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Summary record of the 2347th 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:-
1994, vol. I

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 *juridiction* 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.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*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]

Draft statute for an international criminal court[4] (*concluded*)*

1. The CHAIRMAN invited the Chairman of the Working Group on a draft statute for an international criminal court to give a brief account of the status of the work of the Working Group and to indicate whether he would be able to submit his report to the plenary on the appointed date of 24 June.

2. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group had completed a first reading of the draft statute, taking into account the comments made by the members of the Commission during plenary meetings and further suggestions made by the members of the Working Group themselves. The Working Group had five major tasks to perform. In the first place, it had to establish a workable system for the future international criminal court on the basis of the draft statute. Secondly, it had to endeavour to formulate a clearer and more transparent set of articles having regard to the criticisms made at the forty-fifth session concerning some of the provisions in the draft statute and, in particular, the jurisdictional provisions. Its third—and perhaps also its most important and most difficult—task was to place appropriate limitations on the jurisdiction of the court and on the exercise of that jurisdiction. It was a matter on which States had expressed concern during the debate on the question in the Sixth Committee (A/CN.4/457, sect. B) and which posed a problem, as only some of the crimes defined in international law instruments could fall within the jurisdiction of the court. In the end, the Working Group had come to the conclusion that, even though useful, it would not suffice to draw up a list of the crimes under general international law over which the court should have jurisdiction. The Working Group considered that it should also provide for limitations not only on its jurisdiction, but also on the exercise of that jurisdiction, apart from the limitations arising out of the consent requirements in relation to particular States. That idea had been canvassed fairly broadly in the plenary debate and it was essential to retain it if an acceptable statute was to be drafted. Fourthly, the Working Group should try to introduce a system which was complementary to the criminal justice systems of States in areas where those systems were effective. Fifthly, the Working Group should ensure coordination between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind for all the articles common to both instruments, in other words, certain basic articles such as the article which dealt with the *non bis in idem* rule. The Special Rapporteur on the topic of the draft Code had continued his cooperation with the Working Group and he for one was confident that it would be possible to achieve an identity of views with regard to the wording of those articles, whose objective, it should be remembered, was not identical, but parallel. The draft statute extended the jurisdiction of the court to crimes which were not contained in the draft Code and the Code was intended to be an instrument which could be implemented by national courts, but, in that case, independently of any statute, as well as by international courts.

3. The Working Group hoped to introduce a revised version of the draft statute after it had undergone a second reading. In the new text, the jurisdiction of the court would be more clearly defined. It was likely that a distinction would no longer be made between treaties which defined crimes as international crimes and treaties which provided only for the suppression of undesirable conduct which was a crime under national law. The so-called international crimes would be listed in a single annex. In addition, it would spell out which crimes under general international law would fall within the jurisdiction of the court, rather than leaving the matter to a general formula. The list of such crimes had not been finally determined, but it was clear that it would include aggression and genocide. There was also a proposal that the court should have *ipso jure* jurisdiction in the case of genocide. If that idea were accepted, it would be a significant move in the direction of the establishment of a genuinely international criminal court and an advance from the perspective of those members of the Commission and the Working Group who considered that, in the case of certain extremely serious crimes, the jurisdiction of the court should not be dependent on the consent of particular States. The Working Group took the view, however, that such *ipso jure* jurisdiction should not extend further than genocide. It also considered that a separate appellate chamber should be established for a period of three years. It was still working on such issues as the qualifications of judges and the relationship between the proposed court and the United Nations. As to its timetable of work, the Working Group still had four meetings for the second reading of the draft statute. He could not give a guarantee that the report would be ready, as scheduled, on 24 June, but would assure the Commission that the Working Group would do its best to abide by that deadline.

4. Mr. PELLET thanked Mr. Crawford for his report on the status of the work of the Working Group. He would appreciate it, however, if a member of the Working Group could comment whenever an article in the draft Code under consideration appeared to be in contradiction with the draft statute so that the Commission could be informed without delay of the deliberations in the Working Group. Also, he wished to thank the secretariat for preparing the table of the articles common to both drafts which had been circulated to the members of the Commission and which would certainly save it much time.

5. Mr. THIAM said he agreed that coordination was absolutely essential, since some of the articles in the

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* Resumed from the 2334th meeting.

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

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

[3] Ibid.

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

draft Code were not consistent with articles in the draft statute. He would, however, like to know how the Commission proposed to proceed in order to carry out that coordination, which would be difficult in plenary.

6. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) pointed out that the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[5] would have to be taken into account as well, and that made coordination even more necessary. In his view, however, it should be carried out first in the Working Group and then, as a final stage, in plenary.

7. The CHAIRMAN said that a meeting of the Enlarged Bureau to examine the matter was planned. He did not think that the plenary meeting was the right place to carry out such coordination, at any rate at the current stage of the work. It was a task first of all for the Special Rapporteur and the Chairmen of the Working Group and of the Drafting Committee.

Twelfth report of the Special Rapporteur (*continued*)

8. The CHAIRMAN invited the members of the Commission to resume their consideration of the articles of the draft Code of Crimes against the Peace and Security of Mankind.

Articles 5 to 7 (*concluded*)

9. Mr. KABATSI said that, although the draft Code of Crimes against the Peace and Security of Mankind limited criminal responsibility for certain crimes to the individual, the notion of State crime was to be discerned in article 5, as worded. Unlike some members, he did not think that States could commit crimes or be criminally responsible for them and, in so far as article 5 dealt with the consequences of crimes committed by agents of the State, it would be preferable to replace the word "responsibility", by the word "liability". Also, the words "attributable to it", which appeared at the end of the article, should be replaced by the words "attributable to its agents or servants" for, once again, the State was not responsible for a crime but for the consequences of a crime, committed by its agents or servants.

10. He could accept article 6 as worded. The rule of priority laid down in paragraph 2 could cause a problem, however. The State in whose territory the crime had been committed could bear a measure of responsibility for the crime itself and might not be the most appropriate to try the accused. Another State or international criminal court would be better placed to do so. The rule should therefore be applied with flexibility.

11. He also agreed with article 7. Obviously, crimes against the peace and security of mankind were very serious crimes and could therefore not be statute-barred. It would, however, be advisable to reflect further on the view of the United Kingdom of Great Britain and Northern Ireland according to which such a rule could, in certain cases, hamper reconciliation between two communities that might have been at odds in the past, or even amnesty. Otherwise, he could accept the general principle of the non-applicability of statutory limitations.

12. Mr. Sreenivasa RAO said that he understood Mr. Kabatsi's concerns with regard to article 5. A way should perhaps be found of specifying the exact nature of the responsibility of States in such circumstances, either in the commentary to the article or in the text of the article itself, as Mr. Kabatsi had suggested. That article did in fact differ from article 19 of the draft articles on State responsibility relating to international crimes.[6] It was customary to speak of the responsibility of States in the sense of their obligation to compensate or make reparation to victims of violations of international law, but it was not therefore permissible to infer the existence of the concept of "crimes of States". In that connection, he was not sure of the meaning of the last sentence of paragraph 47 of the twelfth report on the draft Code, which stated that State responsibility for the consequences of the crimes committed by certain of its agents must be determined, especially as the perpetrators of the crimes would not have the financial resources to make reparation for them. What was meant by the word "determined" (*recherchée* in French)? Did it mean that the State's own obligation to make reparation might also be limited? In the case of aggression, the State obliged to make reparation for damage caused would not necessarily have the resources fully to compensate the victims of that aggression, since it would itself have suffered countermeasures. He was in favour of limiting the compensation payable, keeping in mind the need to rebuild peace in an equitable and expeditious manner, and asked for clarification on that question.

13. He had no significant objection to raise concerning the obligation to try or extradite, which was the subject of article 6, since it was a principle well established in international treaties. He thought, however, that paragraph 2 should be drafted rather more flexibly, since its essential purpose was to give indications on the question of priority to be adopted if several States requested extradition. In his opinion, the words "shall be given" made it seem that priority had to be given to the State in which the crime had been committed. He therefore proposed that they should be replaced by the words "may be given". It must also not be forgotten that the principle of territoriality was constantly evolving where extradition was concerned and should not be treated as having absolute priority. In view of those considerations and of the marked preference expressed by the Special Rapporteur for the perpetrators of the crimes to be tried by an international criminal court, which he did not share, he thought that the wording of paragraph 2 should be made slightly more flexible, without thereby lessening the impact of the guidance it embodied.

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

[6] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

14. With regard to article 6, paragraph 3, he thought that the emphasis had wrongly been placed on the establishment of an international criminal court. The important thing, for the purposes of article 6, was that, assuming that that court existed, the obligation to try or extradite should not prejudge the court's jurisdiction. The wording of that paragraph should therefore be reviewed.

15. Referring to the observations of the United Kingdom, he drew attention to the question of purely formal trials, an important one which had already been considered by the Working Group on a draft statute for an international criminal court, and to the question of judicial guarantees, which would be considered in the context of article 8.

16. Concerning article 7 on the non-applicability of statutory limitations, several States had advocated some relaxation of that rule, in view of the practice and legislation of many States throughout the world. However, all States advocated some flexibility with regard to the length of time after which statutory limitation would apply. His own view was that, if there was to be non-applicability of statutory limitations in certain cases, it must be backed up by solid grounds. That position was based on practical considerations relating to prosecution and on the need to ensure the sound administration of justice. After a certain time-limit, prosecution might become a purely hypothetical issue which should not be exaggerated.

17. The observation by the United Kingdom in paragraph 77 of the twelfth report that "the suggested rule could hamper attempts at national reconciliation and the amnesty of crimes" was a question worthy of consideration. Given that the essential aims of drafting the Code and establishing a court were to discourage the commission of crimes against the peace and security of mankind that were a matter of concern to the international community and to punish the perpetrators in order to ensure that such acts did not recur, was it possible that, for the same reasons, namely, in the interests of peace and security, one might envisage refraining from prosecution and tempering the quest for justice? That idea appeared to be a reasonable one which should be kept in mind.

18. Mr. MIKULKA said that article 5 on the responsibility of States was a kind of saving clause. He thus agreed with its content, but considered its wording unfortunate, since it seemed to rule out the existence of any connection between the criminal responsibility of an individual and the responsibility of the State. Yet the broad consensus within the Commission as to the distinction between those two concepts should not take away from the fact that there was sometimes a connection, and indeed an overlap, between the two concepts. The Commission had recognized that certain criminal acts of individuals, as acts of agents of the State, established both their criminal responsibility and the responsibility of the State itself and that one and the same act could thus constitute both a crime within the meaning of the Code and an internationally wrongful act within the meaning of the draft articles on State responsibility.[7] Furthermore, at the preceding session, the Commission had also accepted, when adopting article 10 of the draft on State responsibility, on satisfaction,[8] that, in certain cases, in order for the reparation owed by a State to be full reparation, it must also include satisfaction. Yet, according to paragraph 2 of that article, one of the elements of satisfaction was the criminal prosecution of the individuals whose conduct had been at the origin of the internationally wrongful act of the State. Article 5 thus had a valuable place in the draft, in that it specified that the State could not exhaust the whole content of its international responsibility by prosecuting the individual who had committed the act; its wording must nevertheless be improved.

19. Concerning article 6, he endorsed the principle embodied in paragraph 1. However, paragraph 2 should be reviewed, for the priority given in the extradition process to the request of the State in whose territory the crime had been committed was not fully justified. In certain situations to which the Special Rapporteur had drawn the attention of the members of the Commission, that rule might result in priority being given to the request for extradition of a criminal to the State whose responsibility was also established by the act of the individual.

20. Article 6, paragraph 3, was another fully justified saving clause, but, in his opinion, it should be expanded to include a provision similar to that contained in article 63, paragraph 4, of the draft statute for an international criminal court. Under the terms of that provision, the surrender of an accused person to the Tribunal constituted, as between the States parties to the statute, sufficient compliance with a provision of any treaty requiring that a suspect should be tried or extradited. The introduction of such a clause would take account of the fact that the States parties to the Code would not necessarily be parties to the statute of the court.

21. He fully shared Mr. Pellet's view (2345th meeting) that article 7 on the non-applicability of statutory limitations had a place in the draft Code, on the basic assumption that the Special Rapporteur would follow up the intention expressed in the introduction to his report to limit considerably the number of crimes listed in part two, retaining only the "crimes of crimes". Any final decision on article 7 must therefore be contingent on completion of the consideration of part two.

22. Mr. FOMBA said that he supported the retention of article 5, which embodied the fundamental principle that the international criminal responsibility of the individual should not *ipso facto* exclude the international responsibility of the State for a crime. He pointed out that that principle had been enshrined in treaties, including article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. On a drafting point, he drew attention to an error to be corrected in paragraph 46 of the French version of the twelfth report: in the last sentence, the words *leurs agents* should probably read *ses agents*.

23. The principle laid down in article 6 seemed to pose no problem, but some States were concerned about how

[7] Ibid.

[8] *Yearbook . . . 1993*, vol. II (Part Two), p. 54.

it was to be implemented. As to the concern to provide guarantees to the accused person whose extradition was requested, he endorsed the suggestion that the wording adopted in the draft statute for an international criminal court should be used in the draft Code.

24. With regard to the scope of article 6 *ratione personae*, it was open to question whether the principle *aut dedere aut judicare* must be applied only to States parties or to all States. Paragraph 2 of the commentary to article 6 stated that it was established practice to set forth that principle in treaties in more or less formal terms, but the texts cited fell within the traditional framework of relations *inter partes*. Should the Code become a convention, the theoretical reply to the question would need to be assessed in the light of the relevant provisions of the Vienna Convention on the Law of Treaties and, in particular, of articles 34, 35, 38 and 43. It would thus be necessary to establish to what extent the principle *aut dedere aut judicare* had gained acceptance as a customary rule binding on States not parties to the Code. From a practical standpoint, not to concede that the scope of that principle was *erga omnes* would amount to a weakening of the system of the Code.

25. Another question often raised was that of the order of priority when there were several requests for extradition and the remarks contained in paragraph 4 of the commentary to article 6 showed how difficult it was to find a satisfactory compromise solution. The question thus warranted further consideration. In that regard, he wondered, in the light of the last sentence of paragraph 4 of the commentary to article 6, whether the Commission was going to formulate specific rules on extradition under the draft Code and, if so, in what form. Lastly, he agreed with the Special Rapporteur that, on the assumption that an international criminal court was in existence, the request for extradition by the State in whose territory the crime had been committed should not have priority over a request made by that court.

26. Referring to article 7 on the non-applicability of statutory limitations, he found the example of the new French Penal Code interesting: the first chapter of Book II of part one was devoted to the category of crimes against humanity, with genocide treated separately within that category. All those crimes were punishable by rigorous imprisonment for life and it was particularly noteworthy that article 213-5 of the French Penal Code expressly provided that the public right of action with regard to those crimes, and also the sentences passed, were not subject to statutory limitations. He supported the moral and legal philosophy of the French Penal Code, which was based on the fundamental concept of most serious crimes and on the need to draw the strictest conclusions, both legal and practical, from that concept.

27. Mr. VILLAGRÁN KRAMER said that the report presented by the Chairman of the Working Group on a draft statute for an international criminal court emphasized the Commission's preference for a code limited to the most serious crimes. The Commission was thus entering an area where caution was called for. There was no reason for some members of the Commission to be concerned about the question of compatibility between the Code and the statute: the Special Rapporteur would ensure that the two were compatible. It might be more difficult to ensure harmony between the Code and the draft articles on State responsibility and it was from that point of view that article 5 should be considered. However, if the Commission decided to limit the Code to the most serious crimes and not to include the other crimes, the rule enunciated in article 5 would become unnecessary because it was simply a rule of international law. He nevertheless wondered whether introducing the concept of gravity did not lead logically to incorporating in the Code the concepts of aggravated responsibility and aggravating circumstances. Thus, with regard to the *non bis in idem* rule, he considered that *res judicata* admitted of some exceptions, in particular where new facts came to light of which the first judges had not been aware. As the Working Group had noted, rules of revision must be provided for in conjunction with the *non bis in idem* rule.

28. The gravity of the acts included in the Code might also give rise to legal consequences in other areas, such as that of extradition.

29. In respect of article 7, he agreed with Mr. Sreenivasa Rao that the non-applicability of statutory limitations should not be absolute, but that the Commission should take a clear stand on that matter.

30. In terms of judicial guarantees, which would be treated more extensively in the context of the next group of articles, a basic distinction must be made between the substantive rules to be incorporated in the Code and the procedural rules to be reserved for the statute of the court. He stressed that the Code would be applied as an international convention by the court, which would at the same time apply certain international treaties defining the crimes. Consequently, the general section of the Code would have to provide the court with substantive rules for general application.

31. Mr. IDRIS, referring back to article 1, said that, while there was clearly agreement on the criterion of gravity, the text did not make it clear whether reference was being made to the nature of the act or to its consequences. He was, moreover, unquestionably opposed to the use of the expression "under international law" simply because it might lead to interpretations introducing the idea of the criminal responsibility of States, on which the Commission was still divided. The expression was all the more unnecessary in that it neither confirmed nor invalidated any rule of general international law governing crimes against the peace and security of mankind. The principle of autonomy embodied in article 2 would have been more suitably placed in the framework of the definition or in the chapter on general principles, in which case article 2 would be deleted.

32. With regard to the articles currently under consideration, he noted that article 5 had to be viewed in relation to article 3 and that criminal responsibility for crimes against the peace and security of mankind was limited to individuals, without prejudice to the international obligations of States under international law. The proposed text created a direct and automatic link between the two levels—the individual and the State—and that might, once again, introduce the idea of the criminal responsibility of States. The phrase "does not

relieve a State of any responsibility under international law" should be reviewed carefully by the Commission or by the Drafting Committee. As to guarantees for the accused whose extradition was being requested (art. 6), the Commission should take advantage of the rich debate on that issue that had been held by the Working Group on a draft statute for an international criminal court. The *non bis in idem* rule should apply only to the States parties to the Code. The rule set forth in article 7 was clearly not applicable to all of the crimes included in the Code and the article should be deleted.

33. Mr. ROSENSTOCK said that his proposal that article 4 should be deleted certainly did not mean that he did not consider it important to exclude the exception for political acts in that context. Article 5 on matters of substance was right on point and also had the merit of showing that the concept of State crimes could only be harmful to the Commission's work on the Code and to the Code itself. Moreover, article 5 and the commentary thereto were certainly not the place for a debate on the scope of the financial responsibilities of States or even on the concepts of responsibility and aggravated responsibility.

34. Article 6 was one of the provisions which would need to be re-examined once the Commission had made more progress on the draft statute for an international criminal court. Giving priority to the request of the State in whose territory the crime had been committed was not always justified. In addition, several observations made by the Special Rapporteur, in his report seemed to be lacking in subtlety. It was possible, for instance, that, in many cases, recourse to national courts would be preferable. Mr. Tomuschat's proposal (2344th meeting) in that regard deserved careful consideration. Article 7 should also be reviewed, taking account of Mr. Sreenivasa Rao's observations, in the light of the second part of the text.

35. Mr. HE said that article 5 definitely belonged in the draft Code because it was necessary to include a provision stipulating that the prosecution of an individual did not relieve the State of responsibility to provide reparation for the damage caused. Article 6 introduced a very important and well-established principle (*aut dedere aut judicare*), but the third paragraph raised the problem of the application of that principle once the international criminal court had been established. The priority accorded to the court was stipulated in the commentary, but not in the article itself. A clear provision in that regard could be found in article 63, paragraph 5, of the draft statute. It was therefore important to include an analogous provision in the Code itself and not in the commentary because there would not necessarily be perfect agreement between the States parties to the statute and the States parties to the Code. The non-applicability of statutory limitations provided for in article 7 could, of course, apply only to the most serious crimes included in the Code and, consequently, the examination of that article should be deferred until consideration of part two of the draft.

36. Mr. CALERO RODRIGUES said he hoped that the Special Rapporteur would be able to provide a new version of article 6 before it was considered by the Drafting Committee. That article was in need of updating. Paragraph 1 referred to trying or extradition, whereas it should include the option of recourse to an international criminal court, which was not the same as extradition. Extradition was a matter between two sovereign and equal States, while referral to an international criminal court involved a supranational element. It should also be indicated clearly that the international criminal court would have priority, since the idea that in some cases a national court would be better suited to try crimes under the Code was unacceptable. As for the preference being given to the extradition request of the State in whose territory the crime had been committed, that rule should not be absolute and, consequently, the proposed wording—"special consideration shall be given"—was more than adequate. It was not an absolute priority, quite the contrary. The Special Rapporteur would obviously need to draft a new version of paragraph 3 before the text was considered by the Drafting Committee.

37. Article 5 was entirely satisfactory in that it did not refer to any particular type of State responsibility under international law. If the concept of criminal responsibility of States was admitted, it would be covered; otherwise, what was meant would be simply the usual responsibility to provide reparation. As to the non-applicability of statutory limitations (art. 7), the gravity of the crimes included in the Code was such that the principle adopted with reference to crimes against mankind could be applicable to all crimes included in the Code. From a strictly legal point of view, that was the correct position and there would be no statutory limitation. At the same time, a concern for maintaining domestic and international peace and a desire for reconciliation might be reasons to derogate from that principle, although there was some risk involved. The compromise solution proposed by Paraguay and Turkey—that there should not be a general rule of non-applicability and that the statute of limitations would enter into force only after a sufficiently long period—might be worth considering.

38. Mr. THIAM (Special Rapporteur), referring to article 6, paragraph 3, said that, at the time the Commission had begun drafting the Code, there had been a general feeling of pessimism about the establishment of an international criminal court. As the situation had clearly changed, he was more than willing to prepare a draft article which would replace paragraph 3, especially since it was already indicated in the commentary that, where such a court existed, its requests would have priority over other requests.

39. Mr. GÜNEY said that the Special Rapporteur was right to want to provide a legal basis in article 5 for proceedings to obtain compensation brought by victims of criminal acts committed by agents of the State, but the view he expressed in paragraph 46 of his report did not adequately reflect the realities of the debate and the divisions within the Commission on the question of the responsibility of States. Article 5 might be placed in square brackets until the Commission could decide on it in full knowledge of the facts. Article 6, the principle of which was already embodied in many conventions, failed as it stood to deal with sufficient evidence and the order of priority in the event of more than one request

for extradition. Those two gaps had to be filled so that priority would be given to the State in whose territory the crime had been committed, perhaps by introducing a common denominator which would make it possible to establish universal jurisdiction in that regard.

40. Since no statutory limitation applied to the conscience of mankind, as Mr. Pellet had said (2345th meeting), no such limitation applied to the "crimes of crimes" either. Nevertheless, statutory limitations should apply only to the most serious crimes and should not be absolute, but subject to a sufficiently long time-limit. The judicial guarantees provided for under the draft Code corresponded to the minimum standard necessary for a fair trial, and that was the goal.

41. Mr. de SARAM said that the discussion relating to article 6, both in the Commission and in the Working Group on a draft statute for an international criminal court, clearly showed that coordination was needed in that area. The concerns that had led to the drafting of article 5 were understandable, but it was not necessarily appropriate to get into the difficult area of State responsibility in that way. If there was agreement that the prosecution, sentencing and punishment of a person who had committed a crime under the Code did not in any way affect the responsibility of the State, such an interpretation, like that relating to the scope of the Code, might be included in a preamble rather than in the commentary.

42. Article 7 dealt with a question that basically had to be decided by Governments in view of the various elements that they had to take into account when making general policy decisions. The fact that fewer than 30 States had ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity clearly showed that Governments were hardly inclined to accept provisions regulating in advance and in a standard manner issues which were basically part of their general policy. The Special Rapporteur was therefore perfectly right in believing that that article had no place in the draft Code.

43. Mr. RAZAFINDRALAMBO said that article 5 was necessary because it set forth a principle well known in internal law, that of the State's civil responsibility for offences committed by its agents. The provision was without prejudice to the question of the possible criminal responsibility of the State, left in abeyance for the moment.

44. Article 6 raised the problem of priority among several requests for extradition. He agreed with the comments made by the Government of the United Kingdom of Great Britain and Northern Ireland that priority should be given to the State in whose territory the crime had been committed. So far as extradition was concerned, it might perhaps be appropriate to provide a guarantee based on the rule of speciality of the same kind as that set forth in article 64 of the draft statute for an international criminal court. However, since article 6, unlike article 64 of the draft statute, was expressly concerned with extradition, the rule of speciality should perhaps apply automatically without having to be referred to in the text.

45. Article 7 stated the rule of the non-applicability of statutory limitations, which should apply only to the most serious crimes or, to put it differently, to the "crimes of crimes". The article would therefore have to be reviewed in the light of the final decision on what crimes the Code was to cover. In order to meet the concerns of certain Governments, such as that of the United Kingdom, which wanted to safeguard the possibility of national reconciliation and amnesty, it should be provided, for humanitarian reasons and as envisaged in article 67 of the draft statute, that a convicted person might be eligible for pardon, parole or commutation of sentence, even in the case of the most serious crimes, including crimes to which statutory limitations did not apply.

ARTICLES 8 TO 10

46. Mr. Sreenivasa RAO said that articles 8 to 10, simple and unquestionable as they were, nevertheless raised some major problems. The principles they set forth were highly important, but the application of those principles around the world was subject to subtle variations which ought to be taken into account. In that sense, he regretted that the report under consideration was not more substantial.

47. Article 8 (Judicial guarantees) represented a bare minimum and should include the full range of generally recognized principles, arranged by categories, as established in international or regional instruments which were themselves based on national systems. He wondered whether the rule of speciality should not appear in article 8 or elsewhere.

48. Article 9 (*Non bis in idem*) embodied a fundamental principle of natural law and in so doing raised some serious issues which fall into three categories: would or should trial in one court prevent trial in other courts; was or was not a trial in a national court a bar to trial on the international level; and in what cases was a trial a fake one?

49. Answers to those questions were not easy to find and the solutions proposed in paragraphs 3 and 4 of the article adopted on first reading had elicited comments by Governments which revealed differences of views that seemed well-nigh irreconcilable. The Special Rapporteur's hesitations as evidenced by paragraph 102 of the report clearly showed the complexity of the issue. The Special Rapporteur was categorical only in saying that a national court was not competent to hear a case already tried by the international criminal court. He shared that view, not so much because allowing a national court to hear such a case would destroy the authority of the international criminal court, as the Special Rapporteur argued, as because he considered it desirable to encourage and consolidate the possibility of establishing an international criminal court. In any case, courts at the national level would continue to exercise their jurisdiction until the international criminal court had become fully recognized and credible.

50. The new text proposed by the Special Rapporteur, which was modelled on article 10 of the statute of the

International Tribunal[9] did not solve the problem in itself because the reference to ordinary crimes and fake trials raised some real questions. In his view, the reference to ordinary crimes was connected with the characterization of conduct as a crime under internal law, as opposed to the international characterization of conduct as a crime. It was a fact, for example, that genocide could not be treated on the same basis as homicide as perceived in internal law. The characterization of conduct under internal law could not be an obstacle to prosecution at the international level. Consequently, the *non bis in idem* principle could not be invoked. Contrary to what the Special Rapporteur thought, the problem was not so much one of incorrect characterization of the crime, but, rather, one of the difference of category between crimes tried at the national level and those to be tried at the international level.

51. The problem of fake trials was a real one and it could not be solved by encouraging a multiplicity of trials. In any event, a second trial was only a theoretical possibility unless it took the form of a trial *in absentia* which was contrary to the concept of respect for the rights of the accused. The principle of retrials should in any case be closely analysed with proper respect for all legal systems, laws and regulations, as well as ideas of justice irrespective of the cultural, religious and social backgrounds they represented.

52. Article 9, paragraph 2, adopted on first reading, which placed emphasis on the enforcement of the penalty, suggested that imprisonment was the only valid punishment. In many countries, alternative punishments could take the form of community work. While he did not know whether such a penalty could be imposed in the context of serious crimes, he thought that the question of the enforcement of penalties required careful consideration.

53. Article 10 (Non-retroactivity) was directly related to the question of which court, national or international, would try the accused. If the Code was deemed to cover crimes recognized as such by a treaty to be brought into force, article 10, paragraph 1, was relevant and paragraph 2 would no longer have a place. The principle would be justified and treated as final if the jurisdiction for such crimes was limited to the international criminal court to be established. However, if States preferred the Code to be applied by their own courts, it might be difficult to prevent them from prosecuting if they could declare themselves to be competent under the circumstances listed in article 10, paragraph 2. His own preference would be for dropping paragraph 1 and maintaining paragraph 2, but article 10 could also be dropped altogether.

54. Mr. VILLAGRÁN KRAMER said that he wished to revert to the question of the *non bis in idem* principle or the *res judicata* rule because the Special Rapporteur had put forward two broad working hypotheses: the establishment of an international criminal court or the exclusive jurisdiction of national courts.

55. The *res judicata* rule could be absolute or relative. It was absolute in systems where the possibility of a retrial was limited to a few clearly defined cases. In Anglo-Saxon law, for example, the principle of double jeopardy was strictly applied and sacred.

56. The rule was relative when it authorized a retrial in cases where the higher interests of justice so required, where new facts favourable to the convicted person came to light and where the court which had tried the case had failed to show impartiality or independence. In the event of a retrial, the period already served was taken into account. The new proceedings could be transferred to another national court or to an international court and it was on that last hypothesis that the Commission was working.

57. Noting that the Working Group on a draft statute for an international criminal court was considering an article concerning the revision of a judgement in the event of new facts coming to the court's notice, he said that a distinction should be drawn between such an eventuality and the above-mentioned working hypothesis of the Commission. The statute of the International Tribunal clearly illustrated the *non bis in idem* principle taken in a relative perspective by envisaging the hypothesis of a national court not characterizing the offence as an international crime in accordance with international criteria, but applying criteria of a strictly internal character.

58. With regard to article 10, he said that he viewed the concept of non-retroactivity differently from the Special Rapporteur, namely, from the normative point of view: the absence of legal effect of a rule or of its consequences or its exceptions, except that of benefiting the accused person. In other words, the law could have no retroactive effect except when it benefited the accused person.

59. Lastly, he said that a balance should be maintained between the judicial guarantees offered to the accused and the security of the international community.

The meeting rose at 1 p.m.

2348th MEETING

Thursday, 2 June 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

[9] See footnote 5 above.