organization’s deeds, but the Peruvian Government bore no responsibility for them.

47. He agreed with Mr. Tomuschat’s remarks (2344th meeting) concerning article 6. The wording of the various conventions and treaties in force on the subject of universal jurisdiction was quite varied, and a systematic study should be made to see what the common denominators were. In the French version of article 6 and other texts, care should be taken to use the word *cour*, not *tribunal* in reference to major international courts, except where a more general term was desired, in which case the word *jurisdiction* was best.

48. As to article 7, in indicating that non-applicability of statutory limitations was a debatable notion in respect of international crimes, the Special Rapporteur was being too easily swayed by the observations of Governments. If the Code was to deal with the most serious crimes, the article should be retained in its present wording: indisputably, statutory limitations should not apply to crimes against humanity. For crimes like mercenarism, however, which was an international crime but not a crime against humanity, a period after which statutory limitations would still apply could easily be envisaged.

49. Mr. THIAM (Special Rapporteur) confirmed that the word *cour* would replace *tribunal* throughout the French text. As to statutory limitations, they could not be applied to all the crimes envisaged in the Code as now drafted. If the Code was to cover a more limited number of crimes, statutory limitations might not apply to any of them. The issue should be resolved towards the end of the Commission’s work on the draft.

The meeting rose at 1.05 p.m.

2347th MEETING

Thursday, 2 June 1994, at 10.05 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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