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Summary record of the 2376th meeting

Topic:
<multiple topics>

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

F. Agenda

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

Sections A to F were adopted.

G. General description of the work of the Commission at its forty-sixth session

Paragraphs 16 to 19

Paragraphs 16 to 19 were adopted.

Paragraph 20

36. Mr. EIRIKSSON said that, in his view, paragraph 20 should give a more detailed account of the circumstances in which the Commission had provisionally adopted articles 11, 13 and 14 of the draft articles on State responsibility. It had been understood that the Rapporteur would add a sentence to that effect in the relevant part of chapter IV, but it would be advisable for that additional sentence also to be reflected in paragraph 20 of chapter I.

It was so agreed.

Paragraph 20 was adopted on that understanding.

Paragraph 21

Paragraph 21 was adopted.

Section G was adopted.

Chapter I, as a whole, was adopted.

CHAPTER IV. State responsibility (concluded)** (A/CN.4/L.497 and Add.1)

B. Consideration of the topic at the present session (concluded)** (A/CN.4/L.497 and Add.1)

2. PRE-COUNTERMEASURES DISPUTE SETTLEMENT PROCEDURES SO FAR ENVISAGED FOR THE DRAFT ARTICLES ON STATE RESPONSIBILITY (A/CN.4/L.497/Add.1)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

37. Mr. PELLET proposed that the words "and the commentaries thereto" should be added after the word "countermeasures" in the last sentence.

It was so agreed.

Paragraph 6, as amended, was adopted.

Section B.2, as amended, was adopted.

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

The meeting rose at 6.05 p.m.

** Resumed from the 2369th meeting.

2376th MEETING

Friday, 22 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodriguez, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Güney, Mr. He, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (concluded) (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]

COMMENTARIES TO THE ARTICLES OF THE
DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT
(concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft commentaries contained in the revised report of the Working Group on a draft statute for an international criminal court (A/CN.4/L.491/Rev.2 and Corr.1 and Add.1-3).

Commentaries to parts six to eight and to the annex (A/CN.4/L.491/Rev.2/Add.3)

Commentary to part six

The commentary to part six was adopted.

Commentary to part seven

The commentary to part seven was adopted.

Commentary to part eight

2. The CHAIRMAN suggested that the Commission should adopt the commentary to part eight, subject to consideration later on in the meeting of a new paragraph (3) for the commentary to article 58 to be introduced by the Chairman of the Working Group.

It was so agreed.

The commentary to part eight was adopted on that understanding.

Commentary to the annex

The commentary to the annex was adopted.

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.*

3. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) drew attention to appendix II (Outline of possible ways whereby a permanent international criminal court may enter into relationship with the United Nations), which had been based on a paper prepared by the secretariat (ILC(XLVI)/ICC/WP.2). There was no need to consider the text but it should be included in the Commission's report.

4. Furthermore, the "Note on possible clauses of a treaty to accompany the draft statute" should also be included in the report. Following comments made by Mr. Arangio-Ruiz (2331st meeting), a new paragraph 3 (f) had been added to the note. With regard to the second sentence of that paragraph, the Working Group had not wished to express a view on the ways in which provision should be made for resolution of other disputes arising between States parties, but it had thought that attention should be drawn to the point.

5. Mr. ARANGIO-RUIZ said that he had wished to clarify the distinction between interpretation and application of the statute with regard to cases before the court—clearly a matter for the court itself—and interpretation and implementation of the treaty embodying the statute setting up the court. The latter topic might need to be treated in a clause of the treaty concerning the settlement of disputes. Perhaps the point could be made clearer either by expanding paragraph 3 (f) or in a footnote thereto.

6. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said it would be wrong for the Commission to say what the content of such a clause should be. Views had differed on that point in the Working Group. As a solution, he suggested that the words "relating thereto" at the end of the first sentence should be replaced by "which arise in the exercise of that jurisdiction", and that the words "with regard to the implementation of the treaty embodying the Statute" should be inserted after "other disputes" in the second sentence.

7. Mr. YANKOV suggested that the addition to the second sentence should read "with regard to the interpretation and implementation of . . .".

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to include the note in its report, with the amendments to paragraph 3 (f).

It was so agreed.

The note, as amended, was adopted.

9. The CHAIRMAN drew attention to the paper circulated by the Chairman of the Working Group containing additional paragraphs to the commentaries suggested further to the debate held the previous day. He invited the Chairman of the Working Group to introduce those proposals.

Commentaries to the preamble and parts one to three (concluded)
(A/CN.4/L.491/Rev.2/Add.1)

Commentaries to part one (concluded)

10. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that, after the first sentence of paragraph (2) of the commentary to article 2, two new sentences should be added, reading:

"Adoption of the statute by a treaty to which only some States would be parties would be an unsatisfactory alternative, since the States on whose territory terrible crimes were committed would not necessarily be parties to the Statute; in some cases, such States were the least likely to become parties. To adopt the statute by treaty could give the impression of a circle of 'virtuous' States as between whom, in practice, cases requiring the involvement of the court would not arise."

That text reflected Mr. Pellet's. The remaining sentences of paragraph (2) would become a new paragraph (3), and the subsequent paragraphs would be renumbered accordingly.

Paragraph (2) of the commentary to article 2, as amended, was adopted.

The commentaries to part one, as amended, were adopted.

Commentary to part two (concluded)

11. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that a new paragraph was proposed to be added to the commentary to article 19, reading:

"(4) Some members of the Commission expressed concern at the prospect that rules might be provisionally applied to a given case, only to be subsequently disapproved by States parties. In their view, if the judges were not to be entrusted with the task of making rules without any requirement of subsequent approval, they should not be able to make rules having provisional effect. The idea of rules having provisional effect was particularly difficult to accept in penal matters. On the other hand, the Commission felt that, although the power to give provisional effect to a rule should be exercised with care, there might be cases where it would be necessary, and that some flexibility should be available."

The paragraph reflected the views of Mr. Pellet and other members.

Paragraph (4) of the commentary to article 19 was adopted.

The commentary to part two, as amended, was adopted.

Commentary to part three (*concluded*)

12. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that it was proposed to add a new paragraph (4) to the commentary to article 21, reading:

“(4) The term ‘custodial State’ is intended to cover a range of situations in which a State has detained or detains a person who is under investigation for a crime, or has that person in its control. The term would include a State which had arrested the suspect for a crime, either pursuant to its own law or in response to a request for extradition. But it would also extend, for example, to a State the armed forces of which are visiting another State and which has detained under its system of military law a member of the force who is suspected of a crime: in such a case the State to which the force belongs, rather than the host State, would be the custodial State’. (If the crime in question was committed on the territory of the host State, the acceptance of that State would, of course, also be necessary under subparagraph (b) (ii) for the court to have jurisdiction.)”

The subsequent paragraphs would be renumbered accordingly.

13. Mr. de SARAM said that the words “, for example” should be inserted after “situations”, in the first sentence.

Paragraph (4) of the commentary to article 21, as amended, was adopted.

14. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that a new paragraph was proposed to be added to the commentary to article 22, reading:

“(5) In respect of the court’s ‘inherent’ jurisdiction over genocide (as to which see the commentary to article 20, paragraph (7)), acceptance of jurisdiction under article 22 will not be necessary. However, it is possible to envisage cases where the States concerned are not parties to the Convention on the Prevention and Punishment of the Crime of Genocide but none the less wish the court to exercise jurisdiction over such a crime. The general reference in paragraph 1 to ‘the crimes referred to in article 20’ is intended to cover such an exceptional case: see also articles 21, paragraph 1 (b), and 25, paragraph 2, which are worded accordingly.”

The subsequent paragraphs would be renumbered accordingly.

15. A new paragraph should also be added to the commentary, reading:

“(8) One member of the Commission would go further, expressing profound reserve at a system of acceptance of jurisdiction which would in his view empty the Statute of real content so far as the jurisdiction of the court is concerned. This prevented the member from joining the consensus of the Commission on the system of the draft statute.”

That paragraph reflected the views of Mr. Pellet, who had approved it. The subsequent paragraph would be renumbered accordingly.

New paragraphs (5) and (8) of the commentary to article 22 were adopted.

The commentary to part three, as amended, was adopted.

Commentaries to parts four and five (concluded) (A/CN.4/L.491/Rev.2/Add.2)

Commentary to part four (*concluded*)

16. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that a new paragraph was to be added to the commentary to article 31, reading:

“(4) Some members of the Commission felt that despite the safeguards provided in paragraph 2, any system of secondment of State personnel to the procuracy was calculated to undermine the independence and impartiality of that organ, and could result in the procuracy being little more than an extension of the prosecution power of a single State for the purposes of a given case. However expensive an international prosecution service might be, in their view it was essential to provide for such a service without possibility of dilution if the statute was to operate with the necessary guarantees of integrity.”

17. Mr. TOMUSCHAT said that the words “was calculated to undermine” should be amended to read “involved the danger of undermining”.

Paragraph (4) of the commentary to article 31, as amended, was adopted.

18. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that two new paragraphs were to be added to the commentary to article 33, reading:

“(4) In relation to article 33, as in relation to article 20, several members of the Commission recalled the links to be established between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, and reaffirmed their view that the law to be applied by the court should result from the Code.”

“(5) Certain members expressed substantial reservations about the possibility of the court applying national law as such in cases brought before it. Although these members accepted that it would be necessary for the court to refer to national law for various purposes, they thought that this would always be pursuant to a *renvoi* or authorization given by international law, including applicable treaties; in other cases, resort to the general principles of law would resolve any difficulties.”

Paragraphs (4) and (5) of the commentary to article 33 were adopted.

The commentary to part four, as amended, was adopted.

Commentary to part five (*concluded*)

19. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that a final sentence should be added to paragraph (5) of the commentary to article 47, to read: "Other members stressed that, as the court would only deal with the most serious crimes, the idea of 'community service' was entirely inappropriate."

Paragraph (5) of the commentary to article 47, as amended, was adopted.

The commentary to part five, as amended, was adopted.

Commentaries to parts six to eight and to the annex (concluded) (A/CN.4/L.491/Rev.2/Add.3)

Commentary to part eight (*concluded*)

20. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that a new paragraph was to be added to the commentary to article 58, reading:

"(3) Some members doubted whether a mere obligation to recognize a judgement of the court had any particular meaning. In their view, the obligation, to be meaningful, should extend to recognizing the appropriate legal consequences of a judgement. The judgement itself would be enforced under the statute and did not as such require recognition by States. Others favoured the deletion of the article."

Paragraph (3) of the commentary to article 58 was adopted.

The commentary to part eight, as amended, was adopted.

The commentaries to the articles of the draft statute for an international criminal court, as amended, were adopted.

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 (concluded)* (A/CN.4/L.496 and Add.1)

21. The CHAIRMAN invited the Commission to continue its consideration of Chapter II of its report. Section B.2, had already been adopted (2373rd meeting).

A. Introduction

Paragraphs 1 to 19

Paragraphs 1 to 19 were adopted.

Section A was adopted.

* Resumed from the 2373rd meeting.

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

1. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (A/CN.4/L.496)

Paragraphs 20 to 24

Paragraphs 20 to 24 were adopted.

Paragraph 25

22. Mr. PELLET said that he found the sentence beginning "In response to the suggestion" to be totally incomprehensible and should be deleted.

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

Paragraph 27

23. Mr. PELLET said that the French version of the phrase "a permanent court with the necessary objectivity" was incorrect and should be altered.

Paragraph 27, as amended, was adopted.

Paragraph 28

24. Mr. PELLET said that the distinction made in the second sentence between "some" and "others" was incorrect and the sentence should be redrafted.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 55

Paragraphs 29 to 55 were adopted.

Paragraph 56

25. Mr. MAHIOU said that the paragraph would make better sense if the words "reconvene the" were replaced by "re-establish a" and if the final clause, "which it had established at its previous session", was deleted.

Paragraph 56, as amended, was adopted.

Paragraph 57

26. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that a sentence, taken from paragraph 2 of the introduction to the report of the Working Group, was to be added to paragraph 57, reading:

"In those paragraphs, the Assembly had taken note with appreciation of chapter II of the report of the International Law Commission, entitled 'Draft Code of Crimes against the Peace and Security of Mankind', which was devoted to the question of a draft statute for an international criminal court; invited States to submit to the Secretary-General by 15 February 1994, as requested by the International Law Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court and requested the International Law Commission to continue its work as

a matter of priority on this question with a view to elaborating a draft statute if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States.”

Paragraph 57, as amended, was adopted.

27. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the proposed text of the remainder of Chapter II of the report would be as follows:

“(c) *Outcome of the work carried out by the Working Group on a draft statute for an international criminal court*

“58. The Working Group held 27 meetings between 10 May and 14 July 1994.

“59. In performing its mandate, the Working Group had before it the report of the Working Group on the question of an international criminal jurisdiction annexed to the report of the Commission to the General Assembly on the work of its forty-fourth session (A/47/10, annex); the report of the Working Group on a draft statute for an international criminal court annexed to the report of the Commission to the General Assembly on the work of its forty-fifth session (A/48/10, annex); the eleventh report of the Special Rapporteur, Mr. Doudou Thiam, on the topic “Draft Code of Crimes against the Peace and Security of Mankind” (A/CN.4/449); the comments of Governments on the report of the Working Group on a draft statute for an international criminal court (A/CN.4/458 and Add.1-8); section B of the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session on the report of the International Law Commission on the work of its forty-fifth session (A/CN.4/447); the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1); the rules of procedure and evidence adopted by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (document IT/32 of 14 March 1994) as well as the following informal documents prepared by the secretariat of the Working Group: (a) a compilation of draft statutes for an international criminal court elaborated in the past, either within the framework of the United Nations or by other public or private entities; (b) a compilation of conventions or relevant provisions of conventions relative to the possible subject-matter jurisdiction of an international criminal court; and (c) a study on possible ways whereby an international criminal court might enter into relationship with the United Nations.

“60. The Working Group proceeded to a re-examination chapter by chapter, and article by article, of the preliminary draft statute for an international criminal court annexed to the Commission’s report at the preceding session, bearing in mind, *inter alia*: (a) the need to streamline and simplify the articles con-

cerning the subject-matter jurisdiction of a court, while better determining the extent of such jurisdiction; (b) the fact that the court’s system should be conceived as complementary with national systems which function on the basis of existing mechanisms for international cooperation and judicial assistance; and (c) the need for coordinating the common articles to be found in the draft statute for an international criminal court and in the draft Code of Crimes against the Peace and Security of Mankind.

“61. The draft statute prepared by the Working Group is divided into eight main parts: part one (Establishment of the Court); part two (Composition and Administration of the Court); part three (Jurisdiction of the Court); part four (Investigation and Prosecution); part five (The Trial); part six (Appeal and Review); part seven (International Cooperation and Judicial Assistance); and part eight (Enforcement).

“62. The commentaries to the draft articles explain the special concerns which the Working Group has addressed in considering a provision on a given subject-matter and the various views to which it gave rise or the reservations which it aroused.

“63. In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system, but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions.

“64. Careful note was also taken of the various provisions regulating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.

“65. It is also to be noted that the Working Group has conceived the statute for an international criminal court as an attachment to a future international convention on the matter and has drafted the statute’s provisions accordingly.

“66. At its 2374th to . . . meetings, held on 21 and 22 July 1994, the Commission considered the final report of the Working Group, which contained the complete text of a draft statute consisting of 60 articles with commentaries thereto.

“67. At its 2374th meeting, the Commission adopted the draft statute. At that same meeting and at the 2375th, 2376th and . . . meetings, the Commission adopted the commentaries to the 60 articles comprising the draft statute.”

Paragraphs 58 to 67 were adopted.

28. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that, paragraph 68, following the heading “Recommendation of the Commission”, would read:

“(d) *Recommendation of the Commission*

“68. At its . . . meeting, on 22 July 1994, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.”

Paragraph 68 was adopted.

29. Mr. ROSENSTOCK said that he considered it would be appropriate to conclude Chapter II with an expression of the Commission’s gratitude to the Chairman of the Working Group.

It was so agreed.

30. Mr. EIRIKSSON said that, in endorsing paragraph 68, he wished to say that the method just adopted constituted a model for the future. It had been an excellent idea to deal with the commentaries more or less concurrently with the adoption of the articles.

Section B.1, as amended, was adopted.

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

CHAPTER VI. *Other decisions and recommendations of the Commission (A/CN.4/L.504)*

A. *The law and practice relating to reservations to treaties*

31. The CHAIRMAN suggested that paragraph 1, as completed, should read:

“1. At its 2376th meeting, on 22 July 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic ‘The law and practice relating to reservations to treaties’.”

It was so agreed.

Section A, as amended, was adopted.

32. The CHAIRMAN congratulated Mr. Pellet on his appointment as Special Rapporteur for the topic “The law and practice relating to reservations to treaties”.

33. Mr. PELLET thanked members for appointing him as Special Rapporteur. He would endeavour to carry out his duties to the best of his ability.

B. *State succession and its impact on the nationality of natural and legal persons*

34. The CHAIRMAN suggested that paragraph 2, as completed, should read:

“2. Also at its 2376th meeting, the Commission appointed Mr. Vaclav Mikulka Special Rapporteur for the topic ‘State succession and its impact on the nationality of natural and legal persons’.”

It was so agreed.

Section B, as amended, was adopted.

35. The CHAIRMAN congratulated Mr. Mikulka on his appointment as Special Rapporteur for the topic

“State succession and its impact on the nationality of natural and legal persons”.

36. Mr. MIKULKA thanked the Commission for the confidence placed in him. He would do his utmost not to disappoint its expectations.

C. *Programme, procedures and working methods of the Commission, and its documentation*

Section C was adopted.

D. *Cooperation with other bodies*

Section D was adopted.

E. *Date and place of the forty-seventh session*

37. Mr. CALERO RODRIGUES said that, since Monday, 1 May 1995, was a public holiday in many countries, he would suggest that the Commission’s next session should start on Tuesday, 2 May 1995, but that two meetings should be held on that day.

It was so agreed.

Section E, as amended, was adopted.

F. *Representation at the forty-ninth session of the General Assembly and at the Congress of Public International Law (New York, 13-17 March 1995)*

38. Mr. TOMUSCHAT proposed that, in addition to the attendance of the Chairman of the Commission at the forty-ninth session of the General Assembly, the Chairman of the Working Group on a draft statute for an international criminal court should also be present for the discussion of that matter.

39. After a discussion in which Mr. GUNEY, Mr. MAHIOU, Mr. CALERO RODRIGUES and Mr. de SARAM took part, the CHAIRMAN said he took it that the Commission agreed that the Chairman of the Working Group on a draft statute for an international criminal court, Mr. Crawford, and the Special Rapporteur on the law of the non-navigational uses of international watercourses, Mr. Rosenstock, should also be invited to attend the forty-ninth session of the General Assembly. Wording to that effect should be inserted in the relevant section of the report.

It was so agreed.

Section F was adopted on that understanding.

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

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.498 and Add.1-2)*

A. *Introduction (A/CN.4/L.498)*

Section A was adopted.

B. *Consideration of the topic at the present session (A/CN.4/L.498/Add.1)*

40. Mr. EIRIKSSON said that the first footnote in section B.1 should be expanded slightly. The title of section B.2 (b) should read, not “Liability”, but “State liability

ity". Moreover the words "The prime example", in the seventh sentence of paragraph 8, should be changed to "An example".

Section B, as amended, was adopted.

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.498/Add.2)

1. TEXT OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.498/Add.2)

Section C.1 was adopted.

2. TEXTS OF DRAFT ARTICLES 1, 2, SUBPARAGRAPHS (a), (b) AND (c), 11 TO 14 bis [20 bis], 15 TO 16 bis AND 17 TO 20 WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION (A/CN.4/L.503 and Add.1-2)

General commentary (A/CN.4/L.503)

Paragraph (1)

41. Mr. BARBOZA (Special Rapporteur) said that, owing to time constraints, it had not been possible to issue a corrigendum for a number of changes to document A/CN.4/L.503. In paragraph (1) of the general commentary, the words "It is the Commission's view that", in the first sentence, should be deleted.

42. Mr. ROSENSTOCK, supported by Mr. TOMUSCHAT, said that the first five sentences of the paragraph were redundant, and the paragraph should begin with the words "The frequency . . .". However, if others found the sentences appropriate, he would not insist on his proposal.

43. Mr. BARBOZA (Special Rapporteur) said that they fulfilled a valuable explanatory function. In his view, they should be retained.

44. Mr. de SARAM, supported by Mr. CALERO RODRIGUES, agreed with Mr. Rosenstock that the sentences in question were not strictly necessary. However, they could well be retained, since the subject must also be viewed in a non-legal perspective.

Paragraph (1), as amended, was adopted.

Paragraph (2)

45. Mr. BARBOZA (Special Rapporteur) said that the words "the Commission believes that", at the beginning of paragraph (2), should be deleted, as should the last sentence of the paragraph and footnote 3.

Paragraph (2), as amended, was adopted.

Paragraph (3)

46. Mr. ROSENSTOCK said that he was concerned at the use of the term "responsibility" in the first sentence. The words "have the responsibility 'to ensure . . .'" should be replaced by the words "should 'ensure' . . .".

47. Mr. TOMUSCHAT said the term "responsibility" should be retained, for it was the term chosen in principle 21 of the Stockholm Declaration.**

** Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

48. Mr. ROSENSTOCK said that an acceptable compromise would be to reproduce principle 21 in its entirety.

49. Mr. BARBOZA (Special Rapporteur) said he accepted Mr. Rosenstock's compromise proposal.

Paragraph (3), as amended, was adopted.

Paragraph (4)

50. Mr. BARBOZA (Special Rapporteur) said that the last sentence of paragraph (4) should be deleted.

51. Mr. TOMUSCHAT proposed that the first three words of the paragraph should also be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

52. Mr. BARBOZA (Special Rapporteur) said that the words "As indicated in the introduction to this chapter of the report", as well as the last sentence of paragraph (5), should be deleted.

Paragraph (5), as amended, was adopted.

The general commentary, as a whole, as amended, was adopted.

Commentary to article 1 (Scope of the present articles) (A/CN.4/L.503)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

53. Mr. ROSENSTOCK said that article 1 did not include all of the four criteria, in particular the principle of *sic utere tuo ut alienum non laedas*. He proposed that the word "four", in the last sentence, should be replaced by "three".

54. The CHAIRMAN suggested that the word "four" in the last sentence of the paragraph, should be replaced by "several".

*Paragraph (2), as amended, was adopted.****

Paragraph (3)

55. Mr. BARBOZA (Special Rapporteur) said that the second sentence should be deleted and that the words "is also crucial in making", in the last sentence, should be replaced by "emphasizes".

56. Mr. PELLET proposed that the words "wrongful acts", in the last sentence, should be replaced by "internationally wrongful acts".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

*** This paragraph was subsequently further amended. See 2377th meeting, paras. 16-17.

Paragraph (5)

57. Mr. TOMUSCHAT proposed that the word “case” should be inserted after *Island of Palmas*, in the third sentence.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (12)

Paragraphs (6) to (12) were adopted.

Paragraph (13)

58. Mr. BARBOZA (Special Rapporteur) said that the entire paragraph should be deleted.

It was so agreed.

Paragraph (14)

59. Mr. BARBOZA (Special Rapporteur) said that the word “also” in the first sentence, and the whole of the sixth sentence, should be deleted.

Paragraph (14), as amended, was adopted.

Paragraph (15)

60. Mr. BARBOZA (Special Rapporteur) said that the paragraph should be amended to read:

“(15) The Commission is aware that the concept of ‘territory’ for the purposes of these articles is narrow, and hence the concepts of ‘jurisdiction’ and ‘control’ are also used.”

Paragraph (15), as amended, was adopted.

Paragraph (16)

61. Mr. BARBOZA (Special Rapporteur) said that the last sentence was to be deleted.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21)

62. Mr. TOMUSCHAT said all of paragraph (17) should be deleted. It began by stating that situations existed in which jurisdiction was not territorially based, but it failed to provide appropriate examples in that respect.

63. Mr. YANKOV said he agreed with Mr. Tomuschat, but would none the less retain the first sentence of paragraph (17) because it was important to stress that jurisdiction was not necessarily territorially based.

64. Mr. BARBOZA (Special Rapporteur) said that a compromise solution might be to transfer the first sentence of paragraph (17) to paragraph (18), the remainder of paragraph (17) would then be deleted.

65. Mr. PELLET said that the first sentence of paragraph (17) could give rise to difficulties. The word “jurisdiction” was ambiguous: it could mean the jurisdiction of a State over a territory or the sovereignty of a State over a territory. Paragraphs (17) and (18) both dealt with cases of jurisdiction rather than cases of sovereignty. But in all those cases, the jurisdiction was terri-

torially based. For those reasons, he agreed that paragraph (17) should be deleted.

66. The CHAIRMAN, speaking in his capacity as a member of the Commission, said that he wondered if it was necessary to give such full treatment to the question of jurisdiction in the commentary.

67. Mr. BARBOZA (Special Rapporteur), supported by Mr. CALERO RODRIGUES, said that it would be appropriate to delete paragraphs (17) to (20) and even (21).

68. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete paragraphs (17) to (21).

It was so agreed.

Paragraph (22)

Paragraph (22) was adopted with a minor drafting change.

Paragraphs (23) to (26)

Paragraphs (23) to (26) were adopted.

Paragraph (27)

69. Mr. TOMUSCHAT said that paragraph (27) was too simplistic, given that it dealt with the core problem of distinguishing between activities involving risk and activities causing risk.

70. Mr. ROSENSTOCK said that, according to paragraph (27), the third criterion set forth in article 1 was that activities covered in the draft articles must involve a “risk of causing significant transboundary harm”. He failed to see evidence of that criterion in article 1 and would accordingly delete paragraphs (27) and (28) of the commentary.

71. Mr. BARBOZA (Special Rapporteur) said that article 1 made direct reference to activities which involved a risk of causing significant transboundary harm. He proposed that, in paragraph (27), the sentence “The term is defined in article 2 (see commentary to that article).” should be inserted after the first sentence, ending with the words “risk of causing significant transboundary harm”, and that the last sentence of paragraph (27) should be deleted.

72. Mr. EIRIKSSON said that article 1 set forth four criteria, including that pertaining to the risk of causing transboundary harm. He saw no reason why that particular criterion should be left out.

Paragraph (27), as amended, was adopted.

Paragraph (28)

73. Mr. ROSENSTOCK said that paragraph (28) did not follow on logically from the previous paragraph and should be deleted.

74. Mr. BARBOZA (Special Rapporteur) said that as indicated in paragraph (28), the third criterion was intended to follow the principle of *sic utere tuo ut alienum*

non laedas. Accordingly, States were under an obligation to avoid causing significant harm to other States.

75. Mr. ROSENSTOCK said that article 1 dealt with the scope of the articles. The obligation to avoid causing harm was not mentioned in article 1.

76. The CHAIRMAN said the placement, rather than the substance of paragraph (28) seemed to be at issue.

77. Mr. PELLET proposed that paragraph (28) should be transferred to the beginning of the commentary to article 14.

78. Mr. TOMUSCHAT said that paragraph (28) dealt with the core issue of the draft articles and did not belong in its present place in the commentary.

79. Mr. ROSENSTOCK reminded the Commission that Lauterpacht, whose views were mentioned in paragraph (28), had spoken of unduly injurious activities.

80. Mr. EIRIKSSON proposed that paragraph (28) should become paragraph (4 *bis*).

81. The CHAIRMAN said that the matter could be left pending for the moment.

Paragraphs (29) and (30)

Paragraphs (29) and (30) were adopted.

The meeting rose at 1 p.m.

2377th MEETING

Friday, 22 July 1994, at 3.15 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. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

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

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/L.498 and Add.1-2)

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (A/CN.4/L.498/Add.2)

2. TEXTS OF DRAFT ARTICLES 1, 2, SUBPARAGRAPHS (a), (b) AND (c), 11 TO 14 *bis* [20 *bis*], 15 TO 16 *bis* AND 17 TO 20 WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION (*concluded*) (A/CN.4/L.503 and Add.1-2)

Commentary to article 2 (Use of terms) (A/CN.4/L.503)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

1. Mr. de SARAM, noting that paragraph (4) stated that “significant” was something more than “detectable”, but less than “serious” or “substantial”, said that “significant” harm could also be “serious” or “substantial”.

2. Mr. BARBOZA (Special Rapporteur), supported by Mr. CALERO RODRIGUES, said that the point was not to define the term, but to set a threshold: any harm which was more than “detectable” was “significant” without necessarily being “serious” or “substantial”.

3. The CHAIRMAN, speaking as a member of the Commission, said that, if the point was simply to set a threshold, the sentence in question should end after the word “detectable” because, as worded, it could suggest that harm which was “serious” or “substantial” was not within the scope of the draft articles.

4. Mr. EIRIKSSON proposed that, after the word “detectable”, the sentence should be amended to read: “but need not be at the level of ‘serious’ or ‘substantial’ to be within the scope of these articles”.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

5. Mr. BARBOZA (Special Rapporteur) proposed that the words “The Commission is mindful that” in the first sentence and the words “The Commission is aware that” in the second sentence should be deleted.

It was so agreed.

6. Mr. TOMUSCHAT said that the words “ongoing mutual impacts” in the second sentence were not very clear.

7. Mr. BARBOZA (Special Rapporteur) said they meant that a State which was the State of origin in one case could be an affected State in another.

8. Mr. EIRIKSSON proposed that the sentence should be amended to read: “In carrying out lawful activities within their own territories, States have impacts on each other”. The word “mutual” at the beginning of the third sentence would be deleted.

It was so agreed.

Paragraph (5), as amended, was adopted.