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Summary record of the 2373rd meeting

Topic:
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2373rd MEETING

Wednesday, 20 July 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft report of the Commission on the work of its forty-sixth session (continued)

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (continued) (A/CN.4/L.496 and Add.1)

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.496 and Add.1)

2. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (concluded) (A/CN.4/L.496/Add.1)

1. The CHAIRMAN invited the Commission to resume its consideration of chapter II, section B.2 (A/CN.4/L.496/Add.1). He reminded members that, at the previous meeting, the Commission had taken no decision on paragraphs 10 and 16. New version of paragraphs 10, 13 and 16 had been prepared by the Special Rapporteur to take account of members' comments.

Paragraph 10 (concluded)

2. The CHAIRMAN said that the new version of paragraph 10 would read:

“10. Still another opinion with regard to the list of crimes was that there were two obstacles to a substantial limitation of the number of crimes. The first obstacle might lie in the statute of the court, inasmuch as the statute would give very broad jurisdiction *ratione materiae* that would go beyond the list in the Code. The second obstacle to limitation of the crimes in the Code lay in the nature of the good that was protected, which was mankind. It was difficult to determine and to limit the acts that could affect mankind.”

3. Mr. PELLET proposed that the last two sentences should be reformulated to read: “The second obstacle to limitation of the crimes in the Code lay in the nature of the interests protected, which were those of mankind. It was difficult to determine and to limit in advance the acts that could affect those interests”.

Paragraph 10, as amended, was adopted.

Paragraph 13 (concluded)

4. The CHAIRMAN said that the new version of paragraph 13 would read:

“13. With regard to the draft Code as it related to internal law, the opinion was expressed that it would be preferable if the convention through which the Code entered into force imposed an obligation on States parties to incorporate the Code in their respective legal systems. States, it was pointed out, should be unambiguously bound to graft the entire contents of the Code onto their respective systems of criminal law. In particular, it should be made clear in the convention that any State party whose legal system was not in conformity with the convention would be in breach of the convention establishing the Code. In that way, the primacy of the Code over internal law would be automatically ensured in respect of those States parties.”

Paragraph 13, as amended, was adopted.

Paragraph 16 (concluded)

5. Mr. THIAM (Special Rapporteur) proposed that the text of paragraph 16 should be replaced by the following:

“16. Some members, being of the view that there was a need for coordination between the draft Code and the draft statute, recommended that the two drafts should be harmonized where they had aspects in common.”

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 20

Paragraphs 17 to 20 were adopted.

Paragraph 21

6. Mr. ROSENSTOCK proposed that the word “indissociable”, in the last sentence of the English version, should be replaced by “inseparable”.

Paragraph 21, as amended, was adopted.

Paragraph 22

7. Mr. PELLET proposed that, in the third sentence of the French version, the words *ni à la précision du droit pénal ni à sa rigueur* should be replaced by *ni à l'exigence de précision et de rigueur du droit pénal*.

Paragraph 22, as amended, was adopted.

Paragraphs 23 to 29

Paragraphs 23 to 29 were adopted.

Paragraph 30

8. Mr. THIAM (Special Rapporteur) said that in the second sentence the words “of the crime” should be replaced by “of the act”.

Paragraph 30, as amended, was adopted.

Paragraph 31

9. After an exchange of views in which Mr. THIAM (Special Rapporteur), Mr. TOMUSCHAT, Mr. MAHIOU, Mr. PELLET, Mr. ROSENSTOCK, Mr. YANKOV and Mr. AL-BAHARNA took part, the CHAIRMAN suggested that the second sentence should be replaced by a sentence reading: "The crimes that the Commission had chosen were punishable in the internal law of all States."

Paragraph 31, as amended, was adopted.

Paragraph 32

10. Mr. PELLET proposed that the words *en bas de page*, in the French version, should be replaced by *dans la note de bas de page 3*.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

11. The CHAIRMAN said that several members observed that paragraph 34 dealt with a point of terminology and did not have a proper place in a report by the Commission to the General Assembly. One member, whose remarks were endorsed by the secretariat, said that the paragraph was none the less of practical value.

12. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 34, on the understanding that in future the Commission would deal in its report to the General Assembly only with substantive matters.

Paragraph 34 was adopted on that understanding.

Paragraphs 35 to 43

Paragraphs 35 to 43 were adopted.

Paragraph 44

13. Mr. TOMUSCHAT proposed that the last two sentences should be deleted, as should the last part of the second sentence, from the words "and therefore should not be punished . . .". A full stop would be inserted after the words "for political reasons".

Paragraph 44, as amended, was adopted.

Paragraph 45

14. The CHAIRMAN, further to a proposal of Mr. IDRIS, suggested that the words "which had sent comments thus far" should be inserted at the end of the first sentence, after the words "by Governments".

Paragraph 45, as amended, was adopted.

Paragraph 46

15. Mr. TOMUSCHAT proposed that the words *ipso facto* should be deleted from the second sentence.

Paragraph 46, as amended, was adopted.

Paragraphs 47 and 48

Paragraphs 47 and 48 were adopted.

Paragraph 49

16. Mr. THIAM (Special Rapporteur) said that the words "in principle" should be inserted before "have priority", in the eighth sentence.

Paragraph 49, as amended, was adopted.

Paragraphs 50 to 62

Paragraphs 50 to 62 were adopted.

Paragraph 63

17. Mr. CRAWFORD suggested that the phrase "several members emphasized their importance . . . between those provisions" should be replaced by "several members emphasized both their importance and the need to establish coordination between those provisions".

Paragraph 63, as amended was adopted.

Paragraph 64

Paragraph 64 was adopted.

Paragraph 65

18. Mr. PELLET proposed that the words *ont signalé leur conformité avec*, in the French version, should be replaced by *ont dit qu'ils approuvaient*.

Paragraph 65, as amended, was adopted.

Paragraph 66

19. Mr. YANKOV pointed out that paragraph 66 was a repetition of the amended version of paragraph 63, and proposed that it should be deleted.

It was so agreed.

Paragraph 66 was deleted.

Paragraphs 67 to 69

Paragraphs 67 to 69 were adopted.

Paragraph 70

20. Mr. THIAM (Special Rapporteur) said that the word *doué* in the first sentence of the French version, should be replaced by *doté*.

Paragraph 70, as amended, was adopted.

Paragraph 71

Paragraph 71 was adopted.

Paragraph 72

21. Mr. CRAWFORD proposed that the phrase "and that there were certain limits to the prohibition imposed

by that principle”, in the second sentence, should be deleted.

Paragraph 72, as amended, was adopted.

Paragraphs 73 to 76

Paragraphs 73 to 76 were adopted.

Paragraph 77

22. Mr. PELLET, supported by Mr. THIAM (Special Rapporteur), pointed out that the paragraph had no logic to it and should be deleted.

It was so agreed.

Paragraph 77 was deleted.

Paragraphs 78 to 88

Paragraphs 78 to 88 were adopted.

Paragraph 89

23. Mr. BENNOUNA said that the formulation of the first two sentences was incorrect, inasmuch as it associated the international responsibility of States with Article 51 of the Charter of the United Nations, when in fact Article 52 simply set forth an exception to the rule on the prohibition of the use of force.

24. Mr. THIAM (Special Rapporteur) said he recognized that the wording was clumsy. He would therefore propose that the first two sentences should be replaced by the following:

“The Special Rapporteur explained that the self-defence referred to here was not self-defence under Article 51 of the Charter of the United Nations. Article 51 ruled out the wrongfulness of a particular act and consequently the international responsibility of the State that was the perpetrator of the act.”

Paragraph 89, as amended, was adopted.

Paragraphs 90 to 93

Paragraphs 90 to 93 were adopted.

Paragraph 93 bis

25. Mr. THIAM (Special Rapporteur) said that it would be advisable to insert, after the four paragraphs on the views of members of the Commission, a new paragraph, 93 bis, reading:

“93 bis. The Special Rapporteur pointed out that, in the new draft article he had proposed in his twelfth report, the word ‘defences’ had been eliminated from the title of the draft article.”

Paragraph 93 bis was adopted.

Paragraphs 94 to 103

Paragraphs 94 to 103 were adopted.

Paragraph 104

26. Mr. PELLET pointed out that, in the third sentence, the Special Rapporteur was reported to say one thing and then the opposite. The sentence should therefore be replaced by the following: “The Special Rapporteur indicated that since that sentence explained and underpinned the first sentence, he was in favour of keeping it.”

27. Mr. THIAM (Special Rapporteur) said that two corrections should also be made to the French version. The first concerned the end of the second sentence, where *rien de neuf* should be replaced by *rien de nouveau*. Again, in the context of the draft Code of Crimes against the Peace and Security of Mankind, the fourth sentence should speak of *droit international pénal* and not *droit pénal international*.

Paragraph 104, as amended, was adopted.

Paragraph 105

28. Mr. PELLET said that, for the purposes of consistency, the words “in the French version” should be deleted.

Paragraph 105, as amended, was adopted.

Paragraphs 106 and 107

Paragraphs 106 and 107 were adopted.

Paragraph 108

29. Mr. THIAM (Special Rapporteur) said that three changes should be made. First, the words “State officials”, in the fourth sentence, should be replaced by “perpetrators of a crime”. Secondly, the words “even leaving that case aside”, in the seventh sentence, should be replaced by “even in that case”. Thirdly, in the ninth sentence, the words “fomenting crimes” should be replaced by “committing crimes”.

Paragraph 108, as amended, was adopted.

Paragraph 109

30. Mr. THIAM (Special Rapporteur) said that, in the first sentence of the French version, the words *mis sur le tapis* should be replaced by *reprise*.

31. Mr. CRAWFORD said that, in the English version, the words “criminal State responsibility” should be replaced by “criminal responsibility of States”.

Paragraph 109, as amended, was adopted.

Paragraph 110

32. Mr. THIAM (Special Rapporteur) said that the word *tel* should be inserted before *crime*, at the end of the third sentence.

33. Mr. MAHIU pointed out that the English and the French versions did not correspond.

34. The CHAIRMAN suggested that, consequently, in the third sentence, the words “to try a case” should be replaced by “to try the perpetrator of such a crime”.

35. Mr. THIAM (Special Rapporteur) said it would also be desirable, in the last sentence of the French version, for the words *sans exclure la création éventuelle* to be replaced by *sans exclure l'hypothèse où une cour criminelle internationale serait ultérieurement créée*.

Paragraph 110, as amended, was adopted.

Paragraph 111

36. Mr. THIAM (Special Rapporteur) said that the last sentence should read: "Serious as they might be, it was difficult to see why there should be no statutory limitation for such crimes".

Paragraph 111, as amended, was adopted.

Paragraphs 112 to 120

Paragraphs 112 to 120 were adopted.

Section B.2, as a whole, as amended, was adopted.

CHAPTER III. *The law of the non-navigational uses of international watercourses (A/CN.4/L.500)*

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Paragraph 10

37. Mr. ELARABY said that he wished to be placed on record as joining in the tribute to the Special Rapporteur in paragraph 11, but not in the recommendation set out in paragraph 10, as it was formulated.

38. After an exchange of views, in which Mr. ROSENSTOCK (Special Rapporteur), Mr. TOMUSCHAT and Mr. CALERO RODRIGUES took part, the CHAIRMAN suggested that the text of paragraph 10 should be recast to read:

"10. The Commission decided to recommend the draft articles on the law of the non-navigational uses of international watercourses and the resolution on transboundary confined groundwater to the General Assembly. The Commission recommends the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles."

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

39. Mr. CRAWFORD proposed that the word "seizes" should be replaced by "takes".

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Chapter III, as a whole, as amended, was adopted.

The meeting rose at 5.50 p.m.

2374th MEETING

Thursday, 21 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-7,² A/CN.4/460 and Corr.1,³ A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

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

1. The CHAIRMAN invited the Chairman of the Working Group on the draft statute for an international criminal court, to introduce the Working Group's revised report (A/CN.4/L.491/Rev.2 and Corr.1 and Add.1-3).

2. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the document presently before the Commission contained a substantially revised version of the report the Commission had originally considered in plenary (A/CN.4/L.491). The Group had considered two formal drafts of the statute and had also approved the commentaries as revised in the light of comments made in plenary. The draft statute and the commentaries together represented the collective view of the Working Group and, on that basis, were recommended for adoption by the Commission. Any comments made by members in plenary which had not been reflected in the draft statute for an international criminal court—because they had not been adopted by the Working Group—were reflected in the commentaries. The draft statute should be regarded as a negotiating text to be submitted to the General Assembly and, if the Assembly so decided, to a possible diplomatic conference. It was not an attempt to codify the law, as there was no law in that area. Nor had the Working Group attempted to draft the opening and final

* Resumed from the 2361st 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.*