Document:-
A/CN.4/SR.2356

Summary record of the 2356th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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treated in the same way, since the latter might require a special regime.

68. Lastly, he wondered what purpose the resolution might serve. There were a number of general principles of international law applicable in the matter, as established, for example, in the *Lake Lanoux*[5] and *Corfu Channel*[6] cases, which had a bearing on the issue under consideration. The ambiguity of paragraph 1 did not make it possible to answer the question whether the Commission wished to go beyond the regime embodied in those principles.

69. The CHAIRMAN pointed out that the wording of the draft resolution allowed for some flexibility, thanks to expressions such as "to be guided" and "where appropriate" in paragraph 2.

70. Mr. ROSENSTOCK (Special Rapporteur) said he thought that the text did indeed allow some flexibility and that it was not wise to limit the applicable principles to those listed in article 5 of the draft articles. In that regard, the Drafting Committee had discussed the following principles and practices: entering into agreements with other States in which the confined transboundary groundwater was located; respect for the entitlement of all other States in which the water was located to participate in the negotiation of and become a party to any agreement which might affect the use or enjoyment of the water; utilization of the water in an equitable and reasonable manner; respect for the rights of all States in which part of the water was located to participate in its use in a reasonable manner in accordance with the general obligation to cooperate; exercise of due diligence with regard to utilization of the water so as not to cause significant harm to other States in which part of the water was located; cooperation with other States in whose territory the water was located to obtain optimal utilization and adequate protection thereof and consultation concerning management of the water; exchange of data and information on a regular basis and in response to requests; protection and preservation of the ecosystem of the water; prevention, reduction and control of pollution of the water; and protection and preservation of the natural environment. No members of the Drafting Committee had raised objections to any of those principles and practices; nor could they logically have done so.

71. After debating whether that list was exhaustive or whether there were other principles and practices, the Drafting Committee had decided that it would be better to confine itself to a general reference. It had identified no principle applicable solely to unrelated confined groundwater and it had not considered that some of the above-mentioned principles were not applicable thereto. Lastly, it had found nothing to support the view that a distinction must be made, in respect of the application of such general principles, between non-renewable and renewable confined groundwater.

72. Given the generally flexible character of the text under consideration and the nature of the principles contained in the draft articles and of the above-mentioned principles, it would be strange and disturbing if the Commission did not go at least as far as the Drafting Committee was requesting it to go. Personally, he, like other members of the Commission, would have liked to go further.

The meeting rose at 1.05 p.m.

2356th MEETING

Friday, 24 June 1994, at 10.05 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, 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. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,[1] A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

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

1. Mr. PAMBOU-TCHIVOUNDA said that, in the last preambular paragraph of the draft resolution adopted by the Drafting Committee (A/CN.4/L.492/Add.1), the Commission recognized the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater. Important issues were involved. Was it enough simply to "recognize" that need? Was the Commission expecting some action on the part of the General Assembly? In what context, and to what extent, were such efforts to be continued? The paragraph was by no means negligible, nor was it merely an afterthought. Its contents should therefore also be reflected in the operative part.

2. Mr. GÜNEY said that the draft resolution was the only text on which the Drafting Committee had been unable to reach consensus in the course of the second

[5] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

[6] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

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

reading, and on which it had therefore been obliged to hold a vote. Under the terms of the decision reflected in the summary record of the 2339th meeting,[2] the Drafting Committee was simply to submit suggestions on how the Commission should proceed if it decided to deal with unrelated confined groundwaters in the draft articles. The subject was undoubtedly an important one, but had come to prominence only relatively recently. Furthermore, State practice in that regard was still evolving, and technical data and information on the question were lacking. As an indispensable prerequisite to any future initiative in that regard, the Commission must, pursuant to article 16, subparagraph (*c*) of its statute, first obtain data and information by addressing a questionnaire to Governments. An in-depth study on the subject was a *sine qua non*, even if it were to take the very general form of a resolution on the subject.

3. The draft resolution presented as a so-called compromise did not meet those conditions. Nor did it reflect the realities of the debates in plenary or the general opinion that had emerged from those debates, since it expressed the view that the principles stemming from a study of the law of the non-navigational uses of watercourses might be applied to transboundary confined groundwater. At the current stage in the proceedings, such a conclusion was premature. The aim of the draft articles was simply to establish a framework convention on the non-navigational uses of international watercourses. It was not even clear to what extent the draft articles would be adopted by States, still less when they would enter into force. The Commission should have ensured that it took no action that might prejudge future developments. An in-depth study of the question of confined groundwater, conducted in accordance with the Commission's established practice, would provide a basis for any subsequent efforts to draft rules on the subject, and would determine whether there were similarities between the principles that had emerged from the study of the non-navigational uses of international watercourses and those applicable to unrelated confined groundwater.

4. In view of the fact that the amendment he had proposed to the Drafting Committee as a final attempt to achieve consensus—by adding the words "following an in-depth study" at the end of paragraph 1—had not been accepted, he was regretfully compelled to oppose the draft resolution and, in the event of a vote, would vote against its adoption.

5. Mr. THIAM, referring to operative paragraph 1, said he would again like to have clarification as to what specific principles contained in the draft articles could also be applied to transboundary confined groundwater. Many of the draft articles set forth principles, and there were no clear boundaries between rules and principles. He himself had always maintained that confined groundwater should be the subject of a separate study.

6. Mr. BENNOUNA asked whether the text before the Commission was in fact a draft resolution of the Commission or a draft recommendation addressed to the Sixth Committee. He wondered whether, in the light of the comments made by Mr. Thiam and others, the contents would not be more appropriately reflected in the Commission's report, an approach that would avoid the controversial issue of a draft resolution.

7. Mr. ROSENSTOCK (Special Rapporteur) said that, with regard to the procedure, the draft resolution had been brought before the plenary body with the recommendation of the Drafting Committee and with one dissenting voice. It was a recommendation for a resolution to be adopted by the Commission and forwarded, along with the draft articles, to the General Assembly for such use as the Assembly deemed appropriate.

8. With regard to the question raised by Mr. Thiam concerning what specific principles could be applied (2355th meeting), he (the Special Rapporteur) had read out a long list of principles that were inescapably part of the draft that had now been approved and thus applicable, namely, entering into agreements with other States in which the watercourse was located; respect for the entitlement of all other States in which the watercourse was located to participate in the negotiation of and become party to any agreement which might affect its use or enjoyment thereof; utilization of the watercourse in an equitable and reasonable manner; respect for the rights of all States in which part of the watercourse was located to participate in its use; cooperation with other States in whose territory the watercourse was located to obtain optimal utilization and adequate protection; due diligence with regard to preserving the quantity and quality of the water; protection and preservation of the watercourse ecosystem; exchange of data and information; prevention, reduction and control of pollution of the water; and protection and preservation of the natural environment. All those principles were central to the draft just approved and, in the view of the Drafting Committee, they also applied to unrelated confined groundwater. The only reason why those principles had not been listed in the report of the Drafting Committee was that there had been some disagreement as to whether there might be other, additional matters that should be expressly described.

9. Mr. SZEKELY, referring to the question put by Mr. Pambou-Tchivounda, said there had been differences of opinion in the Drafting Committee about the extent of future efforts to elaborate rules pertaining to confined transboundary groundwater. As a compromise, it had been decided to leave that question open, and simply to recognize that there was a need for continuing efforts in that regard. How, and in what forums, those efforts were to be made, was an issue that the text of the draft resolution did not prejudge. All options were left open, with a view to continuing those efforts in the most appropriate forum and in the light of the interest expressed by States.

10. Mr. ROBINSON said the problem was that not only the uninitiated, but also those who had some familiarity with the subject matter, might believe that the reference in the resolution to "principles" was confined to part two of the draft articles, which was headed "General principles". That confusion could be avoided by finding a formulation that made it absolutely clear that those principles were to be extracted from the draft arti-

[2] See 2339th meeting, para. 65.

cles as a whole, and not just from part two. The difficulty might be solved by replacing the words "said principles" in paragraph 2 by "provisions of the draft articles"—qualified, as before, by the words "where appropriate". Of course, not all those provisions would be appropriate: perhaps those on dispute settlement would be inappropriate. That would be a matter for States to determine.

11. Another approach might be to speak of "principles and practices". Furthermore, paragraph 1 might not in fact be necessary: the operative part of the resolution could well begin with the existing paragraph 2, with the amended wording he had just proposed. In any case, the more fundamental procedural issue raised by Mr. Güney must also be resolved by the Commission at some point.

12. Mr. de SARAM said that, during the discussion in plenary of the question of confined groundwater, there had been general agreement that confined groundwater was of great significance to countries. There had been uncertainty as to their developmental possibilities; but it had also been recognized that the matter was important in the context of global water scarcity. The issue had then been taken up by the Drafting Committee, in which, after much discussion, the draft resolution had been adopted with one dissenting vote. In his view, the draft resolution did reflect the recognition that confined groundwater was important, that the draft articles on the law of the non-navigational uses of watercourses might have very substantial relevance, and that the subject of confined groundwater should continue to be studied.

13. He also approved of the format of the draft resolution. The format was unusual, but the Commission was dealing with an unusual question, and one of great importance. In his opinion, it was a fair and successful attempt to express the Commission's concerns. Any attempt to debate all of the points raised—some of them very valid technical points—would take a great deal of time and would unravel a careful compromise.

14. Mr. KABATSI said that he supported the draft resolution as a compromise following much discussion in the Drafting Committee. He was one of many who had felt that it was not prudent to treat the subject of confined groundwater on the same plane as surface and related transboundary watercourses—a matter about which so much more was known. Furthermore, many members held the view that a wider, in-depth study was required if such a combined exercise was to be undertaken with confidence. At the same time, there was no denying that confined transboundary groundwater was of such vital importance, both now and in the future, that the Commission could not afford to ignore the question and consign it to a legal void. The Commission must at least provide guidelines that could be used by States in dealing peacefully with one another in utilizing a crucial resource.

15. Principles such as reasonable and equitable use, protection, preservation and management, the need for consultations, and where necessary negotiations, and exchange of data and information, could not but be relevant and applicable. The draft resolution drew the attention of States to them. It did not say that all the principles were in fact applicable, or appropriate in all cases. It was a flexible document, but not so much as to be devoid of value.

16. The draft resolution did not spell out principles: in his view, rightly so. It was left to States to determine what principles in the draft articles were applicable and appropriate. Nor was the question of further study omitted. Mention had also been made of the confusion that might arise as a result of the fact that the resolution was drafted in such a way that it might refer to some principles and not to others. Yet operative paragraph 1 referred to "principles", and not to "general principles"; while paragraph 2 went on to refer to "the said principles". Paragraphs 1 and 2 were complementary and both of them should therefore be retained. Any potential confusion could be dealt with in the commentary, in which it could be specified that the principles were to be found in the body of the draft articles, and that States were at liberty to select what was relevant and appropriate for the resolution of their disputes. He therefore commended the draft resolution to the Commission as a minimum formulation.

17. Mr. HE said he agreed that further study was needed on the increasingly important matter of confined groundwater, a natural resource which was of vital importance for sustaining life. At the same time, abundant research findings already existed and the Commission could not ignore the trend towards integrated management of all water resources, especially since the environment and ecosystems had become key international issues. Many of the principles set out in the draft articles on international watercourses could apply equally to confined groundwater. It was, therefore, appropriate for the Commission to adopt a resolution on the matter, in conjunction with its adoption of the draft articles on international watercourses. The draft resolution was flexible and States were under no obligation to accept it.

18. Mr. FOMBA said that he was one of the few members of the Commission who had supported the Special Rapporteur's proposal to include confined groundwater in the draft articles. That approach would have provided for parallel application of the same rules both to watercourses *stricto sensu*, and to confined groundwater. Furthermore, that was the logic behind the elaboration of the draft resolution. While it might be premature to take such a stand in the absence of solid scientific proof, he nevertheless remained convinced that many of the principles and rules set forth in the draft articles were equally applicable to unrelated confined groundwater.

19. The draft resolution constituted an acceptable approach to the issue. It was flexible and did not preclude the possibility of carrying out a comprehensive study on confined groundwater or of elaborating more detailed legal rules at a later time. Admittedly, the word "principles", in operative paragraph 1, might be misinterpreted to refer exclusively to those principles included in part two (General principles) of the draft articles. However, since it was not vital to distinguish between general principles and rules and since it was clear that legal principles were not confined to part two of the draft articles, he saw no need to alter the wording of paragraph 1. The competent authorities of the States concerned were free, on the basis of the rule of speciality, to

identify *mutatis mutandis* the principles or rules contained in the draft articles that might apply in a particular case.

20. Mr. Sreenivasa RAO said he welcomed that fact that the draft resolution was broadly worded and took in the form of a recommendation. The Commission, despite its desire to do so, had not, because of time constraints, been able to carry out a comprehensive study on transboundary confined groundwater which it had deemed essential for the elaboration of a set of draft articles parallel to those relating to international watercourses. The alternative was the draft resolution before the Commission, a solution which had already found support within the Commission and did not preclude a more thorough investigation of the subject in the future, which was in fact desirable.

21. Further discussion on the wording of the draft resolution, which was the result of careful compromises hammered out in the Drafting Committee, would not be productive and might weaken the impact of the resolution. He therefore urged the Commission to adopt it without further delay.

22. Mr. MAHIOU said that he endorsed Mr. Sreenivasa Rao's views.

23. Mr. GÜNEY said that, contrary to what had been said, the members of the Drafting Committee had not, owing to time constraints, discussed at length the way in which the principles contained in the draft articles might be applicable to confined groundwater. They had discussed neither the scope nor the nature, nor the legal aspects of that matter and they had not reached any agreement on which specific principles might be applicable. It was unfortunate that the entire question had been treated with such haste. In that connection, the proposal made by Mr. Robinson merited the Commission's consideration.

24. Mr. BENNOUNA said that the words "Expresses its view" in paragraph 1 should be replaced by "Considering" and that the paragraph, so altered, should form the last paragraph of the preamble.

25. Mr. THIAM and Mr. PAMBOU-TCHIVOUNDA endorsed Mr. Bennouna's proposal.

26. Mr. ROSENSTOCK (Special Rapporteur) said that it might be a good idea for the Chairman to ask the members whether they found Mr. Bennouna's proposal acceptable, so that the Commission could move on to other matters.

27. The CHAIRMAN referred members to the appropriate part of the report of the Chairman of the Drafting Committee, which set out the Committee's rationale for deciding to elaborate on the draft resolution. The report also indicated that operative paragraph 4 had given rise to reservations and that one member of the Committee had objected to the entire text.

28. While objections to the entire text had also been raised in plenary, there was none the less very little support for an approach that did not deal with the text as a whole. He therefore urged the Commission to consider the draft resolution as a whole.

29. Mr. THIAM said that he supported the amendment proposed by Mr. Bennouna. It might also be appropriate to replace the words "may be applied" in paragraph 1, by "might be applied".

30. Mr. FOMBA said he endorsed Mr. Thiam's proposal. While he was not in favour of transferring paragraph 1 to the preamble, he would accept that amendment in a spirit of compromise.

31. Mr. ROSENSTOCK (Special Rapporteur) said that he would urge the Commission to take immediate action on the amendment.

32. Mr. GÜNEY said that he endorsed the amendments proposed by Mr. Bennouna and Mr. Thiam.

33. Mr. ROSENSTOCK (Special Rapporteur) said that the only formal amendment before the Commission was the one proposed by Mr. Bennouna.

34. Mr. TOMUSCHAT said that, if paragraph 1 were to be moved to the preamble, then what was now paragraph 2 would have to be redrafted: the words "said principles" would have to be replaced by "the principles contained in its draft articles on the law of the non-navigational uses of watercourses".

35. Mr. VILLAGRÁN KRAMER said that he would, with reluctance, accept the proposed amendment.

36. Mr. MAHIOU said that he supported the amendment proposed by Mr. Bennouna. However, he was not convinced of the need for any further drafting changes in paragraph 1.

37. Mr. AL-KHASAWNEH said that he had already expressed his reservations (2355th meeting).

38. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt by consensus the draft resolution, as amended by Mr. Bennouna.

The draft resolution, as amended, was adopted.

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING (*continued*)

39. The CHAIRMAN invited members to comment on the draft articles and on the resolution, if they so wished.

40. Mr. VILLAGRÁN KRAMER said that the topic of the law of the non-navigational uses of international watercourses was closely related both to State responsibility for internationally wrongful acts and to international liability for injurious consequences arising out of acts not prohibited by international law. Although some members might not agree, he would even maintain that the topic was linked to the so-called theory of the improper exercise of a right (*abus de droit*).

41. It was important not to forget that States did not accept and would not accept any proposal by the Commission to the effect that strict liability was applicable in respect of harm, significant or not. The only relevant precedent in the area of strict liability was the Convention on International Liability for Damage caused by

Space Objects. However, with regard to the non-navigational uses of watercourses, there was no precedent for applying the theory of strict liability.

42. As to due diligence, he would point out that it was not a rigid concept, but could be adapted to particular circumstances. For instance, the obligation to exercise due diligence in a case involving the construction of a hydroelectric dam was not the same as that in a case involving imminent harm to an international watercourse. In view of the reservations that had been expressed on the subject, he wished to remind members that due diligence constituted the legal basis for the resolution that they had just adopted.

43. Mr. YAMADA said that the draft articles represented the first concrete results that the Commission would be submitting to the General Assembly during the current quinquennium. The articles appropriately reflected modern trends in international law, such as the principle of equitable and reasonable utilization, consultations and negotiations concerning planned measures, and the obligation to protect and preserve ecosystems. They thus combined in a well-balanced manner the codification of existing rules and the progressive development of international law.

44. The principles set forth in the draft articles might well form the basis for the elaboration of international rules applicable to unrelated confined groundwater. However, the Commission was right to exclude such rules from the scope of the present set of draft articles.

45. The CHAIRMAN, speaking as a member of the Commission, said that he wished to refer to a number of linguistic difficulties which might lead to differing interpretations of the draft articles. First, although the Special Rapporteur and the Chairman of the Drafting Committee had stressed that the replacement of "appreciable" by "significant" in article 7 did not mean a higher threshold of harm, the new term used in Russian did in fact imply such a higher threshold. He understood that a similar difficulty arose in some of the other official languages. Secondly, the English text now used "groundwaters" instead of "underground water" in the definition in article 2, subparagraph (*b*), and elsewhere. It must be made clear that the change did not amount to the introduction of a new concept and that the original term could be used in the other languages. Thirdly, the Russian translation of "flowing into a common terminus" in article 2, subparagraph (*b*), was ambiguous and would have to be changed.

46. He also wished to make a general point about article 32 (Non-discrimination). Since most members of the Drafting Committee and the Commission had not objected to the article, he too had decided not to raise a formal objection, although, like Mr. Sreenivasa Rao (2355th meeting), he had doubts about the article. It was in fact wrong to include a provision granting such broad rights to foreign natural or juridical persons, regardless of their place of residence, in an article whose main purpose was to regulate relations between States in an area involving the interests or potential interests of a large number of States. Many factors would have to be taken into account in striking a balance, especially the factors covered in articles 5, 6 and 7, and it would be very difficult to take them all into account in court proceedings based on a submission by a foreign natural or juridical person living in a foreign State.

47. Article 32 could also be regarded as broadening excessively the concept of exhaustion of local remedies beyond the question of jurisdictional priority. It could be interpreted to mean that a State was obliged to grant foreign natural or juridical persons living in a foreign State the same regime as that granted its own citizens. He was unfamiliar with such a rule of international law, but with article 32 the Commission would appear to be trying to introduce such a rule. His point was reinforced by the fact that the Commission was giving such a broad meaning to the term "watercourse". It was true that the article included the qualification "in accordance with its legal system", but that might also mean that a State was required to bring its legal system into line with the requirement of article 32.

48. Mr. GÜNEY said that the draft articles were not satisfactory in all respects, but he would not repeat the comments he had made at earlier meetings on various points. The replacement of "appreciable" by "significant" in the draft articles was an improvement, since it raised the threshold of harm closer to the notion of "important". He had accepted article 32 concerning dispute settlement only with reluctance, for there was no need to include such a mechanism in a framework convention. An opportunity should be afforded to reopen the issue at a diplomatic conference convened to adopt the draft articles.

49. Mr. PAMBOU-TCHIVOUNDA said that, prior to the adoption of article 2, attention had been drawn to the lack of any definition of the purpose of the draft articles and to the failure, for example, to explain fully the meaning of the term "use" in article 1, paragraph 2. The commentary should perhaps try to do three things: first, define the nature of possible uses; secondly, provide some defining criteria such as special installations in order to give a concrete idea of the meaning of "use"; and thirdly, indicate the types of activity which might be undertaken in connection with a watercourse—industrial, economic, and so on, for it was the activities which gave rise to problems of responsibility.

50. Mr. TOMUSCHAT said that, with respect to the resolution just adopted by the Commission, the Drafting Committee had felt that it was not on safe ground in dealing with the question of groundwater. In such a situation the Commission should refrain from acting. Its task was to lay down hard and fast rules of law after studying a topic in depth. The resolution did not provide much guidance to States and did not make for greater legal certainty. In the past, the Commission had proceeded very cautiously in similar situations. In particular, he could not agree that States were under any legal obligation to develop the use of groundwater by analogy with article 5, paragraph 1, of the draft articles.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt on second reading the draft articles on the law of the non-navigational uses of international watercourses, on the understanding that it would decide at a later stage on the recommendation to be addressed to the General

Assembly concerning the follow-up action on the draft articles.

It was so agreed.

52. The CHAIRMAN said that it was now his pleasant duty to invite the Commission to pay a well-deserved tribute to the Special Rapporteur, Mr. Rosenstock, by adopting the following draft resolution:

"*The International Law Commission,*

"*Having adopted* the draft articles on the law of the non-navigational uses of international watercourses and a draft resolution on transboundary confined groundwater,

"*Expresses its deep appreciation and warm congratulations* to the Special Rapporteur, Mr. Robert Rosenstock, for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on the law of the non-navigational uses of international watercourses and of a draft resolution on transboundary confined groundwater."

The draft resolution was adopted by acclamation.

53. Mr. ROSENSTOCK (Special Rapporteur) said that he was grateful to the Commission for paying such a warm tribute, which he could accept only on the understanding that most of the credit belonged to his predecessors as Special Rapporteur, Mr. Kearney, Mr. Schwebel, Mr. Evensen and Mr. McCaffrey.

Draft Code of Crimes against the Peace and Security of Mankind[3] (*continued*)* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[4] A/CN.4/460,[5] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3, ILC(XLVI)/ICC/WP.3 and Add.1-2)

[Agenda item 4]

Report of the Working Group on a draft statute for an international criminal court

54. The CHAIRMAN drew attention to the report of the Working Group on a draft statute for an international criminal court (A/CN.4/L.491), which contained a revised draft statute for an international criminal court, and to the commentaries thereto (ILC(XLVI)/ICC/WP.3 and Add.1 and 2). He invited the Chairman of the Working Group to introduce the report.

55. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group had met 19 times during the 5 weeks available to it and, after considering a paper raising the main issues of principle, had given the draft statute two complete readings. It had not had time to adopt the commentaries as such, but had instead agreed that the commentaries should be made available to the Commission as a working paper. Following the discussion on the draft statute in the Commission, the Working Group would reconvene to consider any amendments suggested by members of the Commission either to the draft statute itself or the commentaries, and also to adopt the commentaries.

56. The Working Group consisted of 23 members, many of whom had attended all or nearly all of the meetings. In addition, a number of non-members had attended the meetings regularly as observers. The Working Group had had before it the reports of the Working Group at the forty-fourth and forty-fifth sessions of the Commission[6] and a large number of comments made by States in the Sixth Committee or made subsequently by States and organizations in writing, as well as the other documents referred to in the report. He wished to thank the members of the Working Group for their open and cooperative contributions; particular thanks were due to the Special Rapporteur, Mr. Thiam, and to the Chairman of the Commission. He also wished to thank the members of the secretariat, in particular Mr. Rama-Montaldo and Ms. Morris, for the considerable assistance they had given.

57. The Working Group's task had been a difficult one. There had never been an international criminal court established on a permanent basis or with general jurisdiction. There had been occasional ad hoc courts whose record had been the subject of scrutiny and debate. The task assigned to the Commission by the General Assembly was to produce a statute for a permanent court which would hear charges in criminal matters of international concern. The establishment of such a court would be a major change in the international institutional infrastructure. The need was to create a mechanism which could be made to work in present world circumstances, in the hope that such a foundation could be built upon.

58. There had been a strong internationalist school in the Working Group favouring a full-scale court with full-time judges and extensive, even exclusive, jurisdiction, thus replacing some elements of national criminal justice systems. A second group had thought that the court would only be required in very extreme circumstances and that nothing should be done to displace national systems. And there had been a middle group favouring a cooperative approach in which the court would be fitted into the existing structure for international cooperation in criminal matters. But that group also wanted to institutionalize some elements of international public policy as a reflection of the worldwide concern about the grave international crimes which were now being committed. No doubt, the outcome would not please everyone, but the Working Group was proposing the draft statute as a workable start in addressing the problem of a permanent criminal court, and as providing the appropriate set of balances between the demands

* Resumed from the 2350th meeting.

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

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

[5] Ibid.

[6] *Yearbook ... 1992*, vol. II (Part Two), p. 58, document A/47/10, annex, and *Yearbook ... 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

stemming from international concern and the functioning of existing national jurisdictions and existing cooperative arrangements.

59. Despite its differences of opinion, the Working Group had been remarkably harmonious, and the outcome did reflect strong elements of each of the trends reflected in the debates in the Group and in the Commission. The principles on which the Group had operated had been drawn largely from its earlier work, but had also taken into account comments and criticisms made in the Sixth Committee and elsewhere. It was hoped that the revised statute was clearer, better organized and more transparent, and that it would be flexible enough in operation to cope with the wide range of possibilities that a permanent criminal court must envisage.

60. Six of the major changes made to the version of the draft statute at the forty-fifth session in 1993 should be highlighted. First, the jurisdictional provisions in part three (Jurisdiction of the Court) had been simplified and made more specific; if not limpid, they were at least brief. A key element was the conferral of automatic or *ipso jure* jurisdiction over genocide, completing the work of the international community on the crime of genocide begun in 1948. Secondly, emphasis was now placed on the functions of the court, which was intended (*a*) to exercise jurisdiction only over the most serious crimes of concern to the international community, and (*b*) to complement as far as possible national criminal justice systems in cases which they could not resolve. Article 35 provided for discretion not to exercise jurisdiction, taking those factors into account. Thirdly, the draft statute carefully specified the relations between the court and the Security Council and between the court and national criminal justice systems, especially in the context of extradition and similar arrangements. Fourthly, the Working Group had tried to ensure that the draft statute complied with the standards of the International Covenant on Civil and Political Rights in relation to the administration of criminal justice and that it was consistent as far as possible with common articles of the draft Code of Crimes against the Peace and Security of Mankind. Fifthly, important clarifications had been made in connection with the structure of the court, in particular, the role of the presidency, and a system for election of judges in order to ensure a balance between criminal trial experience and expertise in international law. The sixth major change was the clarification and reenforcement of the role of States parties in electing judges, making rules, and so on. It was envisaged that the statute would be annexed to a treaty covering such matters as meetings of States parties, financial control, amendment and review.

61. Against that background, six key features of the court, as envisaged by the draft statute, could be pinpointed. First, the statute would create a permanent court sitting as required. Provision was made for the court to become a full-time one on a determination of two thirds of the States parties. Secondly, the court would be created by treaty under the control of the States parties to the treaty, but in a close relationship to the United Nations. Thirdly, the court would have a defined jurisdiction over grave crimes of an international character under existing international law and existing treaties. Fourthly, the basis of the court's jurisdiction, with the significant exception of genocide, depended on the acceptance of States. The draft statute therefore embodied a facultative approach to criminal justice which was entirely consistent with the two earlier reports of the Working Group. Fifthly, the operation of the court would be integrated into the existing system of international criminal assistance. The court was not intended to displace that system in cases where it was capable of functioning properly. Last, and by no means least important, the court offered full guarantees of due process as defined by relevant treaties, especially the International Covenant on Civil and Political Rights.

62. He wished to deal next, although not necessarily in order of importance, with some of the controversial issues raised by the draft statute and with the Working Group's approach to them. A substantial majority had thought that, in view of the initial difficulties in creating a court and achieving amendments to the Charter of the United Nations, the court should in the first instance be created under its own treaty and brought into a relationship with the United Nations by an association arrangement analogous to the one under which IAEA operated. The financial arrangements could be worked out within that framework; a number of treaty bodies, the Human Rights Committee for example, were already funded by the United Nations. It was believed essential that the States parties should take responsibility for the court and its functioning. At a later stage, the court could perhaps be incorporated in the structure of the United Nations by amendment of the Charter. The Working Group was unanimously opposed to the idea that the court should be a subsidiary organ of the United Nations established, and potentially abolished, by resolution.

63. The Working Group had spent considerable time on the important questions of the qualifications, election and independence of the judges. The proposed system established a balance of qualifications for the 18 judges, with 10 elected by the States parties from a list of nominees with criminal trial experience, and 8 elected from a list of nominees with recognized competence in international law (art. 6). The Working Group believed that both elements should be reflected in each chamber and in each exercise of the court's judicial function. The provision concerning the judicial independence of the judges (art. 10) had been reinforced with a stipulation that persons performing central executive, legislative or prosecutorial functions in their national systems should not be eligible to act as judges of the court at the same time.

64. Part three was the core of the statute. The jurisdictional provisions in article 20 (Jurisdiction of the Court in respect of specified crimes) had been considerably simplified. The Working Group had accepted the widely held view of States that simply to confer jurisdiction on the court for crimes under general international law at large would not be sufficiently precise. It had therefore selected what, in its view, were the four most important crimes under international law that were committed on a continuing basis and in a variety of circumstances. Those crimes were genocide, aggression, grave breaches of the laws of war, and crimes against humanity. The Working Group had not endeavoured to define the content of the

four crimes, partly because the Commission still had to conclude its consideration of the issues of definition in the context of its work on the draft Code of Crimes against the Peace and Security of Mankind, and partly because it was not its function to define, in legislative mode, crimes under international law. There was an extensive commentary reflecting what he trusted would become the Working Group's view of the issues involved. In the case of genocide, the only requirement, in order for the court to have jurisdiction, was that a State party to the Convention on the Prevention and Punishment of the Crime of Genocide that was also a party to the court's statute must have brought a complaint of genocide. It would be one of the most important achievements of the statute and it would also serve as a litmus test of the acceptability to States of any idea of an *ipso jure* jurisdiction.

65. A second category of jurisdiction, already provided for in the earlier drafts of the statute, was jurisdiction over the crimes defined in the treaties listed in the annex to the statute. In that case, the Working Group had made significant changes in response to criticism from individual members of the Commission and in the Sixth Committee. In particular, it had abolished the distinction between treaty crimes under international law and suppression conventions, and had treated them all on the same footing by imposing in all cases the requirement that, for a charge to be brought before the court, an exceptionally serious crime of international concern, being a crime defined in a treaty listed in the annex, had to be involved. The Working Group had decided, after a careful review of many treaties, that, apart from adding the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the list of treaties in the annex should remain as drafted.

66. The effect of article 21 (Preconditions to the exercise of jurisdiction) was to limit the cases in which the court could act. In the case of genocide, as explained earlier, the only requirement was that a complaint must have been brought by a State party to the statute, that was also a State party to the Convention on the Prevention and Punishment of the Crime of Genocide. In any other case covered by article 20, a complaint had to be brought by a State party to the statute, and the court's jurisdiction had to be accepted by the two States referred to in article 21, paragraph 1 (*b*), namely, the State that had custody of the accused, and therefore would have jurisdiction over the accused under its own law, and the State on whose territory the act or omission occurred. However, where a State had already agreed that a person should be extradited to a requesting State for trial in connection with the crime, the State that made the request for extradition must also give its consent to jurisdiction. Otherwise, the statute could override an operative extradition arrangement in relation to a particular accused person. That was the purport of article 21, paragraph 2.

67. Another important change to article 21 related to the way in which the statute had been integrated into the existing network of international judicial cooperation. If the court's jurisdiction depended on acceptance by a State party to the statute under article 21 and that State had not done so, it must, if it was a party to the treaty that defined the crime, either extradite the suspect to a requesting State or take steps to ensure that the crime was prosecuted (art. 21, para. 3). In that way, a State that was a party to the statute and also to the treaty establishing the act as a crime could not hide behind the consent requirements of article 21. It was an important provision, as it meant that the intent of the statute could not be flouted by its own parties.

68. Article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21) simply spelt out the functional way in which States accepted the jurisdiction of the court. Under the terms of the article, States could accept the court's jurisdiction at the time they became a party to the statute or at any subsequent time, and a declaration to that effect could be of either general or particular application. This was the so-called opting-in system. It had been preferred by the Working Group to an "opting-out" system, because under the latter a case might arise where the court could not exercise jurisdiction even though all the interested States were prepared for it to do so, because the States in question had not accepted jurisdiction at the crucial stage and could not do so retrospectively. Accordingly, and in keeping with the facultative approach to the court's jurisdiction, the opting-in approach had been preferred.

69. Article 23 (Action by the Security Council) dealt with the important issue of the relationship with the Security Council. One aspect of the matter, involving prior authorization by the Council in the case of a charge of aggression, had already been widely debated and, as he understood the position, had been widely accepted in plenary. Two other points required emphasis, however. In the first place, the Commission had agreed that the Council could, when acting under Chapter VII of the Charter, dispense with the acceptance requirements under article 21 of the statute, in which case the court could proceed to hear the case. Article 23, paragraph 1, was carefully drafted to make it clear that any action the Security Council took in that connection would be taken pursuant to Chapter VII of the Charter of the United Nations. The statute did not confer any additional power on the Council, but simply made the mechanism of the court available to it if the issue of jurisdiction over a crime covered by article 20 fell within the powers of the Security Council under Chapter VII of the Charter. In those circumstances, the Council would have compelling reasons to use the statute rather than to create an ad hoc tribunal. That must surely be in the interests of the international community and of upholding the rule of law.

70. Another point concerned the paramountcy of Security Council action taken under Chapter VII of the Charter. Where the Council did act under Chapter VII, a prosecution might not be commenced nor a complaint brought without Council authorization. Otherwise a situation could arise in which the statute was used in an attempt to pre-empt the Council's action in connection with a Chapter VII situation. The relevant provision was considerably more limited than some members of the Working Group would have liked, since they did not want the Council to be able to exercise a veto, as it were, in relation to action under the statute. It had, however, been decided that in the case in which action under Chapter VII had actually been taken it would be appropriate to subordinate action under the statute for the time

being to the authorization of the Council—an authorization that might be a very effective element in the Council's concerted action with respect to a given situation.

71. With regard to part four of the draft statute (Investigation and prosecution), and specifically to the prosecution process, it was clearly understood that the prosecution was an independent organ of the court and would operate independently even when the court was acting pursuant to Security Council authorization. The prosecutor was under no obligation to launch a prosecution even if a complaint had been brought by an influential State and even if the court's jurisdiction had been triggered by the Council. The prosecutor, though independent, was none the less accountable and the court, acting through the presidency, had the power to review, at the request either of the complainant State or, in cases where the Council had triggered the action, of the Council, any decision of the prosecutor not to initiate a prosecution. Similarly, if the prosecutor did decide to prosecute, the court, again acting through the presidency, had to review the indictment and decide whether to confirm it.

72. The provision on applicable law was at present set forth in part five of the statute rather than in part three, since applicable law (art. 33) was a separate issue from jurisdiction. It was, none the less, understood that article 33 laid down the applicable law standards for the whole statute. The substance of the article was unchanged, though certain minor alterations had been made. The article had been debated fairly extensively and required no further comment for the time being.

73. A new provision pertaining to challenges to jurisdiction had been introduced in article 35 (Discretion of the Court not to exercise its jurisdiction), under the terms of which the court would have the discretion, on the application of an interested State or of the accused, not to exercise its jurisdiction if the case was not sufficiently serious or if it was being appropriately dealt with by a national criminal justice system. As one of the most important of the new provisions, it responded to the concern expressed by many States that the court might exercise jurisdiction in cases that were not of sufficient international significance.

74. The Working Group had dealt with the vexing question of trial *in absentia* by establishing a presumption that the accused should be present and by laying down certain exceptions to that presumption which were spelt out in article 37 (Trial in the presence of the accused). A key element of the article was that the court could, under its rules, adopt a public indictment procedure, along the lines of that provided for under the rules of procedure and evidence 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.[7] Thus, the spectre of the court being repeatedly called upon to try persons *in absentia*, which many members of the Working Group had feared would bring the court into disrepute, had been banished.

75. The conduct of the trial was dealt with in article 38 (Functions and powers of the Trial Chamber), which drew on elements from both the inquisitorial and the adversarial systems. Thus, while the prosecutor was not subject, in the conduct of the prosecution, to the control of the court, the court did have significant powers, such as calling witnesses and questioning them, a power that did not exist under some adversarial systems. The exact balance to be struck between the role of the prosecutor and the role of the court would have to be determined in practice, but the court had ample powers to ensure that the trial was conducted fairly. Another point concerned guilty pleas, in which connection the various national legal systems differed widely. Under the statute, the accused could plead guilty if he so elected. If he did not do so, no plea would be entered, and the trial would proceed with the prosecutor calling the evidence in the normal way. The court would ensure that the guilty plea was reliable and was supported by the evidence. Normally, therefore, the prosecution would none the less be called upon to tender evidence after a plea of guilty, usually in documentary form, so that the court could be satisfied, for example, that the plea had not been made under some form of duress.

76. Extensive provision was made for the rights of the accused in articles 39 (Principle of legality (*nullum crimen sine lege*)), 40 (Presumption of innocence), 41 (Rights of the accused), 42 (*Non bis in idem*), and 44 (Evidence), paragraph 4.

77. With regard to judgement, as in earlier drafts, the trial chamber could make a majority decision. No dissents were allowed. There was provision for reserve judges to ensure that, even after a long trial, a quorum could be maintained. There was only a very limited possibility of retrial if the number of judges had fallen below the required maximum. The statute also allowed for a separate sentencing hearing. The Working Group had eventually decided to omit the earlier provisions on forfeiture and restitution on the ground that the procedures for dealing with such issues were too complex and that, since they related essentially to title to property, they were best left to national law. If, however, the conviction itself were to provide the basis for a subsequent forfeiture under national law, it would be subject to the recognition provision of the statute under article 57 (Recognition of judgements).

78. Provision was also made for appeal and review. A prosecutor could appeal against an acquittal, but in that case the only remedy was an order for retrial. In that sense, the appeals chamber could be said to combine the functions of *appel* and *cassation* in French law.

79. Article 50 (Revision) provided for revision, should new facts be discovered. Nevertheless, revision was available only in the event of a conviction. There could be no revision of a final decision to acquit.

80. The statute also contained extensive provisions on judicial assistance and he would refer members in particular to articles 51 (Cooperation and judicial assis-

[7] Hereinafter referred to as the "International Tribunal". The rules of procedure and evidence were adopted at the end of the second session of the International Tribunal in February 1994.

tance) and 53 (Transfer of an accused to the Court). Of special significance was the relationship between existing arrangements for extradition and the arrangements for transfer to the court, which had been carefully synchronized in article 20, paragraphs 2 and 3, and article 53, paragraphs 2, 3 and 4. In addition, a State which was requested to transfer a person to the court would have the power to set the relevant order for transfer aside provided it could show sufficient reason; it might also defer compliance, for instance, if it was itself trying the accused for a serious crime.

81. Articles 57 and 58 dealt with recognition of judgements and enforcement of sentences respectively. The former was of a rather formal character, but could well have a particular procedural significance in systems that recognized the idea of *res judicata*.

82. Article 59 (Pardon, parole and commutation of sentences), paragraph 4, allowed for the possibility of release on probation subject to the control of the court; that control might, in certain circumstances, be delegated to the State, subject to reporting requirements.

83. Although there had been points on which it had disagreed—and those points were reflected in the commentaries to the articles—the Working Group had in general accepted the basic approach to the matter, and the provisions of the statute as a whole. It would, of course, have to reconsider the statute in the light of the discussion in plenary to examine any difficulties that might emerge. It would also revise and adopt the commentaries. In his view, the revised statute represented an important step towards an international criminal court of general and permanent jurisdiction, and was a mere satisfactory solution to the problem than the creation of ad hoc courts by executive resolution.

84. On behalf of the Working Group, he commended the statute to the Commission.

85. The CHAIRMAN thanked Mr. Crawford for his statement and congratulated the Working Group on the remarkable progress achieved at the present session. The debate on the item would continue at the next meeting.

86. In response to a point raised by Mr. PAMBOU-TCHIVOUNDA, and following a brief discussion, the CHAIRMAN suggested that, at its next meeting, the Commission should take up parts one and two of the draft statute and, if it had time, part three as well, on the understanding that members would have an opportunity to make general statements at the end of the discussion on the draft statute.

It was so agreed.

The meeting rose at 1.05 p.m.

2357th MEETING

Monday, 27 June 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

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, ILC(XLVI)/ICC/WP.3 and Add.1-2)

[Agenda item 4]

REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (*continued*)

1. The CHAIRMAN invited the members of the Commission to begin their consideration of the revised draft statute for an international criminal court (A/CN.4/L.491), beginning with parts one and two, and pointed out that the commentaries thereto, which the Working Group on a draft statute for an international criminal court still had to revise, had been distributed informally as documents ILC(XLVI)/ICC/WP.3 and Add.1 and 2.

2. The third preambular paragraph of the French version of document A/CN.4/L.491 should be brought into line with the English original version and should read: *Soulignant également que ladite cour est destinée à être complémentaire des systèmes nationaux de justice pénale dans les affaires que ces systèmes ne sont pas en mesure de régler.* In the English version of article 15, paragraph 4 should be renumbered as paragraph 3.

3. Mr. ROBINSON said that he wished to take the opportunity to state his views on the report of the Working Group; he was a member of the Working Group, but had regrettably been unable to attend the first part of its work. The report, which was the outcome of excellent work, was capable of helping the Commission to move ahead and discharge the mandate given to it by the General Assembly.

4. He feared that the words "in cases which those systems cannot resolve" in the third preambular paragraph

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* Resumed from the 2350th 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.